United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1252 **September Term, 2019**

FILED ON: April 21, 2020

DANIEL E. LARKIN AND CHRISTINE LARKIN,
APPELLANTS

V.

COMMISSIONER OF INTERNAL REVENUE,
APPELLEE

On Appeal from the Decisions
of the United States Tax Court

Before: SRINIVASAN, *Chief Judge,* and ROGERS and RAO, *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 of the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). 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 be **AFFIRMED IN PART** and **VACATED AND REMANDED IN PART.**

Taxpayers Daniel and Christine Larkin are dual citizens of the United States and United Kingdom who resided in the United Kingdom from 2003 to 2006. During those years, Daniel Larkin worked as a partner at a law firm and managed a real estate investment and consultancy business. Although the couple generated around $400,000 a year in income, they paid no United States federal income tax for those four years after claiming various deductions and tax credits on their returns.

The Commissioner of the Internal Revenue Service disagreed with the Larkins' reporting for those years and issued them notices of deficiency. The Commissioner assessed deficiencies for those years totaling $524,140 and penalties totaling $151,992.

The Larkins challenged the notices of deficiency in Tax Court. The Tax Court rejected

most of the Larkins' claimed deductions and credits and largely upheld the Commissioner's disallowances and assessment of additional tax and penalties. *See Larkin v. Comm'r of Internal Revenue*, T.C.M (RIA) 2017-54, 2017 WL 1227282, at *3 (2017). The Larkins now appeal. We affirm the Tax Court's decision except as to four discrete errors acknowledged by the Commissioner.

First, the Larkins forfeit many of their arguments by wholly failing to develop their claims or anchor them to the record. *See* Fed. R. App. P. 28(a)(8)(A); *Angelex, Ltd. v. United States*, 907 F.3d 612, 620 (D.C. Cir. 2018); *Sierra Club v. EPA*, 925 F.3d 490, 496 (D.C. Cir. 2019). In many instances in their briefs, the Larkins claim that a deduction or credit was substantiated by evidence in the record but then fail to provide any citation or identification of which documents ostensibly provide the claimed substantiation. For example, the Larkins assert that they "have submitted adequate substantiation" to support their claimed deductions for expenses related to their real estate business (i.e., business computer, nonmortgage interest, travel, meals, and entertainment), but they provide no citations to the record and identify no supporting documents. Appellant's Br. 19–20. For their claimed home-office deduction, they go as far as to say that the "Trial Record" is "replete with substantiation," but without providing any citations. Appellant's Reply Br. 25. The Larkins also assert various conclusory legal positions without citing any source of law, as when they claim, without support, that they are "entitled to automatic extensions to October 15 in a filing year" for filing deadlines or that their rental cost deduction is "a large partnership item entitled to deference." Appellant's Br. 17, 23. (In addition, in the few instances in which the Larkins do provide any citations, the citations are often entirely unhelpful, such as a general reference to an entire volume of their unpaginated appendix.)

We decline to consider the arguments for which the Larkins fail to provide support in the record or law. While the Larkins are pro se litigants, Daniel Larkin has extensive legal experience working as a partner for a law firm. And the patent deficiencies in their briefing are not isolated to a few instances but are consistent throughout.

The few arguments the Larkins have not forfeited are meritless. We reject the Larkins' arguments that the Tax Court was incorrect in finding inadequate substantiation for their claimed deductions and credits. We review the Tax Court's substantiation determinations for clear error. *See Green Gas Delaware Statutory Tr. v. Comm'r of Internal Revenue*, 903 F.3d 138, 142–143 (D.C. Cir. 2018). For all of the Larkins' challenges to the Tax Court's substantiation determinations, we agree with the Tax Court's resolution for the reasons stated in its decision and find no clear error in its determinations. In contending that there is sufficient substantiation in the record for an item, the Larkins cite the same evidence they referenced in the proceedings before the Tax Court, but without explaining why that court erred in determining that the evidence was insufficient. For their claimed foreign-tax credits, for example, the Larkins point to the same forms they relied on in the Tax Court to substantiate their U.S. tax liability (as is required in order to validly claim the credit). But the Larkins fail to address the court's explanation that those forms cannot substantiate a taxpayers' income because they are filled out by taxpayers themselves.

The Larkins separately argue that, for certain items resolved against them in the Tax Court, the burden of proof should have shifted to the Commissioner. Ordinarily, taxpayers bear the burden of proof at trial to substantiate the reported income or claimed deductions and credits on their return. *See* Tax Ct. R. 142(a)(1). The burden, however, can shift to the Commissioner in at least two circumstances: (i) if the taxpayer presents "credible evidence" about an item, *see* I.R.C. § 7491(a); and (ii) if the Commissioner presents a "new matter" at trial that was not included in the notice of deficiency, *see* Tax Ct. R. 142(a)(1). We reject the Larkins' burden-shifting arguments for essentially the same reasons as did the Tax Court.

The Larkins claim that the burden should have shifted to the Commissioner for their charitable-contribution deductions because they submitted adequate, credible evidence at trial. But the sole evidence they provided was Daniel Larkin's trial testimony to the effect that, while he had brought no documentation with him to support the deductions, he swore that the payments had been made to charitable organizations. That testimony does not qualify as "credible evidence" under Internal Revenue Code Section 7491(a) that would shift the burden to the Commissioner. *See Higbee v. Comm'r of Internal Revenue,* 116 T.C. 438, 442 (2001) (explaining that credible evidence is evidence that, on its own and without contrary evidence, would suffice to substantiate the deduction).

The Larkins contend that the burden also should have shifted to the Commissioner in connection with their real-estate business items because the Commissioner had put forth a new theory at trial for the disallowance. But the Commissioner's theory, which was that the items were unsubstantiated, had been clearly noted in the notice of deficiency as an alternative. The Larkins also argue for a burden shift with respect to their housing-costs deduction. The notice of deficiency did not include the disallowance of that deduction, but that was only because the Commissioner had no reason to know to include it given that the Larkins had failed to correctly report the amounts in the first place. *See Larkin,* 2017 WL 1227282 at *14. And even if the burden should have shifted to the Commissioner on that item, the evidence in the record establishes that the Larkins had no right to claim the deduction because the amounts fall well below the statutory floor.

Lastly, the Larkins claim the burden should have shifted in connection with their claimed foreign-tax credits. They argue that the Commissioner presented a new theory at trial on that item. Their argument, in particular, is that the Commissioner contended in the notice of deficiency that they had not provided adequate documentation of their payment of foreign taxes, but at trial, the Commissioner argued that they had not demonstrated the amount of their U.S. tax liability for those years and had thus failed to show an entitlement to carry over the credit.

The latter position taken by the Commissioner was not a "new matter" for purposes of shifting the burden. A theory does not constitute a "new matter" when it "merely clarifies or develops the original determination without being inconsistent or increasing the amount of

deficiency." *Virginia Educ. Fund v. Comm'r of Internal Revenue*, 85 T.C. 743, 751 (1985). The Commissioner was free at trial to assert grounds concerning the foreign-tax credits that were "implicitly within the ambit of the determination in the notice of deficiency." *Pagel, Inc. v. Comm'r of Internal Revenue*, 91 T.C. 200, 212 (1988). Because the Commissioner in the notice of deficiency had disallowed the Larkins foreign-tax credit, the Larkins at trial needed to show their entitlement to claim the credits and carry them over to later years. That in turn required the Larkins to demonstrate the amount of their U.S. federal income tax liability during those years, and the Commissioner did not assert a "new matter" by pointing out to the court that the Larkins had failed to do so. Additionally, in determining whether a theory amounts to a "new matter" for purposes of shifting the burden, the Tax Court looks to factors such as whether the theory required new evidence, invoked a new area of the code, or changed the amount of the deficiency, none of which are present here. *See, e.g.*, *Wayne Bolt & Nut Co. v. Comm'r of Internal Revenue*, 93 T.C. 500, 507 (1989); *Estate of Jayne v. Comm'r of Internal Revenue*, 61 T.C. 744, 749 (1974).

While the Larkins' arguments are either forfeited or meritless, the Commissioner confesses error on four discrete issues: the inclusion of self-employment tax in the Larkins' tax liability, a computational error resulting in an additional $27 in income for the year 2003, a computational error resulting in an additional $10,792 in the assessment of penalties for the year 2004, and a computational error resulting in an additional $1,948 in income for the year 2006. The Commissioner requests a limited remand to correct those errors and recalculate the Larkins' assessments and penalties, and we grant that request. In all other respects, however, we affirm the decision of the Tax Court.

Pursuant to D.C. Circuit Rule. 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/
Daniel J. Reidy
Deputy Clerk