United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1251 **September Term, 2017**

FILED ON: NOVEMBER 14, 2017

GERD TOPSNIK,

APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

APPELLEE

On Appeal from the United States Tax Court

Before: SRINIVASAN, *Circuit Judge*, and WILLIAMS and RANDOLPH, *Senior Circuit Judges*.

J U D G M E N T

The court considered this appeal on the record from the United States Tax Court, and on the briefs and arguments of the parties. The court has given the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is hereby

ORDERED AND ADJUDGED that the judgment of the Tax Court is **AFFIRMED.**

In 2011, the Internal Revenue Service sent Gerd Topsnik a notice of deficiency, informing him that he had underpaid his income taxes for the 2004-2009 tax years. Topsnik petitioned for review in the United States Tax Court. There, he raised four arguments: first, that under the bilateral tax treaty between the United States and Germany, he was not subject to taxation in the United States; second, that he qualified for exceptions to several of the penalties assessed against him by the IRS; third, that the IRS had computed those penalties incorrectly; and fourth, that after he received the notice of deficiency, he actually overpaid the IRS, but the IRS wrongfully refused to give him a refund. The Tax Court rejected each of those arguments.

Topsnik now reasserts each of those arguments on appeal. We affirm the Tax Court's decision.

First, Topsnik was subject to taxation in the United States. The Tax Court's understanding below—which neither party takes issue with on appeal—was that the parties had agreed that the income at issue was a series of "gains from the sale of intangible personal property." J.A. 548. Under the tax treaty between the United States and Germany, a person must pay income taxes to

a country on such gains only if he is a "resident" of that country. *Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital and to Certain Other Taxes*, U.S.-Ger., art. 13.5, Aug. 29, 1989, 1708 U.N.T.S. 3. A person qualifies as a "resident" of a country if, under the country's domestic law, he must pay taxes on income earned from sources worldwide. *Id.* art. 4.1. If a person is a "resident" of both the United States and Germany under that definition, the treaty sets forth a list of tiebreaker rules that determine which country is the one to which the person must pay taxes. *Id.* art. 4.2. In 2006, the United States and Germany amended the treaty, but made no substantive changes to any of the rules discussed above.

Here, the Tax Court correctly determined that Topsnik was a "resident" of the United States in the relevant tax years. Under 26 C.F.R. § 1.1-1(b), "resident aliens" must pay taxes to the United States on income earned from sources worldwide. And under 26 C.F.R. § 301.7701(b)-1, a person qualifies as a "resident alien" of the United States if he has a Permanent Resident Card (commonly known as a green card) at any point during the tax year in question. Resident alien status continues until it is rescinded or abandoned. *Id.* § 301.7701(b)-1(b)(1). Here, it is undisputed that Topsnik had a green card in 2004-2009; he did not administratively abandon it until November 20, 2010, when he filed a Record of Abandonment of Lawful Permanent Resident Status (commonly known as a Form I-407). Topsnik responds by pointing to an IRS guidance document—Publication 519—which, he says, contradicts § 301.7701(b)-1. But the publication says exactly what the regulation does: that anybody with a green card is a "resident" of the United States for tax purposes.

The Tax Court also correctly determined that Topsnik was not a "resident" of Germany in the relevant tax years. Before sending Topsnik a notice of deficiency, the IRS contacted the German tax authorities pursuant to the information-sharing provisions of Article 26 of the tax treaty. The IRS asked whether, under German law, Topsnik was required to pay taxes to Germany on income earned from sources worldwide. The German authorities said no, and further advised that Topsnik had paid no such taxes to Germany for the 2004-2009 tax years. In light of that evidence, the Tax Court reasonably determined that Topsnik was not a "resident" of Germany in those years.

Topsnik responds that, in a separate case he brought against the IRS, a federal district court dismissed his complaint for improper venue, finding that Topsnik *was* a resident of Germany. But the district court made that finding in 2011, and had no occasion to address Topsnik's residence during the tax years in question in this case, 2004-2009. As a result, the IRS could determine, and the Tax Court could properly hold, that Topsnik was not a "resident" of Germany in 2004-2009. In sum, because Topsnik was a "resident" of the United States but not Germany in those years, he was subject to taxation in the United States.

Second, Topsnik did not qualify for exceptions to any of the penalties assessed against him by the IRS. Topsnik contends that he meets the "reasonable cause" exception for penalties assessed under I.R.C. § 6651, and the "equity and good conscience" exception for penalties assessed under I.R.C. § 6654. That is so, Topsnik says, because Publication 519 misled him into thinking that he did not need to pay taxes or even file returns. But again, Publication 519 confirms

that Topsnik was subject to taxation in the United States. So even if Topsnik did rely on the publication, that reliance could not have been reasonable, and accordingly did not render him eligible for the "reasonable cause" and "equity and good conscience" exceptions.

Third, the IRS correctly computed the penalties. Topsnik complains that the penalties the IRS actually assessed were higher than the penalties listed in the notice of deficiency. But as the Tax Court explained, that is because one of the penalties was still accruing when the notice of deficiency was sent. And the notice informed Topsnik about the accruing penalty. Thus, the Tax Court did not err when it concluded that the penalties had been computed correctly.

Fourth, the IRS did not improperly withhold a refund of overpayments by Topsnik. Under the relevant provision of the Internal Revenue Code, the IRS was not required to refund any overpayment until 60 days after the Tax Court issued its final decision. I.R.C. § 6503(a)(1).

Pursuant to D.C. CIR. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate 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(b).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk