

INDEX TO APPENDICES

Appendix A, Judgment of the United States Court of Appeals for the District of Columbia Circuit, Filed April 25, 2018	2a
Appendix B, Order of the United States Tax Court, Entered May 3, 2017	4a
Appendix C, Denial of Panel Rehearing by Court of Appeals, Filed July 25, 2018 ...	6a
Appendix D, Denial of En Banc Rehearing by Court of Appeals, Filed July 25, 2018	7a
Appendix E, Letter from IRS, Dated Dec. 15, 2016	8a
Appendix F, Letter from IRS, Dated Apr. 3, 2013	10a
Appendix G, Treasury Inspector General's publication of details of former IRS employee Monica Hernandez, Dated May 1, 2011	11a
Appendix H, IRS publication "National Taxpayer Advocate 2011 Annual Report to Congress Executive Summary Preface & Highlights", Dated December 31, 2011 ..	12a

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

JUDGMENT

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

UNITED STATES TAX COURT
WASHINGTON, DC 20217

NORMAN DOUGLAS DIAMOND & ZAIDA)
GOLENA DEL ROSARIO,)
)
Petitioners,)
)
v.) Docket No. 4029-17.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

On April 6, 2017, respondent filed a Motion To Dismiss for Lack of Jurisdiction on the ground that no notice of deficiency has been sent to petitioner for tax years 2005, 2006, and 2008, nor has respondent made any determination concerning collection or any other determination that would confer jurisdiction on this Court for tax years 2005, 2006, and 2008. On April 26, 2017, petitioners filed an Objection to respondent's motion.

This Court is a court of limited jurisdiction. It may therefore exercise jurisdiction only to the extent expressly provided by statute. Breman v. Commissioner, 66 T.C. 61, 66 (1976). In a case seeking the redetermination of a deficiency, the jurisdiction of the Court depends, in part, on the issuance by the Commissioner of a valid notice of deficiency to the taxpayer. Rule 13(c), Tax Court Rules of Practice and Procedure; Frieling v. Commissioner, 81 T.C. 42, 46 (1983). The notice of deficiency has been described as "the taxpayer's ticket to the Tax Court" because without it, there can be no prepayment judicial review by this Court of the deficiency determined by the Commissioner. Mulvania v. Commissioner, 81 T.C. 65, 67 (1983).

Similarly, the Court's jurisdiction to review certain collection activity of the Internal Revenue Service depends on (1) the issuance of a valid notice of determination by an Internal Revenue Service Appeals Officer under I.R.C. section 6320 or 6330 and (2) the timely filing by the taxpayer of a petition generally within 30 days of that Appeals Office determination. Smith v. Commissioner, 124 T.C.

36, 38-39 (2005); Offiler v. Commissioner, 114 T.C. 492, 498 (2000); I.R.C. sec. 6320(c) and 6330(d)(1); Rule 330(b), Tax Court Rules of Practice and Procedure.

In their response to respondent's motion to dismiss, petitioners do not dispute the jurisdictional allegations set forth in respondent's motion. The present record in this case does not contain a notice of deficiency, notice of determination under I.R.C. sec. 6320 or 6330, or any other determination pertaining to the tax years 2005, 2006, or 2008. Consequently, this case must be dismissed for lack of jurisdiction.

Premises considered, it is

ORDERED that respondent's Motion To Dismiss for Lack of Jurisdiction is granted and this case is dismissed for lack of jurisdiction.

**(Signed) L. Paige Marvel
Chief Judge**

ENTERED: **MAY 03 2017**

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1169

September Term, 2017

USTC-4029-17

Filed On: July 25, 2018

Norman Douglas Diamond and Zaida Golena
Del Rosario,

Appellants

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Henderson, Griffith, and Srinivasan, Circuit Judges

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Norman Douglas Diamond and Zaida Golena
Del Rosario,

Appellants

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith, Kavanaugh*, Srinivasan, Millett, Pillard, Wilkins, and Katsas, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

* Circuit Judge Kavanaugh did not participate in this matter.

Appendix E

(1-800-829-3676).

HOW TO CONTACT US

If you have questions, you can call us toll free at 1-866-883-0235.

If you prefer, you can write to us at the address at the top of the first page of this letter.

When you write, include a copy of this letter and provide in the spaces below, your telephone number and the hours we can reach you. Keep a copy of this letter for your records.

Telephone number () _____ Hours _____

You can get any of the forms or publications mentioned in this letter on our website at www.irs.gov/formspubs or by calling 1-800-TAX-FORM (1-800-829-3676).

Sincerely yours,

Kenneth C. Corbin

Dir., Rtn. Integrity & Comp. Svc.

Enclosures:

Copy of this letter

Publication 1

Appendix F - Letter from IRS,

Dated Apr. 3, 2013

IRS Department of the Treasury

Internal Revenue Service

In reply refer to: 0567247712

PHILADELPHIA PA 19255-0530 Apr. 03, 2013 LTR 2645C E0

...

NORMAN D DIAMOND

...

If you don't accept our findings, you may petition the United States Tax Court for a re-determination of the amount of the tax you owe, as explained in the Notice of Deficiency we sent to you earlier.

...

Sincerely yours,

Patsy A. Belton

CSCO Operation Manager

Appendix G - Treasury Inspector General's publication of details of former IRS
employee Monica Hernandez,

Dated May 1, 2011

Treasury Inspector General's public posting:

May 1, 2011

Monica Hernandez Indicted for Making and Subscribing a False Income Tax
Return, Wire Fraud, and Aggravated Identity Theft

On April 14, 2011, in California, Monica Hernandez was indicted on three counts of
making and subscribing a false income tax return, six counts of wire fraud, and one
count of aggravated identity theft.

Hernandez was an employee of the Internal Revenue Service (IRS) and worked as a
part-time data entry clerk.¹

As part of her duties, Hernandez inputted taxpayers' information into the IRS's
computer system. During the course of her employment with the IRS, Hernandez
stole and/or misappropriated information of other taxpayers, listed on various IRS
forms, including Form 1099-B. This particular form lists a taxpayer's income
received and withholdings withheld from interest and dividend earnings.

Hernandez falsified and forged Forms 1099-B to reflect her own personal
information. Although, in most cases, Hernandez did not submit the falsified
1099-B forms with her own tax returns, she used these forms to obtain large tax
refunds. As a result of her fraud, Hernandez was able to obtain refunds from the
IRS in the amount of \$175,144.²

¹ E.D. Cal. Indict. filed Apr. 14, 2011.

² Id.

Appendix H - IRS publication "National Taxpayer Advocate 2011 Annual Report to
Congress Executive Summary Preface & Highlights",

Dated December 31, 2011

IRS publication:

The complexity of international tax law, combined with the procedural burden on international taxpayers, creates an environment where honest taxpayers who are trying their best to comply simply cannot. For some, this means paying more U.S. tax than is legally required, while others may be subject to steep civil and criminal penalties. Some U.S. taxpayers abroad find the tax requirements so confusing and the burden of complying with them so great that they give up their U.S. citizenship.

Many U.S. taxpayers abroad are confused by the complex legal and reporting requirements they face and are overwhelmed by the prospect of having to comply with them. Some are even renouncing their U.S. citizenship for that reason; about 4,000 people did so in fiscal years (Fys) 2005 to 2010.

Renunciations increased more than tenfold from 146 in Fy 2008 to 1,534 in Fy 2010, with 1,024 renunciations in the first two quarters of Fy 2011 alone.