FILED
United States Court of Appeals
Tenth Circuit

September 2, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRUCE W. LEMAY,

Petitioner - Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee.

No. 20-9001
(CIR No. 019356-15 L)
(United States Tax Court)

ORDER AND JUDGMENT*

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Bruce Lemay, acting pro se, appeals the decision of the Tax Court holding him liable for tax penalties under I.R.C. § 6700. Exercising jurisdiction under I.R.C. § 7482(a)(1), we affirm.

BACKGROUND

The parties are familiar with the facts underlying this matter and we need not restate them in full here. It suffices to say that in 1999 Lemay, along with others,

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

organized Cash Management Systems ("CMS"), a Virginia S-Corporation. Lemay served on the CMS board throughout the life of the business. CMS sold, promoted, and marketed "tool plans"—arrangements through which employers would reclassify some of their employees' pay as "reimbursement" for tools the employees owned and used on the job, thereby avoiding substantial employment taxes. Employers would divide employee pay between wages/reimbursement according to a proprietary formula owned by CMS, which charged fees to administer the tool plans on behalf of its employer-clients.

CMS engaged the services of Pete Davison, an accountant with Grant Thornton LLP, who drafted a justification paper opining on the legality and tax risk of the tool plans. Davison opined that "substantial authority" supported the tool plans, but CMS did not disclose to clients that the term "substantial authority" meant Davison believed the plans would have only about a one-in-three chance of withstanding an audit. *See* R. Vol. 18 at 113.

From 1999 to 2005, Lemay sought other outside opinions regarding the legality of the tool plans. He approached three additional accounting firms—Crowe Chizek, McDermott Will & Emery, and KPMG—none of whom agreed with Davison's opinion regarding the tool plans. And in 2002 Grant Thornton disavowed the justification letter Davison had written on its behalf, instructing CMS by letter to remove its name from any marketing or promotional materials regarding the tool plans. Throughout this period, Davison continued to provide opinions in favor of the tool plans and continued to assist in their marketing and promotion.

In 2008, the IRS obtained an injunction against Davison ordering him to cease the promotion and sale of illegal tax shelters. As a result of this action, Davison's CPA license was suspended. The IRS opened a § 6700 examination against CMS, Lemay, and Davison. Based upon this examination, in 2014 the IRS assessed penalties against Lemay totaling $181,076 for tax years ending 2008, 2009, and 2010.[1] The IRS Appeals Office issued a notice of determination sustaining the levy notice and lien notice resulting from this penalty, and Lemay timely filed a petition seeking review from the Tax Court. The Tax Court upheld the underlying liability, and this appeal followed.

DISCUSSION

Because Lemay proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). Where, as here, "the Tax Court decision rests on its review of an Office of Appeals' determination following a [collection due process] hearing," "we review the Office of Appeals' determinations about challenges to the amount of the underlying tax liability de novo and its administrative determinations unrelated to the amount of tax liability for abuse of discretion." *Cropper v. Comm'r*, 826 F.3d 1280, 1284 (10th Cir. 2016). Section 6700 of the Internal Revenue Code provides, as relevant here:

[1] This amount represented Lemay's proportionate share of one half of CMS's revenues for those tax years.

> Any person who . . . organizes . . . any . . . plan or arrangement, . . . and . . . makes or furnishes or causes another person to make or furnish . . . a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of . . . participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, . . . shall pay . . . 50 percent of the gross income derived . . . from such activity by the person on which the penalty is imposed.

I.R.C. § 6700(a). From this language, the Tax Court concluded the government could establish Lemay's liability for § 6700 penalties by showing he

> (1) organized (or assisted in the organization of) or participated (directly or indirectly) in the sale of an interest in an investment plan or arrangement, or any other plan or arrangement; and (2) made material statements concerning the "tax benefits" to be derived from that plan or arrangement that [he] knew or had reason to know were false.

R. Vol. 18 at 151 (footnote omitted). Lemay raises two issues on appeal. First, he argues the Tax Court should have applied a more demanding standard of proof to the government. Second, he argues the Tax Court "fail[ed] to examine the evidence in an unbiased manner and misapplied the law relating to reliance on tax advice." Aplt. Opening Br. at 10.

1. Standard of Proof

Under I.R.C. § 6703(a), "[i]n any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700 . . . the burden of proof with respect to such issue shall be on the Secretary." But, while the tax code specifies which party bears the burden of proof, it does not specify the magnitude of that

burden. The Tax Court applied a preponderance-of-the-evidence standard, which the Supreme Court has described as "generally applicable in civil actions," *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). Lemay, though, argues the Tax Court should have held the government to a clear-and-convincing standard of proof. We do not need to decide this issue, however, because even if the clear-and-convincing standard of proof applied the government presented more than sufficient evidence to establish Lemay's liability under § 6700. We therefore will not disturb the conclusion of the Tax Court on this basis.

2. Other Alleged Errors

In his second issue on appeal, Lemay argues the Tax Court misconstrued the law in rejecting his argument that he reasonably relied on the tax advice and opinions of Davison. The Tax Court concluded it was unjustifiable for Lemay to rely on the advice of a co-promotor of the tool plans despite the advice of four independent accounting companies and published IRS guidance. Lemay does not cite any authority or otherwise articulate how the Tax Court erred in this respect, and such "conclusory allegations with no citations to the record or any legal authority for support" are inadequate to preserve an issue for review. *Id.* at 841.

Lemay argues the Tax Court "showed bias in allowing the [government] to submit a 162[-]page brief," Aplt. Opening Br. at 12, but the record reveals the government's brief complied with the Tax Court's orders, which excluded certain sections of the parties' submissions from the page limit. *See* R. Vol. 18 at 54–55. Lemay also asserts he "believes The Tax Court was bias[ed] adversely to [him] due

to Mr. Davison's record of disputes with the Internal Revenue Service, that the Tax Court allowed itself to consider, and by transference, adversely applied to [Lemay]." Aplt. Opening Br. at 12. But because Lemay does not support this conclusory statement with any developed argument, we decline to consider it. *See Garrett*, 425 F.3d at 841.

CONCLUSION

We affirm the judgment of the Tax Court.

Entered for the Court

Carolyn B. McHugh
Circuit Judge