United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1262 **September Term, 2013**

FILED ON: DECEMBER 2, 2013

FREDERICK NERLINGER, ET AL.,
PETITIONERS - APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT - APPELLEE

Consolidated with 12-1281

On Appeal from the United States Tax Court

Before: HENDERSON, BROWN and GRIFFITH, *Circuit Judges*

A M E N D E D J U D G M E N T

This appeal was considered on the record from the United States Tax Court and the briefs filed by the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The Court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the appeal be dismissed and the petition for writ of mandamus be denied.

Frederick and Delores Nerlinger appeal from the Tax Court's entry of judgment in their favor in a collection due process (CDP) hearing arising from their alleged failure to report certain income received in offshore accounts during tax years 2001 and 2002. On June 7, 2007, the Internal Revenue Service (IRS) mailed the Nerlingers a notice of the alleged deficiencies at an address in the Cayman Islands believed to be their last known address. The Nerlingers did not respond or petition for a redetermination of the deficiencies and accordingly the IRS assessed the deficiencies without holding a redetermination hearing. *See* I.R.C. § 6213(a). On March 27 and April 9, 2009, the IRS sent the Nerlingers notices (at a new address) of its intent to levy and to file a federal tax lien and of the Nerlingers' right to a CDP hearing. *See* I.R.C. §§ 6320, 6330. After several failed attempts to secure the Nerlingers' participation in the hearing, the IRS Appeals Office sustained the collection action and notified the Nerlingers of the decision.

The Nerlingers filed a petition in the Tax Court challenging the findings set out in the Appeals Office's decision. In the Tax Court, the Nerlingers presented evidence that on March 5, 2007—before the IRS had sent the original deficiency notice—Delores Nerlinger notified the IRS that she had moved from the Cayman Islands to Cyprus. This, coupled with the Nerlingers' affidavits stating that they had not received the deficiency notices mailed to the Cayman address, had the effect of putting their liability for the underlying deficiency at issue in the CDP hearing. *See* I.R.C. § 6330(c)(2)(B). At that point, IRS counsel stated on the record that the IRS had lost the records supporting the underlying deficiency determination and it was therefore willing to concede the Nerlingers owed no deficiencies for 2001 and 2002. The Tax Court directed the parties to prepare a stipulation of settled issues but the Nerlingers were unwilling to agree to a stipulation unless the IRS admitted it had abused its discretion in assessing the deficiencies.

On March 14, 2012, the Tax Court issued an order granting the IRS's motion for entry of decision in the Nerlingers' favor, finding that "the determinations . . . for the taxable years 2001 and 2002 are not sustained." The Nerlingers then moved to vacate that decision, arguing that the IRS's concession on the record was not sufficient and that the Tax Court should have resolved whether the IRS abused its discretion. The Tax Court denied the motion, declaring: "Respondent fully conceded this case. . . . Respondent also abated (or would soon abate) the liabilities for 2001 and 2002 and the liens released [sic]. In addition, no levy action would occur for these years." The Nerlingers appealed and separately petitioned for a writ of mandamus requesting, *inter alia*, that this Court direct the Tax Court to make a *de novo* determination regarding their liability *vel non* for deficiencies in 2001 and 2002.

At bottom, the Nerlingers seek an assurance that they in fact owe no deficiencies for the years in question. The IRS has "fully conceded" that issue, however, and the Tax Court has entered judgment to that effect. The Nerlingers' appeal is therefore in contravention of the rule that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). An exception to this rule has been applied in some tax cases where the IRS concedes the issue of liability for the year in question but an issue that might result in recurring liability in future tax years—such as the taxpayer's eligibility for an exemption—is left unresolved. *See Church of Scientology of Haw. v. United States*, 485 F.2d 313, 316–17 (9th Cir. 1973). *But see Handeland v. Comm'r*, 519 F.2d 327, 330 (9th Cir. 1975). Assuming that exception to be sound, it does not apply if the unresolved issue is a factual one specific to the tax year in question and lacks preclusive effect in any proceeding involving future tax years. *See W.W. Windle Co. v. Comm'r*, 550 F.2d 43, 45–46 (1st Cir. 1977); *cf. Ala. Mun. Distribs. Grp. v. FERC*, 312 F.3d 470, 474 (D.C. Cir. 2002). That is the case here. The assessed deficiencies arose from the Nerlingers' alleged failure to report certain income in each of two taxable years and there is thus no issue that might recur in later tax years. The IRS has conceded that the Nerlingers owe no deficiencies for the years in question, abated the assessments, released the liens and disavowed any intent to levy on the Nerlingers' property.[*] And although the

[*] After the parties' briefs were filed, the Nerlingers submitted additional exhibits, including a July 1, 2013 notice from the IRS stating that the Nerlingers still owe $122.78 for tax year 2001. *See* Appellants' Notice of Filing New Evidence, Ex. D; *see also id.* Ex. E–G. Far from supporting the Nerlingers' assertion that the IRS might try to renege on its concession, the exhibits demonstrate that the IRS has abated the 2001 assessment of over $360,000.

Nerlingers contend that they are nonetheless aggrieved because the Tax Court determined that they "abus[ed] the purposes for which the collection review statutes . . . were adopted," they are wrong. We review judgments, not statements in opinions. *See Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 647 (D.C. Cir. 1998); *see also California v. Rooney*, 483 U.S. 307, 311 (1987) ("The Court of Appeal's [sic] use of analysis that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review."). The Nerlingers have therefore received all relief to which they are entitled and we lack jurisdiction to hear their appeal. *Deposit Guar. Nat'l Bank*, 445 U.S. at 333. In addition, we deny the Nerlingers' petition for a writ of mandamus. *See Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 353 (D.C. Cir. 2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

All that remains unabated is a $122.78 lien-filing fee that the IRS represents was mistakenly overlooked and will be abated promptly. *See* Appellee's Response to the Appellants' Notice of Filing New Evidence, at 4.