

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GOVERNMENT OF GUAM,
Plaintiff-Appellee,

v.

DANNY LEON GUERRERO; JENNIFER
ROSE RABAGO; CHRISTINE E.
EVANGELISTA; FREDDIE D.
AFLAGUE,
Defendants-Appellants,

and

MONICA JANE AFLAGUE; BETTY
JANE TORRE BLAS,
Defendants.

No. 19-16793

D.C. No.
1:16-cv-00002

OPINION

Appeal from the United States District Court
for the District of Guam
Frances Tydingco-Gatewood, Chief District Judge,
Presiding

Argued and Submitted October 20, 2020
Honolulu, Hawaii

Filed August 31, 2021

Before: J. Clifford Wallace, Carlos T. Bea, and
Mark J. Bennett, Circuit Judges.

Opinion by Judge Wallace;
Dissent by Judge Bennett

SUMMARY*

Tax

The panel affirmed the district court's judgment partially ruling in favor of the Government of Guam, in Guam's action to reduce unpaid income tax liabilities to judgment and foreclose on certain real property.

Taxpayer contended that Guam could not prove that the Department of Revenue and Taxation ("the Department") acted within the three-year limitations period set forth in 26 U.S.C. § 6501(a) and 48 U.S.C. § 1421i(d)(i) (applying federal income tax laws to Guam), because it could not provide the relevant certificates of assessment to prove the assessment date. The original certificates of assessment were damaged. Consequently, Guam's evidence of timeliness consisted only of the Department's internal documents and employee testimony.

The panel held that the district court did not clearly err in determining that Guam is entitled to the presumption of regularity to establish the timeliness of the tax proceedings, which taxpayer failed to rebut with clear, affirmative

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

evidence. The panel further held that Guam established by a preponderance of the evidence that the Department timely assessed taxpayer's liability, filed the tax lien on his real property, and commenced this action.

Judge Bennett dissented because the record does not clearly reveal any basis for invoking the presumption of regularity; the Department's longstanding procedures are alone insufficient to raise the presumption; the district court either failed to shift the burden of proof to taxpayer or did not properly apply the presumption and determine whether it was rebutted; and, while it is unclear which error or errors were committed, all roads lead to reversal.

COUNSEL

Ronald I. Heller (argued), Torkildson Katz Hetherington Harris & Knorek, Honolulu, Hawaii; Michael J. Berman, Berman O'Connor & Mann, Hagåtña, Guam; for Petitioner.

Marianne Woloschuk (argued), Assistant Attorney General; Leevin Taitano Camacho, Attorney General; Office of the Attorney General, Tamuning, Guam; for Respondent.

OPINION

WALLACE, Circuit Judge:

Guam's Department of Revenue and Taxation (the Department) has concluded that Danny Leon Guerrero owes approximately \$3.7 million in unpaid taxes to the United States Territory of Guam because he did not pay his full tax liability for the tax years 1999, 2000, 2001, and 2002 after belatedly filing his returns for these years. The parties dispute when the Department assessed Leon Guerrero's taxes because the official records are missing, likely due to water, mold, and termite damage at the storage facility where they were housed. After assessing Leon Guerrero's tax liability, the Government of Guam (Guam) filed tax liens on various parcels of real property that he owns with his former spouse in joint tenancy. Guam then commenced this action to collect Leon Guerrero's tax deficiencies through foreclosure of the tax liens.

Leon Guerrero does not contest that he owes Guam unpaid taxes. However, Leon Guerrero contends that the Department cannot prove that it timely assessed his taxes, timely levied the tax liens on his share of the parcels of real property, nor timely commenced its action. *See* 26 U.S.C. §§ 6501(a), 6502(a)(1). Guam acknowledges that it does not have the original certificates of assessment, but it invokes the presumption of regularity based on the Department's standard procedure and internal documents to establish that Guam acted within the statute of limitations. *See United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926) (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties”). After denying Leon Guerrero's motion for summary judgment, the district court conducted a bench

trial. The district court heard testimony elicited over two days and partially ruled in favor of Guam, specifically on the issues of the presumption of regularity and the timeliness of the Department's actions. Leon Guerrero appeals from the district court's adverse judgment.

We review the district court's factual findings during a bench trial for clear error, and we review its legal conclusions de novo. *Comm'r v. Duberstein*, 363 U.S. 278, 291 (1960). A court's findings are clearly erroneous if they are "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009). We review the district court's conclusion regarding an application of the statute of limitations de novo. *United States v. Workinger*, 90 F.3d 1409, 1412 (9th Cir. 1996). Finally, we review the district court's determination that Guam is entitled to the presumption of regularity for clear error as a mixed question of law and fact where the nature of our inquiry is essentially factual. *See United States v. Lang*, 149 F.3d 1044, 1047 (9th Cir. 1998) (acknowledging that the standard of review for mixed question is typically de novo "but, depending on the nature of the inquiry involved, may be reviewed under a more deferential clearly erroneous standard" such as where the issue is "an essentially factual inquiry"); *cf. Khyn v. Shinseki*, 716 F.3d 572, 577 n.9 (Fed. Cir. 2013) (reasoning that, while the presumption of regularity is a rule of law, its application is triggered by preliminary factual findings). Based on the following reasoning, we hold that the district court did not commit clear error when it found that the presumption of regularity applied or that Leon Guerrero failed to rebut it. We also hold that Guam established the timeliness of its assessment of Leon Guerrero's unpaid taxes, its filing of the tax lien, and its commencement of this action through the internal

documents and the witness testimony from the Department's employees.

I.

Leon Guerrero late filed his Guam Territorial income tax returns for the tax years 1999 and 2000 on March 21, 2003, and the tax years 2001 and 2002 on April 17, 2003. Sometime thereafter, the Department assessed Leon Guerrero's tax liability on the late returns. Ultimately, the Department determined that Leon Guerrero owed Guam approximately \$3.7 million in unpaid taxes. Pursuant to 26 U.S.C. § 6501(a), Guam was required to assess Leon Guerrero's taxes within three years after he filed his returns. As such, the Department was required to sign an assessment of Leon Guerrero's 1999 and 2000 tax returns by March 21, 2006, and an assessment of his 2001 and 2002 tax returns by April 17, 2006. But, as previously mentioned, the Department cannot locate the original certificates of assessment after the warehouse storing the documents experienced water damage, termites, and mold.

As a result, Guam's evidence that the Department timely assessed Leon Guerrero's taxes instead consists only of the Department's internal documents rather than the certificates of assessment. Guam argues that these internal documents are sufficient evidence that the Department assessed Leon Guerrero's unpaid taxes in January 2006 and sent the relevant notices before the three-year statute of limitations expired. Guam relies on the Department's internal registers (record lists of delinquent taxpayers) known as TY53 and TY69 registers, as well as an internal transmittal sheet sent to the collections branch after the TY53 and TY69 notices were sent to Leon Guerrero, to demonstrate both that it followed standard procedure for purposes of the presumption of regularity and to show the assessment dates.

The Department learned from Leon Guerrero at a meeting on March 10, 2006, that the certificates and notice had not reached him because they were sent to his ex-wife's address rather than his current address. During the meeting, Leon Guerrero was given a final demand notice of the Department's intent to levy a tax lien on each of his real properties, which he signed to confirm receipt. The March 10, 2006, meeting occurred before the three-year statute of limitations was set to expire on March 21. Leon Guerrero met with Department officials again in August 2006 to discuss a repayment plan, but the Department eventually decided to file a tax lien to protect Guam's interests. On August 15, 2006, the Department filed a tax lien with the Department of Land Management.

The Department's tax liens were filed on six parcels of land that Leon Guerrero purchased between November 2000 and May 2002. On January 8, 2016, Guam brought its action against Leon Guerrero to reduce his unpaid Guam income tax liabilities to judgment. Guam also sought foreclosure of Leon Guerrero's interest in the six parcels of land. Leon Guerrero did not contest the amount assessed.¹ Instead, Leon Guerrero's primary argument has been that Guam cannot prove that the Department acted within the statute of limitations period because it cannot provide the relevant certificates of assessment to prove the assessment date, even

¹ Although Leon Guerrero insists that some of his underpayment was his response to a \$1.7 million debt that Guam owes Leon Guerrero for services rendered, he has nonetheless paid some money toward the approximately \$3.7 million he owes Guam. We do not address this matter, or the concomitant offset argument raised by Guam before the district court, because the central focus of this appeal is whether the Department timely assessed Leon Guerrero's unpaid taxes and timely placed the tax liens on Leon Guerrero's share of real property.

though Leon Guerrero was personally served the final notice of assessment within the three-year period.

The district court denied Leon Guerrero's motion for summary judgment where he had argued that Guam's action was time-barred due to the absence of the signed certificates of assessment. Instead, the district court held that there was a genuine dispute of material fact about whether the Department followed its routine practices and completed the tax assessments with the three-year period of limitations.

The district court next conducted a two-day bench trial. Employees for the Department testified about the Department's procedure for processing and assessing tax returns, as well as its notice process for delinquent taxes. One witness explained that a certificate of assessment is a Guam tax document that is akin to the United States Internal Revenue Service's (IRS) Form 4340, and that both are consistent with IRS regulations although they are not interchangeable. The employees detailed that the principal difference between a Form 4340 and a certificate of assessment is that the former includes a summary of tax assessments with payments and the latter contains only an assessment. In addition, the employees explained that a certificate of assessment contains summary information pertaining to all the taxpayers listed on the corresponding TY53 (for example, if the return was for spouses who filed jointly) whereas a Form 4340 is personal to the taxpayer and not a summary.

According to testimony, the Department's internal process starts after a taxpayer submits a return and the processing branch of the Department enters the data from the return into the system. Next, the return is sent to the tax assessment branch to confirm the accuracy of the self-assessment by the taxpayer. If the tax assessment technician

determines that a taxpayer owes more than the amount assessed in the tax return, the technician enters this information into an accounts receivable in the Department's computer system. Entering the accounts receivable information into the system generates a TY53 entry which is compiled within the overall TY53 register and records the date entered. The TY53 register is a list of delinquent taxpayers, along with each taxpayer's name, social security number, assessment date, TY53 date, type of tax assessed, taxable period, the assessment amount including interest and penalties, and a code identifying the technician who prepared the TY53 entry. The TY53 register is generated the same day as the assessment. The witness specified that a TY53 is "the first notice that gets sent out to the taxpayer," although the entire TY53 register is not sent to the taxpayer.

The witness emphasized that the information contained in the TY53 is the same information as the certificate of assessment because the TY53 is used to create the certificate, and the TY53 cannot be changed after it has been generated. The employee testified that when the TY53 register is printed, the technician checks whether the taxpayer has made any payments and signs a verification of the register. The employee next explained that a TY69 register generates a second notice of assessment that is sent to a taxpayer ten days after the TY53 notice. A separate Department employee confirmed that the Department's assessment branch transmits the notices to the collection branch a day after the TY69 notice is mailed.

Ultimately, the district court ruled in favor of Guam, in part. The district court held that the Department timely and properly assessed Leon Guerrero's tax liability. The district court relied upon testimony from the Department's employees regarding why the documents were not available,

as well the Department's procedures for assessing taxes and the various registers used to maintain records of dates. The district court held that the testimony from the Department's employees was "credible and consistent with the procedures described in their declarations." The district court also held that the Department is entitled to the presumption of regularity due to the absence of contrary evidence presented by Leon Guerrero and failure "to expose any credibility issues of inconsistencies" in the Department's employees' witness testimony. The district court further held, based on its ruling that the assessments were timely, that the Department's tax lien on Leon Guerrero's interest in the properties was timely and valid.²

II.

Guam's Territorial income tax mirrors the Internal Revenue Code, including the code's statute of limitations. *See* 26 U.S.C. § 6501(a); 48 U.S.C. § 1421i(d)(1). In an action to collect tax, the government bears the initial burden of proof. The government can meet its burden by introducing a tax assessment. *United States v. Stonehill*, 702 F.2d 1288, 1293 (9th Cir. 1983). The Department generally follows the Internal Revenue Code and its corresponding regulations when preparing an assessment. The Internal Revenue Code sets forth the requirements for making a tax assessment. *See* 26 U.S.C. § 6203; 26 C.F.R. § 301.6203-1. Pursuant to these requirements, Guam must show that there is a dated record of the assessment signed by

² The district court also ruled partly in favor of Leon Guerrero and held that Guam had failed to prove that Leon Guerrero's 2002 property transfers were fraudulent conveyances under Guam law. We express no opinion on the correctness of this finding of the district court because Guam did not appeal it.

an assessment officer that contains all the necessary information about the assessment, including the taxpayer's identity, the type of tax, and the amount owed to prove a valid assessment. 26 U.S.C. § 6203; 26 C.F.R. § 301.6203-1.

Certificates of assessments qualify as “[r]ecords, reports, . . . or data compilations, in any form, of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report,” and thus meet one of the definitions of public records set forth in Rule 803(8) of the Federal Rules of Evidence. *Hughes v. United States*, 953 F.2d 531, 539 (9th Cir. 1992) (holding that a Form 4340 certificate of assessment and payment is an official document that established an assessment, in the absence of contrary evidence). The certificates of assessment are not available in this case. Guam, instead, submitted the TY53 register, the TY69 register, and the internal transmittal sheet with other evidence as to the method of their preparation by government employees to show that the Department followed its procedures to trigger the presumption of regularity and demonstrate that the assessments occurred within the limitations period.

III.

We hold that the district court did not clearly err when it determined that Guam is entitled to the presumption of regularity, which Leon Guerrero failed to rebut with clear, affirmative evidence.³ We, therefore, also hold that Guam

³ Our dissenting colleague is correct that the district court may have committed possible errors during its sparse analysis regarding the presumption of regularity. We also acknowledge the limitations of the

established by a preponderance of the evidence that the Department timely assessed Leon Guerrero's tax liability, filed the tax lien on Leon Guerrero's share of the real properties, and commenced this action. However, it is necessary for us to elaborate on the district court's analysis regarding the presumption of regularity.

We have held that a public actor is entitled to the presumption of regularity where there is some evidence that the public actor properly discharged the relevant official duties, which an opposing party must rebut with clear, affirmative evidence to the contrary. *See Palmer v. IRS*, 116 F.3d 1309, 1311 (9th Cir. 1997) (holding that the Palmers "failed to produce any evidence that would counter the normal presumption of regularity" after the government presented some evidence to invoke the presumption); *Huff v. United States*, 10 F.3d 1440, 1444 (9th Cir. 1993) (affirming that "the IRS Forms 4340 introduced by the government raised the presumption that the IRS had made the requisite demands for payment" so that the government was entitled to summary judgment on defendants' claim that the IRS failed to issue a notice of assessment and demand for payment); *Lewis v. United States*, 279 U.S. 63, 74 (1929) (holding that "all necessary prerequisites to the validity of

district court's scant analysis. However, the clear error standard of review is deferential. Our desire for perfection should not be the enemy of the good. We, therefore, conclude that affirmance is appropriate here because the record—including, but not limited to, internal documents and testimony from employees of the Department about its procedures to infer the assessment date—supports the district court's findings regarding the presumption of regularity, and its ultimate determination that the presumption was available based on those findings. As a result, the district court's holding does not appear illogical, implausible, or "without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1262.

official action are presumed to have been complied with, and that where the contrary is asserted it must be *affirmatively* shown”) (citation omitted, emphasis added).

In *Palmer*, we held that the presumption of regularity was available because the government presented redacted copies of two letters. 116 F.3d at 1311. The Department, like the IRS, is entitled to the presumption, so long as the presumption is supported by some evidence. *See id.* As previously observed, whether the presumption applies or has been rebutted with clear and affirmative evidence to the contrary are mixed questions of law and fact that may be reviewed for clear error. The clear error standard is significantly deferential, and clear error is not to be found unless the reviewing court is “left with the definite and firm conviction that a mistake has been committed.” *Duberstein*, 363 U.S. at 291 (citation and quotation marks omitted). Such a definite and firm conviction requires us to find that the district court’s determination was wrong because it was: (1) illogical, (2) implausible, or (3) “without support in inferences that may be drawn from the facts in the record.” *Hinkson*, 585 F.3d at 1262. While we hold that the district court did not commit clear error considering the significant evidence available in the record, the court’s reasoning was opaque and did not adhere to the proper steps of the analysis. Therefore, we outline how the analysis should have been conducted after the district court gathered the facts during the bench trial.

First, the district court should have considered whether there was some evidence, in the absence of the certificates of assessment, that the Department had properly discharged its official duty to assess Leon Guerrero’s unpaid taxes and file its tax lien within the statute of limitations. *See Huff*, 10 F.3d at 1444. Instead, the district court assumed that the

presumption was automatically available. Nonetheless, there is evidence in the record that supports the conclusion that the presumption of regularity was triggered, namely the testimony describing the Department's standard procedures, the TY53 and TY69 registers, and the transmittal form to collections regarding Leon Guerrero's tax liability.

The trial record demonstrates that a tax assessment technician with the Department entered Leon Guerrero's tax return information from tax years 1999 through 2002 into its assessment system on January 12, 2006. The evidence shows that the entry into the accounts receivable system, which generated a TY53 entry in the register, created a TY53 notice, and issued the certificate for Leon Guerrero's 1999, 2001, and 2002 tax returns on January 19, 2006. A separate entry generated a TY53 entry in the register, created a TY53 notice, and issued the certificate for his 2000 tax returns on January 27, 2006. Guam also offered, and the district court accepted the TY69 register for the second notice sent to Leon Guerrero; one TY69 notice was generated on January 30, 2006, for the 1999, 2001, and 2002 tax returns whereas the other TY69 notice was generated on February 6, 2006, for the 2000 tax returns. Furthermore, the district court accepted Guam's offered evidence of the Department's internal transmittal sheet, which was sent with the key documents to the collections branch on January 31, 2006, and February 7, 2006. Finally, multiple Department employees submitted declarations and testified about the Department's internal procedure to explain the various steps and how information is gathered to generate the registers.

We agree with the district court that the TY53 and TY69 registers are highly probative. We hold that the district court's factual findings are sufficient to trigger the presumption and establish that the assessments occurred on

the proffered dates. *Cf. United States v. Zolla*, 724 F.2d 808, 810 (9th Cir. 1984) (holding that a Postal Service form certifying that the notices of deficiency had been mailed, and an IRS form certifying that the taxes and penalties had been assessed, were sufficient to satisfy the presumption of regularity in the absence of official records that were routinely destroyed by the IRS); *United States v. Ahrens*, 530 F.2d 781, 786–87 (8th Cir. 1976) (holding that a Postal Service form triggered the presumption of regularity).

Although the district court discussed the presumption in conjunction with its determination that the Department had established the timeliness of its action, the district court did not explicitly hold that this evidence was sufficient to trigger the presumption of regularity. Instead, the district court wrote that it relied on the credibility of the witness testimony from the Department's employees, as well as the testimony's consistency "with the procedures described" in the witnesses' declarations. The dearth of clear precedent and the parties' failure to brief properly the issue might have contributed to the district court's analysis. Regardless, the district court's conclusion is supported by the evidence in the record and appropriate inferences.

The next step in our inquiry is whether Leon Guerrero rebutted the presumption. The Supreme Court has used the language of "clear evidence" and "contrary evidence . . . [that] must be affirmatively shown." *Lewis*, 279 U.S. at 73; *Chem. Found.*, 272 U.S. at 14–15. We, therefore, hold that because Guam triggered the presumption with its evidence, the burden shifted to Leon Guerrero to present clear, affirmative evidence to rebut the presumption. We read the district court's judgment as holding that Leon Guerrero failed to rebut the presumption during his cross-examination of the Department's employees. Before us, Leon Guerrero

argues that the Department's internal records are not trustworthy due to alleged discrepancies, and he relies heavily on the presumption of correctness rather than the presumption of regularity. Leon Guerrero did not raise the presumption of correctness or challenge the accuracy of the assessments before the district court; therefore, this argument is waived. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) (observing that a "federal appellate court [generally] does not consider an issue not passed upon below" absent a reason to exercise discretion and deviate from this rule (citation omitted)). As a result, most of Leon Guerrero's arguments before us are not responsive to the correct framework even though he attempted to cure his error in subsequent briefing.⁴ In addition, Leon Guerrero's argument about discrepancies and alleged procedural irregularities misrepresents the record, as the purported difference in dates between the TY53 date and the assessment date was clarified on multiple occasions through witness testimony.⁵ Leon Guerrero's efforts, therefore, fail to rebut the presumption.

We agree with Guam that the case relied upon by Leon Guerrero to assert that he rebutted the presumption of regularity—*Brafman v. United States*, 384 F.2d 863 (5th Cir. 1967)—is easily distinguishable. First, the decision is not binding upon our court. Second, *Brafman* involved a

⁴ But because Leon Guerrero's subsequent briefing included more than a response to Guam's brief, those new arguments are also forfeited. See *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1047 n.3 (9th Cir. 2020).

⁵ There is a discrepancy between the assessment dates listed in Amended Complaint and the testimony, but it does not alter the determination that the Department complied with the statute of limitations.

certificate of assessment that had not been signed by an assessment officer as required by statute. *Id.* at 866. Thus, that court found that the assessment was not valid, and the action was barred by the statute of limitations. *Id.* at 867–68. In contrast, this appeal centers on missing certificates of assessments, not that the certificates were not signed. Here, Guam's evidence was sufficient to trigger the presumption of regularity which regularly includes the signing of the assessments. In addition, the assessment's formal certification in *Brafman* occurred after the limitations period. *Id.* at 865–66. Therefore, the validity and time distinction for *Brafman* is significantly different from the context of this appeal because one date fell before the limitations period and the other date fell after the period. *Id.* In this appeal, the assessment dates occurred at least two months before the relevant limitations period.

Leon Guerrero's reliance on *Huff* is also misplaced. The plaintiffs in *Huff* challenged the procedural validity of the tax liens filed against them for tax deficiencies because they claimed that the IRS failed to send them a notice of deficiency, a notice of assessment and demand for payment, and failed to assess their tax deficiencies in accordance with section 6203. 10 F.3d at 1444. In sum, the plaintiffs in *Huff* challenged the validity of the assessment rather than its timeliness.

Overall, Leon Guerrero failed to present clear, affirmative evidence to rebut the presumption of regularity as to the preparation and service of the assessments before the district court. His attempts to challenge the accuracy of certain dates within the registers does not demonstrate that the Department did not follow its procedures. The alleged procedural irregularities are also not irregularities at all, but a mischaracterization of the record. Consequently, Guam's

evidence establishes by a preponderance of the evidence that the Department acted within the statute of limitations to assess Leon Guerrero's tax deficiencies and to file a tax lien against his interest in the parcels of land.

IV.

We affirm the district court's holdings that the Department is entitled to a presumption of regularity. We also affirm the district court's conclusion that the Department, therefore, timely assessed Leon Guerrero's tax liability within the three-year statute of limitations and placed the tax liens within the ten-year statute of limitations. *See* 26 U.S.C. §§ 6501, 6502.

AFFIRMED.

BENNETT, Circuit Judge, dissenting:

“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926). In essence, the presumption “allows courts to presume that what appears regular is regular, the burden shifting to the attacker to show the contrary.” *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011) (citation omitted).

Here, the district court concluded that Guam's Department of Revenue and Taxation (“Department”) was “entitled to a ‘presumption of regularity’ with regard to [its] actions in the absence of contrary evidence.” But in the very next sentence, the district court evaluated whether the

Department had proven that it complied with its official duty to timely assess a taxpayer's liability by a preponderance of the evidence:

This court finds that the [Department] has shown, by a preponderance of evidence, that (1) the [Department] assessed Leon Guerrero's tax liability for the tax years 1999–2002 on January 12, 2006, (2) the [Department] recorded Leon Guerrero's tax liability for tax years 1999, 2001, and 2002 in a TY53 register dated January 19, 2006, (3) the [Department] recorded Leon Guerrero's tax liability for tax year 2000 in a TY53 register dated January 27, 2006, and (4) pursuant to the [Department's] longstanding procedures, the date a taxpayer's liability appears on a TY53 register is the date that a [Department] employee signs a certificate of assessment for that taxpayer's liability for that year.

The district court concluded that “[g]iven that Leon Guerrero's tax liability for the 1999–2002 tax years appear[ed] on [the] TY53s created in January of 2006, . . . [the Department] properly assessed Leon Guerrero's liability within three years of the dates he filed his tax returns for those years,” and “[t]hus, [the Department had] complied with the three-year statute of limitations provided in 26 U.S.C. § 6501(a).”

In short, despite concluding that the Department was entitled to a presumption of regularity absent contrary evidence, the district court analyzed whether *the Department* had proven its compliance with its duty to timely assess

Guerrero's tax liability, and in doing so, the district court relied not on the Department's official duties, but on its "longstanding procedures." Further, the district court never evaluated whether Guerrero had rebutted the presumption of regularity with clear evidence. I believe this shows that the district court committed at least one of several possible errors.

First, perhaps the district court believed that the Department's "longstanding procedures" (presumably as to the TY53s) themselves gave rise to the Department's presumption of regularity. But only "*official duties*" can trigger the presumption of regularity. *See Chem. Found.*, 272 U.S. at 15 (emphasis added). Thus, if the district court's decision to invoke a presumption of regularity rested on "longstanding procedures," which are not required by either statute or regulation, then the district court erred. *Cf. Rock Creek All. v. U.S. Fish & Wildlife Serv.*, 663 F.3d 439, 443 (9th Cir. 2011) (official agency regulation entitled the agency to a presumption of regularity, even though the agency did not comply with its own guidance memorandum).

Second, and relatedly, perhaps the district court believed that the Department's "longstanding procedures," paired with the TY53s, laid the necessary evidentiary foundation for the presumption of regularity. In other words, the district court may have discussed the TY53s because it believed that the Department's official duty to timely assess a taxpayer's tax liability, though necessary, was alone insufficient to raise the presumption that the Department timely assessed Guerrero's tax liability. This seems to be the interpretation of the Department, which argues that it "is normally entitled to a presumption of regularity . . . , so long as the presumption is supported by some substantive evidence."

This also seems to be the interpretation adopted by the majority opinion, which explains that “a public actor is entitled to the presumption of regularity where there is some evidence that the public actor properly discharged the relevant official duties.” Majority at 12.

Usually, our court applies the presumption of regularity even with no affirmative evidence that a government agency complied with its official duty. *See, e.g., United States v. Jabara*, 618 F.2d 1319, 1326–27 (9th Cir. 1980) (presuming that wiretap was properly authorized, even “in the absence of some affirmative showing” that an official prerequisite for the wiretap authorization had been met), *overruled on other grounds by United States v. DeBright*, 710 F.2d 1404 (9th Cir. 1983); *United States v. Neckels*, 451 F.2d 709, 712 (9th Cir. 1971) (presuming that military appeal board “considered all pertinent material in [the defendant’s] file,” even though “[t]he record [was] completely devoid of evidence on the nature of other matters considered by the appeal board or the time devoted to an evaluation of [his] appeal”), *overruled on other grounds by United States v. D’Arcey*, 471 F.2d 880 (9th Cir. 1972) (en banc).

Sometimes, however, we do require the agency to provide some affirmative evidence that it complied with its official duty before giving it the benefit of the presumption. *See, e.g., Palmer v. IRS*, 116 F.3d 1309, 1311 (9th Cir. 1997); *Huff v. United States*, 10 F.3d 1440, 1446–47 (9th Cir. 1993). In such cases, the affirmative evidence can be direct evidence of the agency’s fulfillment of its duty. *See Palmer*, 116 F.3d at 1311 (letters were direct evidence that civil action was instituted at the direction of delegates of the Attorney General and the Secretary of the Treasury, thus triggering the presumption that the government complied with its official duties under 26 U.S.C. §§ 7401, 7403). Or

it can be indirect evidence, such as an official document showing that the duty was fulfilled. *See Huff*, 10 F.3d at 1446 (form 4340 showed that one taxpayer received timely notice of assessment, thus triggering the presumption that the government complied with its official duty under 26 U.S.C. § 6303(a)). But if the official document does not *itself* show that the agency complied with its official duty, a court may not so infer to apply the presumption.

For example, we vacated summary judgment in *Huff* as to one of the two plaintiffs, reversing the district court's presumption, based on the plaintiff's form 4340, that the IRS had sent the plaintiff a timely notice of assessment. *Id.* at 1446–47. Although the form showed the date of the notice, it did not show the date of the assessment, so it did not show that the IRS sent the notice within sixty days of the assessment, as was its official duty under 26 U.S.C. § 6303(a). *Id.* The majority distinguishes *Huff* by limiting its holding to the presumption of a timely *notice* of assessment, Majority at 17, but we applied similar logic to the presumption of a timely assessment in *Jones v. United States*, 60 F.3d 584 (9th Cir. 1995). There, we held that the IRS was not entitled to “the presumption of timely assessment,” explaining that even though official documents such as the form 4340 *can* establish the timeliness of an assessment, “[o]ne must read the official documents to see what they say.” *Id.* at 590. “Where the official certificates do not support the proposition which must be proved,” they do not support “the presumption of timely assessment.” *Id.*

Here, the Department has conceded that *the TY53s do not themselves show the date of the assessment*. Instead, they simply show the date of the TY53 entry. Thus, under the reasoning of *Huff* and *Jones*, the district court erred by relying on the TY53s—assuming that the Department

needed to produce some evidence that it complied with its duty of timely assessment, as the Department concedes, the majority holds, and *Jones* suggests. Unlike the missing certificates of assessment, which would have shown the date of the assessment, the TY53s show only the date that a Department employee filled out a tax register, which includes the tax liabilities of several different taxpayers. Although a factfinder could rely on the TY53s and “longstanding procedures” to *infer* that the Department has proven that it *did* timely assess Guerrero’s tax liability, such an inference is categorically different from using the TY53s and “longstanding procedures” to trigger the presumption of regularity, thereby shifting the burden to *Guerrero* to prove by clear evidence that the Department *did not* timely assess his tax liability.

Third, perhaps the district court simply failed to shift the burden of proof to Guerrero despite its conclusion that the Department was entitled to the presumption of regularity, thus the district court’s discussion of what the *Department* had shown by a preponderance of the evidence with the TY53s. But “[t]hat is not how presumptions work. The burden is on [the opposing party] to provide ‘clear evidence’ that contradicts a properly invoked presumption of regularity” *B.R. v. Garland*, 4 F.4th 783, 791 (9th Cir. 2021). If the district court failed to shift the burden to Guerrero, it did not properly apply the presumption (assuming it actually intended to apply it).

Finally, the district court also erred by failing to analyze whether Guerrero rebutted the presumption of regularity with clear evidence. Its observation that “Leon Guerrero’s cross examination failed to expose any credibility issues or inconsistencies in [the Department’s] witnesses’ testimon[ies]” hardly amounts to a conclusion that Guerrero

presented no clear evidence himself to rebut the presumption.

The majority ignores these errors, focusing on what the district court could or should have done, rather than what the district court did. The majority states that the district court “*should* have considered whether there was some evidence . . . that the Department had properly discharged its official duty,” instead of “assum[ing] that the presumption was automatically available.” Majority at 13–14 (emphasis added). And the majority “read[s] the district court’s judgment as holding that Leon Guerrero failed to rebut the presumption,” without pointing to any part of the judgment that so held. Majority at 15.

This attempt to provide the requisite analysis and conclusions to invoke the presumption of regularity on appeal, even though they were absent from the district court’s judgment itself, is impermissible here. As the majority holds, we review the district court’s decision to apply the presumption of regularity for clear error as an “essentially factual” inquiry. Majority at 5. When applying that standard, “we cannot affirm a district court whose findings are ‘skeletal’ or conclusory unless the record . . . clearly reflects the basis for the trial court’s determinations.” *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1445 (9th Cir. 1985). As explained above, the record does not clearly reveal any basis for invoking the presumption of regularity, such as an official document showing that the Department timely assessed Guerrero’s liability. The TY53s and the Department’s “longstanding procedures” are alone insufficient. At bottom, then, although it is unclear *which* error or errors were committed, the district court committed at least one clear error. All roads lead to reversal, and thus I respectfully dissent.