

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-2203

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IN THE MATTER OF: WILLIAM V. WALKER, TRUSTEE  
FOR MINRO OIL, INC.,

Debtor.

WILLIAM V. WALKER, TRUSTEE FOR MINRO OIL, INC.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

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Appeal from the United States District Court for  
the Southern District of Texas  
CA H 90 1206

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December 31, 1992

Before REAVLEY, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:<sup>1</sup>

William V. Walker ("Walker"), trustee for the bankrupt Minro Oil Co. ("Minro"), initiated this adversary proceeding by filing an action against the United States for the refund of \$900,000.00 in corporate income tax prepaid by Minro. The United States

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<sup>1</sup> Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

eventually refunded \$263,962.08, but retained the balance as an offset against unemployment, withholding, social security, and windfall profit taxes that it claimed Minro owed prior to its bankruptcy. Walker contested only Minro's liability for some \$545,000.00 in windfall profit taxes.

The bankruptcy court found that Minro was liable for \$593,574.65 in unpaid taxes and penalties, and ordered the United States to setoff that amount against the \$636,037.92 that it was holding and return the balance to Minro. Walker appealed to the district court, which entered an order affirming the judgment of the bankruptcy court and dismissing Walker's appeal with prejudice on March 11, 1991.

Due to exigent circumstances, Walker's counsel did not receive a copy of the district court's Judgment until November 25, 1991. Walker filed a motion, dated December 6, 1991, requesting the district court to vacate its prior judgment and re-enter judgment, so as to facilitate a timely appeal. The district court did so, and re-entered judgment on January 10, 1992. Walker filed his notice of appeal to this court on March 6, 1992.

The United States contends that Walker's notice of appeal was not timely filed, in light of recent amendments to Federal Rule of Appellate Procedure 4(a). We agree.

Appellate Rule 4(a) now reads, in relevant part:

The district court, if it finds (a) that a party entitled to notice of entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would

be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days or receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Fed. R. App. P. 4(a)(6) (emphasis added). This new version of Appellate Rule 4(a) "t[ook] effect on December 1, 1991, and . . . govern[s] all proceedings in appellate cases thereafter commenced." *In re Jones*, 970 F.2d 36, 38 & n.2 (5th Cir. 1992) (quoting Order of the Supreme Court of the United States, April 30, 1991, *reprinted in* 111 S. Ct. 1011 (interim ed.)).

Walker's counsel had moved and did not receive notice of the district court's judgment from the clerk. Despite a number of attempts to ascertain whether the district court had entered a judgment or an order, neither Walker nor his counsel became aware of the judgment until the time for filing an appeal under Fed. R. App. P. 4(a)(1) -- here 60 days, because the United States was a party -- had run. The question is whether the clerk's failure to assure that Walker's counsel received timely notice of the judgment should allow Walker to file an out-of-time notice of appeal.

In *Jones*, this court held that the district court did not abuse its discretion by refusing discretionary relief under Appellate Rule 4(a)(6) to the Joneses some 87 days after entry of its judgment. Here, we hold that the district court did abuse its discretion by providing relief to Walker some 271 days after entry of its judgment, in clear contravention of the 180 day limit of Fed. R. App. P. 4(a)(6).

APPEAL DISMISSED.