

102 F.3d 425

United States Court of Appeals,  
Ninth Circuit.

ATCHISON, TOPEKA & SANTA FE  
RAILWAY COMPANY, Plaintiff–Appellee,

v.

CALIFORNIA STATE BOARD OF  
EQUALIZATION, Defendant–Appellant,

And

Contra Costa County; Fresno County; Kern  
County; Kings County; Los Angeles County;  
Madera County; Alameda County; Merced  
County; Tulare County; Orange County; Riverside  
County; San Bernardino County; San Diego  
County; San Francisco City and County; San  
Joaquin County; Stanislaus County, Defendants.

No. 95–15999.

Argued and Submitted Oct. 11, 1996.

Decided Dec. 11, 1996.

#### Synopsis

Railroad challenged assessment and collection of taxes against its property by State Board of Equalization pursuant to Railroad Revitalization and Regulatory Reform Act (4-R Act). The United States District Court for the Northern District of California, D. Lowell Jensen, J., 1994 WL 508836, entered partial judgment for railroad and State Board appealed. The Court of Appeals, Goodwin, Circuit Judge, held that State Board failed to timely appeal.

Appeal dismissed.

West Headnotes (7)

#### [1] Federal Courts

☞ Appellate Jurisdiction and Procedure in  
General

Court of Appeals possesses only such  
jurisdiction as Congress chooses to confer.

1 Cases that cite this headnote

#### [2] Federal Courts

☞ By motions to vacate, amend, or modify  
judgment

Appellant failed to timely appeal, even though  
appellant filed appeal within 30 days from  
trial court's modified partial judgment, where  
appellant did not appeal within 30 days of  
original judgment, appellant did not file motion  
for new trial or relief from judgment and  
modified partial judgment was change favorable  
to appellant. F.R.A.P.Rule 4, 28 U.S.C.A.

3 Cases that cite this headnote

#### [3] Federal Courts

☞ Time of Taking Proceeding or Filing Notice  
of Appeal

Filing of timely notice of appeal is mandatory  
and jurisdictional.

1 Cases that cite this headnote

#### [4] Federal Courts

☞ By motions to vacate, amend, or modify  
judgment

Appellant failed to file motion to modify,  
alter or amend original judgment and, thus,  
time to appeal judgment was not tolled,  
despite appellant's statement to trial court at  
status conference that judgment was overstated  
and court's comments about altering original  
judgment, where appellant never filed writing  
with trial court and status conference was not on  
record. Fed.Rules Civ.Proc.Rules 7(b), 59, 60, 28  
U.S.C.A.

Cases that cite this headnote

#### [5] Federal Courts

☞ Scope and contents of record

Hearing or trial exception to rule requiring  
applications to courts for orders to be made in  
writing mandates that proceeding be recorded.  
Fed.Rules Civ.Proc.Rule 7(b), 28 U.S.C.A.

Cases that cite this headnote

[6] **Federal Courts**

🔑 Extension of Time

Trial court's willingness to continue to deal with matter informally after original judgment was entered until corrections were made to original judgment did not extend time to appeal as original judgment became final when entered.

Cases that cite this headnote

[7] **Federal Courts**

🔑 By motions to vacate, amend, or modify judgment

Only those changes to original judgment by district court that adversely affects appellant in material manner resets time for appeal.

1 Cases that cite this headnote

**Attorneys and Law Firms**

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Paul J. Mooney, Phoenix, AZ, for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California, D. Lowell Jensen, District Judge, Presiding. D.C. No. CV 89-4030-DLJ.

Before GOODWIN, WALLACE and RYMER, Circuit Judges.

**Opinion**

GOODWIN, Circuit Judge.

The State Board of Equalization of California (the "SBE") appeals a judgment enjoining the SBE from collecting taxes on certain Non-Unitary Railroad Property Eligible for 4-R Act Relief ("NURPEFAR") of the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe"). The SBE also appeals the district court's order to refund monies already paid by Santa Fe on this property. We dismiss for lack of jurisdiction.

Santa Fe challenged the assessment and collection of ad valorem taxes against its property pursuant to sections 306(l)(a) and (d) of the Railroad Revitalization and Regulatory Reform Act of 1976. Pub.L.No. 94-210, 90 Stat. 31, 54-55 (1976) (codified as amended at 49 U.S.C. § 11501). The district court held a trial limited to Santa Fe's claims under section 306(l)(d) and entered a partial judgment in Santa Fe's favor on September 14, 1994. Other claims remained to be resolved, but the Judgment Order stated: "In accordance with Rule 54(b), Federal Rules of Civil Procedure, the Court hereby expressly determines that there is no just reason for delay and directs the entry of judgment as set forth herein."

The Partial Judgment permanently enjoined the SBE from collecting taxes on Santa Fe's NURPEFAR for 1992 and ordered the SBE to refund Santa Fe \$3,003,098.00.

At a status conference held the same day the partial judgment was entered, September 14, 1994, counsel for the SBE informed the district court that the Partial Judgment overstated the amount of the refund. No Rule 60 motion was filed then or later. The court merely directed counsel for both sides to get together and to determine the correct amount. Apparently this unwritten direction was complied with some time early in 1995, and at another status conference, on February 15, 1995, the district court directed the SBE to submit a proposed modified partial judgment. The SBE lodged its proposal with the district court on April 21, 1995, and the district court filed its Modified Partial Judgment on April 24, 1995. No Rule 60 motion, no order correcting the error, and of course, no appeal had been filed challenging the September 14 judgment.

The Modified Partial Judgment incorporated the district court's Findings of Fact and Conclusions of Law entered in conjunction with the September 14, 1994 Partial Judgment and differs from the Partial Judgment only in the amount of the refund which was decreased to \$856,917.00.

The SBE filed its notice of appeal on May 23, 1995, ostensibly appealing the Modified Partial Judgment. On June 16, 1995, Santa Fe filed in this court a motion to dismiss for lack of jurisdiction. The Ninth Circuit Commissioner denied the motion to dismiss the appeal and the matter was presented for decision. *See* 9th Cir. Gen. Orders § 6.3(e).

[1] This court possesses only such jurisdiction as Congress chooses to confer. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, —, 114 S.Ct. 1673, 1675, 128 L.Ed.2d 391 (1994); *Russell v. Law Enforcement Assistance Admin.*, 637 F.2d 1255, 1257 (9th Cir.1980). Pursuant to 28 U.S.C. § 1291, we have jurisdiction to hear appeals from final judgments. When some claims are severable from others, the trial court may direct the entry of final judgment as to fewer than all claims “upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” Fed.R.Civ.P. 54(b); *see Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797–98 (9th Cir.1991). The original Partial Judgment as to Santa Fe's claims under section 306(l) (d) was entered pursuant to Rule 54(b). Thus, this court would have had jurisdiction over a timely appeal from this judgment. The SBE did not appeal within 30 days of the original Partial Judgment, or at any time until after the district court filed a modified judgment.

### III. Notice of Appeal

[2] [3] The filing of a timely notice of appeal is “mandatory and jurisdictional.” *See Vernon v. Heckler*, 811 F.2d 1274, 1276 (9th Cir.1987) (internal quotations and citations omitted); *see also Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 264, 98 S.Ct. 556, 560–61, 54 L.Ed.2d 521 (1978); *United States v. Robinson*, 361 U.S. 220, 229, 80 S.Ct. 282, 288, 4 L.Ed.2d 259 (1960). In a civil case, the notice of appeal must be filed within thirty days of entry of the judgment or order appealed from. Fed.R.App.P. 4(a)(1). The original Partial Judgment was entered on September 14, 1994, thus making the deadline for appeal October 14, 1994.

The SBE could have tolled the deadline to appeal that judgment by filing a motion under Rule 59 or Rule 60 within ten days of entry of the judgment. Fed.R.App.P. 4(a)(4). However, the SBE did not do so.

[4] [5] The SBE's reliance on oral comments about the amount of the tax refund at a status conference on September

14, 1994, did not extend the time for appeal. A motion must be made in writing “unless made during a hearing or trial.” Fed.R.Civ.P. 7(b). No writing was ever filed with the court, and the “hearing or trial” exception requires that the proceeding be recorded. *See Taragan v. Eli Lilly & Co.*, 838 F.2d 1337, 1340–41 (D.C.Cir.1988); *IBM Corp. v. Edelstein*, 526 F.2d 37, 47 (2d Cir.1975); *Alger v. Hayes*, 452 F.2d 841, 843 (8th Cir.1972). The September 14th status conference was not on the record, and thus the SBE made no timely motion to modify, alter, or amend the September judgment, and the time to appeal expired.

[6] [7] The SBE's appeal, though styled as an appeal of the Modified Partial Judgment, simply challenges the substance of the September Partial Judgment. The Modified Partial Judgment of April 24, 1995 only reduced the amount of the tax refund, a change clearly favorable to the SBE. A change favorable to the SBE “cannot possibly subject the entire original judgment to a new opportunity” for appeal. *Harman v. Harper*, 7 F.3d 1455, 1457 (9th Cir.1993), *cert. denied*, 513 U.S. 814, 115 S.Ct. 68, 130 L.Ed.2d 24 (1994). Nor did the district court's willingness to continue to deal with the matter informally until the corrections were made extend the time to appeal. The original Partial Judgment became final when entered, *see Williams v. Boeing Co.*, 681 F.2d 615, 616 (9th Cir.1982), and only changes that adversely affected the appellant in a material manner would reset the time for appeal. *See Harman*, 7 F.3d at 1457; *American Fed'n of Grain Millers, Local 24 v. Cargill Inc.*, 15 F.3d 726, 729 (7th Cir.1994). Thus, the SBE filed its notice of appeal beyond the time limits specified in Rule 4. We must therefore dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

### All Citations

102 F.3d 425, 36 Fed.R.Serv.3d 934, 96 Cal. Daily Op. Serv. 8928, 96 Daily Journal D.A.R. 14,965