United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1390 **September Term, 2018**

FILED ON: SEPTEMBER 21, 2018

MARLENE D. MORTEN,
APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
APPELLEE

On Appeal from the United States Tax Court

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

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**.

On November 7, 2012, the IRS issued a notice of deficiency to Morten notifying her that it had identified an income tax deficiency based on her alleged failure to file returns and pay taxes for 2003 and 2005. Morten timely petitioned the Tax Court for review. After a one-day trial, the Tax Court held that the notice of deficiency was untimely as to 2003, and that Morten was liable for a tax deficiency and penalties for the year 2005. The Tax Court found that Morten received $560,890 in income in 2005, and that she was liable for additions to tax under 26 U.S.C. § 6651(a) because she had failed to file her return and to pay her taxes, and had failed to show that her failure was due to reasonable cause rather than willful neglect. On August 24, 2016, the Tax Court entered its final decision holding Morten liable for a tax deficiency of $201,076 and penalties totaling $95,511.10.

Morten timely appealed the Tax Court's decision, presenting four challenges. Because none has merit, we affirm the Tax Court's decision.

First, Morten challenges the amount of income attributable to her in 2005. Because Morten

failed to file a tax return in 2005 and failed to keep adequate records, the Commissioner was entitled to compute her income using the "indirect bank deposits" method. *See Dodge v. Commissioner*, 981 F.2d 350, 353 (8th Cir. 1992). Under that method, the Commissioner totals the deposits into all bank accounts over which the taxpayer exercised dominion and control and then deducts redeposits and transfers between accounts. The result is presumptive evidence of income, and the taxpayer bears the burden of showing that any given deposit was derived from a nontaxable source. *See Welch v. Commissioner*, 204 F.3d 1228, 1230 (9th Cir. 2000). Following that methodology, the Tax Court concluded that Morten earned $560,890 in 2005.

Morten argues that the Tax Court's calculation erroneously includes $153,150.63 of nontaxable redeposits, consisting of a $14,994 deposit on April 28, a $14,656.63 deposit on May 13, a $7,000 deposit on June 6, a $6,500 deposit on June 6, and a $110,000 deposit on June 17. But Morten did not contend that any of those deposits (besides the June 17th deposit) were double-counted during her trial and thus forfeited any such argument. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084–85 (D.C. Cir. 1984). Forfeiture aside, she produced no evidence demonstrating the source of those deposits and thus also failed to rebut the income presumption.

As to the June 17th deposit, Morten noted only that the $110,000 deposit "may have been" part of an earlier $275,000 deposit. J.A. 423. But she made no actual argument on the point, and there is record evidence to the contrary: Morten testified at trial that she received $110,000 for her services as executive director of a nonprofit organization, independent of the $275,000 she received from the D.C. Government as part of a litigation settlement. J.A. 334–36, 341–43.

Morten separately argues that the Commissioner should have deducted $90,000 from her 2005 income. That argument stems from the fact that, on a number of occasions, Morten would deposit a check into a bank account, leave about $5,000 in the account, and then withdraw the remainder as a cashier's check. Morten testified that she did so to have readily accessible funds when she travelled to Zimbabwe to be with her sick father. The Commissioner dealt with the series of deposits by logging the initial deposit as taxable and the subsequent deposits as non-taxable. But Morten argues that only the amount left in the bank account should qualify as income. Presumably, Morten is claiming that $90,000 is the amount she held in the form of a cashier's check at the end of the year.

The record is less than clear on the point, but Morten's argument fails regardless. A paycheck of $1,000 constitutes $1,000 in income, regardless of whether it is deposited in a bank or withdrawn as a cashier's check. That is because gross income includes "all income from whatever source derived," including all "[c]ompensation for services." 26 U.S.C. § 61(a). The Tax Court reached the same conclusion: "[I]f you deposited that money into your own account and you thereafter had dominion and control over the proceeds, whether you left it in the bank or carried it around in a cashier's check, I don't know why that wasn't your money." J.A. 352. There was no error in that analysis.

Second, Morten challenges the Tax Court's decision to allow her to deduct only 10% (and

not 25%) of her household expenses as home office expenses. That is a factual dispute that we review for clear error. *See Pomarantz v. Commissioner*, 867 F.2d 495, 497 (9th Cir. 1988).

One way to calculate the percentage of a home used as a home office is to determine the proportion of the home's square footage used as an office. *See* Rev. Rul. 62-180, 1962-2 C.B. 52, 54. Morten's house is roughly 2,000 square feet in size. At trial, Morten equivocated about the size of her home office. Eventually, she concluded, "I would say the office was maybe, you know, 300 square feet I think." J.A. 442. Although 300 square feet represents 15% of her home, the Tax Court allowed Morten to deduct only 10% of her home expenses because "the portion of the house used for business . . . was vague and poorly demonstrated." J.A. 486.

The Tax Court did not clearly err in applying a discount. The taxpayer carries the burden of showing entitlement to a deduction. *See INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992). The Code requires the taxpayer to demonstrate that the space at issue is "exclusively used on a regular basis . . . as the principal place of business for any trade or business of the taxpayer." 26 U.S.C. § 280A(c)(1). But all Morten offered at trial was that the space was "maybe . . . 300 square feet" without any further substantiation of size or use. The Tax Court could have rejected the deduction entirely given the lack of detail in her presentation. Given that Morten shouldered the burden, the Tax Court committed no clear error in allowing a deduction of 10% of household expenses.

Third, Morten argues that her failure-to-pay and failure-to-file tax penalties should be excused. That requires Morten to demonstrate that the violations were "due to reasonable cause and not due to willful neglect." 26 U.S.C. § 6651(a). We give deference to the Tax Court as to whether a particular factual scenario satisfies reasonable cause. *See United States v. Boyle*, 469 U.S. 241, 249 n.8 (1985).

Morten's principal argument at trial was that her father's failing health and her travel to Zimbabwe to handle her father's estate interfered with her ability to file her 2005 tax return. In that sort of situation, Commission regulations require the taxpayer to file a written statement, under penalty of perjury, showing "all facts alleged as a reasonable cause for his failure to file such return or pay such tax." 26 C.F.R. § 301.6651-1(c)(1). Morten did not do so. We have found such a failure sufficient grounds to reject a reasonable-cause defense. *Kuretski v. Commissioner*, 755 F.3d 929, 935–36 (D.C. Cir. 2014). And in any case, Morten's ability to handle other business affairs in the United States during the relevant period, and file tax returns for subsequent years (but never 2005), undermines the force of her argument. *See Marrin v. Commissioner*, 147 F.3d 147, 153 (2d Cir. 1998).

Fourth, Morten argues that the Tax Court should have either extended the length of the trial or allowed her to file a post-trial brief. We review for abuse of discretion. *See United Bhd. of Carpenters & Joiners of Am. v. Operative Plasterers' & Cement Masons' Int'l Ass'n of the U.S. & Can.*, 721 F.3d 678, 689–90 (D.C. Cir. 2013).

Morten had a full and fair opportunity to prepare the record and present her case at trial.

First, the Tax Court granted Morten's request to continue the trial on three separate occasions. The court finally held the trial in May 2016, more than three years after Morten filed her petition, giving her ample time to prepare. Second, the Tax Court instructed both parties to file pretrial memoranda specifying the amount of time they would require for the trial. The Commissioner's memorandum asked for four hours. Morten neither submitted a timely memorandum nor objected to the Commissioner's recommendation. Third, the Tax Court judge repeatedly asked Morten throughout the trial if she needed more time to present evidence, and she said she did not. *See*, *e.g.*, J.A. 379–80, 461, 466–67. Finally, Morten failed to provide any explanation of why a post-trial memorandum was necessary at the time she made the request.

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).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk