

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 17-1169**

**September Term, 2017**

**USTC-4029-17**

**Filed On: April 25, 2018**

Norman Douglas Diamond and Zaida Golena  
Del Rosario,

Appellants

v.

Commissioner of Internal Revenue Service,

Appellee

**ON APPEAL FROM THE UNITED STATES TAX COURT**

**BEFORE:** Henderson, Griffith, and Srinivasan, Circuit Judges

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

This appeal was considered on the record from the United States Tax Court and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing and the motion for appointment of counsel, it is

**ORDERED** that the motion for appointment of counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

**FURTHER ORDERED AND ADJUDGED** that the decision of the United States Tax Court entered May 3, 2017, be affirmed. The Tax Court correctly concluded that it lacked jurisdiction over the petition for review, because appellants have not shown that the Internal Revenue Service (“IRS”) issued to them a notice of deficiency, or any other notice which would confer jurisdiction on the Tax Court. See 26 U.S.C. § 6213; see also Edwards v. Comm’r, 791 F.3d 1, 3 (D.C. Cir. 2015) (describing notices of deficiency as “taxpayers’ ‘tickets’ to tax court”).

To the extent appellants assert that the IRS has improperly refused to issue notices of deficiency to which they are entitled, appellants – who filed this action in order to recover alleged tax overpayments – have not provided any evidence suggesting that the IRS assessed a tax deficiency for any of the relevant tax years. Moreover, appellants have cited no authorities suggesting that an IRS letter denying a claim for a refund may be construed as a notice of deficiency when no tax deficiency

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was assessed. Further, appellants' allegations of misconduct and spoliation are unsupported, and, in any event, do not support the exercise of jurisdiction by the Tax Court. See Willson v. Comm'r, 805 F.3d 316, 319-20 (D.C. Cir. 2015) (“[T]he tax court possesses only limited jurisdiction . . . and may exercise it only to the extent expressly authorized by Congress.”) (internal quotations omitted). Finally, appellants may not rely on the Fifth Amendment to supply jurisdiction, because the Constitution does not create jurisdiction in the Tax Court. Cf. Micei Int’l v. Dep’t of Commerce, 613 F.3d 1147, 1153 (D.C. Cir. 2010) (“[T]he Constitution vests the power to confer jurisdiction in Congress alone.”).

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 petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

**Per Curiam**