

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 9, 2013

Elisabeth A. Shumaker
Clerk of Court

JAN H. GAUDINA,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

No. 12-9013
(T.C. No. 8368-09)
(U.S. Tax Court)

ORDER AND JUDGMENT*

Before **HARTZ**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **EBEL**, Circuit Judge.

Jan H. Gaudina, proceeding pro se, appeals the Tax Court's August 14, 2012, decision confirming his tax liability for tax years 2004 through 2006. Mr. Gaudina also urges us to reverse the Tax Court's September 14, 2012, order refusing to file his untimely motion for reconsideration and denying his motion to vacate. Although

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

affording Mr. Gaudina's pro se materials a liberal construction, *see United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009), we conclude that we lack jurisdiction to review the September 14 order and accordingly dismiss the appeal to the extent it seeks review of that order. As for the Tax Court's August 14 decision, we have jurisdiction under 26 U.S.C. § 7482(a)(1) and affirm. We deny Mr. Gaudina's motion to proceed on appeal in forma pauperis (IFP).

I. Background

Mr. Gaudina operated a corporation (Ameradream Corporation) and a sole proprietorship, both of whose financial affairs he commingled with his own.¹ The Internal Revenue Service (IRS) audited Mr. Gaudina and his businesses but had difficulty determining his tax liability because of his failure to keep adequate financial records. From what records he did produce (and others that could be obtained), the IRS assessed his tax liabilities for tax years 2004 through 2006. The parties settled most of their differences, but the case went to trial on two lingering issues: whether corporate expenditures for Mr. Gaudina's benefit could be classified as repayments of loans purportedly made by him to his business, and whether he was liable for an accuracy-related negligence penalty under 26 U.S.C. § 6662.

¹ Ameradream was a party in the Tax Court. Mr. Gaudina attempted to appeal the Tax Court's judgment on behalf of Ameradream, but because he was unable to secure counsel to represent the company, that appeal was dismissed for lack of prosecution. *See Ameradream Corp. v. Comm'r*, No. 12-9012 (10th Cir. Jan. 31, 2013) (dismissing appeal). Our disposition does not consider any issues regarding Ameradream.

On March 14, 2012, the Tax Court issued its Findings of Fact and Opinion in favor of the Commissioner, which the court had rendered orally on March 6. *See* Tax Ct. R. 152. Based on the legal holdings in that opinion, the Commissioner submitted a computation of Mr. Gaudina's actual liability. On August 14, 2012, the Tax Court issued its decision, confirming a total tax liability against Mr. Gaudina of \$22,870.80. Dissatisfied with this decision, Mr. Gaudina mailed to the Tax Court on September 8 a pair of nearly identical motions, one under Tax Court Rule 161, entitled, "Motion for Reconsideration of Findings or Opinion," and another under Tax Court Rule 162, entitled, "Motion to Vacate."

The Tax Court took up the motions on September 14, 2012, refusing to file them as untimely motions for reconsideration of the March 14 opinion. The Tax Court explained that under Tax Court Rule 161, the 30 days to move for reconsideration of the March 14 opinion had long since passed. *See* Tax Ct. R. 161. As motions to vacate the August 14 decision, however, the court recognized the motions were timely under Tax Court Rule 162. Nevertheless, the court denied them as simply seeking reconsideration of the March 14 opinion out of time, adding that Mr. Gaudina's arguments were meritless in any event.

On November 9, 2012, Mr. Gaudina filed his notice of appeal, designating only the August 14 decision. He insists that the decision is premised on the Tax Court's mistaken conclusion that the distributions he received from his business should be deemed taxable income rather than excludable loan repayments. He also

asserts that the Tax Court incorrectly sustained a negligence penalty under 26 U.S.C. § 6662. And apart from these claims, Mr. Gaudina makes additional arguments relating to the Tax Court’s September 14 order disposing of his motion for reconsideration and motion to vacate.

II. Discussion

A. Jurisdiction

We first define the scope of our jurisdiction. Under Fed. R. App. P. 3(c), which applies to tax appeals, *see* Fed. R. App. P. 13(c), a notice of appeal must “designate the judgment, order, or part thereof being appealed.” Fed. R. App. P. 3(c)(1)(b). Mr. Gaudina’s notice of appeal designated only the August 14 decision and did not indicate any intent to appeal the September 14 order disposing of the motion for reconsideration and motion to vacate. *See* R., Doc. 49. Mr. Gaudina’s failure to designate the September 14 order precludes us from reviewing it, and we dismiss the appeal to the extent he challenges that order.

B. Merits

As for those issues that are properly before us, we review the Tax Court’s legal conclusions de novo and its factual findings for clear error. *Katz v. Comm’r*, 335 F.3d 1121, 1126 (10th Cir. 2003). Mr. Gaudina first contends that the distributions he received from his business were in fact loan repayments that should be excluded from his taxable income. “Under the Internal Revenue Code, gross income is ‘all income from whatever source derived’” *Barrett v. United States*,

561 F.3d 1140, 1145 (10th Cir. 2009) (quoting 26 U.S.C. § 61(a)). “Where, as here, the taxpayer keeps inadequate records . . .[,] the Commissioner is entitled to reconstruct the taxpayer’s gross receipts and costs to arrive at an assessment for the unreported income.” *Jones v. Comm’r*, 903 F.2d 1301, 1303 (10th Cir. 1990). It is the taxpayer’s burden “to establish that the determination of income is erroneous.”

Id.

The Commissioner reconstructed Mr. Gaudina’s relevant taxable income by including expenditures made by his business for his benefit. Mr. Gaudina protests that these distributions actually were excludable loan repayments, but the Tax Court found his evidence “almost wholly lacking,” R., Doc. 39 at 15. The Tax Court’s assessment was not clearly erroneous.

Typically, courts determine whether there was a bona fide loan by considering such factors as

- (1) whether the promise to repay is evidenced by a note or other instrument;
- (2) whether interest was charged;
- (3) whether a fixed schedule for repayments was established;
- (4) whether collateral was given to secure payment;
- (5) whether repayments were made;
- (6) whether the borrower had a reasonable prospect of repaying the loan and whether the lender had sufficient funds to advance the loan; and
- (7) whether the parties conducted themselves as if the transaction were a loan.

Welch v. Comm’r, 204 F.3d 1228, 1230 (9th Cir. 2000). But Mr. Gaudina established none of these things, at least not reliably. Although he submitted several promissory notes, he conceded that they were sometimes prepared after the relevant transactions simply to characterize the particular transfers. In an attempt to show that he loaned

his business money, he also produced carbon copies of checks purportedly made to it, but he produced no corresponding bank statements to verify that the checks were actually negotiated. Finally, Mr. Gaudina furnished deposit slips bearing the notation “Loans” from the checking account of one of his business entities, but there was no indication these notations were made contemporaneously with the deposit. And apart from these items, there was nothing to suggest that interest was charged, that a fixed schedule for repayment was established, that collateral was exchanged, that repayments were made, or that any funds were even extended as a loan. Given these circumstances, Mr. Gaudina fails to show that the Tax Court erred by counting the distributions as taxable income.

Mr. Gaudina’s final argument is similarly unavailing. He contends that the Tax Court improperly sustained a negligence penalty against him under 26 U.S.C. § 6662. That provision imposes a 20% penalty on any portion of an underpayment of tax attributable to the taxpayer’s negligence or disregard of the rules or regulations. *Id.* § 6662(a)-(b)(1). “The term negligence includes any failure to make a reasonable attempt to comply with the provisions of the internal revenue laws or to exercise ordinary and reasonable care in the preparation of a tax return.” 26 C.F.R. § 1.6662-3(b)(1). “‘Negligence’ also includes any failure by the taxpayer to keep adequate books and records or to substantiate items properly.” *Id.* “The term disregard includes any careless, reckless or intentional disregard of rules or

regulations,” including “the provisions of the Internal Revenue Code.” *Id.* § 1.6662-3(b)(2).

We perceive no error. As the Tax Court explained, Mr. Gaudina’s almost complete failure to maintain adequate financial records reflected negligence, particularly given his claim that company expenditures for his benefit constituted loan repayments. Mr. Gaudina also exhibited negligence by underreporting his income and overreporting his deductions for the 2004 and 2005 tax years. He claims that he had reasonable cause for underreporting because he believed in good faith that his income should be reduced by the alleged loan repayments. *See* 26 U.S.C. § 6664(c)(1) (excepting from penalty “any portion of an underpayment if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion”). But Mr. Gaudina failed to maintain adequate records and therefore could not substantiate any loans. This alone demonstrates negligence. *See* 26 C.F.R. § 1.6662-3(b)(1). It also undercuts the most important factor used to determine reasonable cause and good faith—the extent of Mr. Gaudina’s effort to assess his proper tax liability. *See id.* § 1.6664-4(b)(1)). Hence, the Tax Court did not err in sustaining the penalty.

C. IFP Motion

Finally, we deny Mr. Gaudina’s motion for IFP status. “[T]o succeed on a motion to proceed IFP, the movant must show a financial inability to pay the required fees, as well as the existence of a reasoned, nonfrivolous argument on the law and

facts” *Lister v. Dep’t of Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005).

Further, although “in forma pauperis status does not require a litigant to demonstrate absolute destitution,” *Lee v. McDonald’s Corp.*, 231 F.3d 456, 459 (8th Cir. 2000),

Mr. Gaudina’s financial affidavit suggests he could pay the required fees. He is therefore directed to remit the entire filing and docketing fees forthwith.

III. Conclusion

The appeal is dismissed to the extent it challenges the Tax Court’s September 14, 2012 order; otherwise, the judgment of the Tax Court is affirmed. Mr. Gaudina’s motion to proceed IFP is denied.

Entered for the Court

Harris L Hartz
Circuit Judge