

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-60190

Adolfo Sandor Montero,
Petitioner—Appellant

v.

Commissioner of Internal Revenue
Respondent—Appellee

Appeal from a Decision of the
United States Tax Court
Tax Court No. 22454-21

ON PETITION FOR REHEARING EN BANC

Before Haynes, Higginson, and Douglas, Circuit
Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a
petition for panel rehearing (5th Cir. R.40 I.O.P.),
the petition for panel rehearing is DENIED. Because
no member of the panel or judge in regular active
service requested that the court be polled on
rehearing en banc (Fed. R. App. P.40 and 5th Cir.
R.40), the petition for rehearing en banc is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-60190

Adolfo Sandor Montero,
Petitioner—Appellant

v.

Commissioner of Internal Revenue
Respondent—Appellee

Petition for Review from an Order of the
Tax Court, Internal Revenue Service
Agency No. 22454-21

Before Haynes, Higginson, and Douglas, Circuit
Judges.

JUDGMENT

This cause was considered on the petition of Adolfo Sandor Montero for review of an order of the Tax Court, Internal Revenue Service, and the briefs on file.

IT IS ORDERED and ADJUDGED that the decision of the Tax Court, Internal Revenue Service is AFFIRMED.

IT IS FURTHER ORDERED that Petitioner pay to Respondent the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-60190

Adolfo Sandor Montero,
Petitioner—Appellant

v.

Commissioner of Internal Revenue
Respondent—Appellee

Appeal from the Tax Court,
Internal Revenue Service
Agency No. 22454-21

Before Haynes, Higginson, and Douglas, Circuit
Judges.

PER CURIAM:¹

Adolfo Montero is no stranger to making frivolous arguments to avoid paying income tax. In this case, he argues that he is not subject to income tax because he declined to withhold income taxes. Because that argument is frivolous, we AFFIRM the tax court's grant of summary judgment and imposition of a \$25,000 fine.

In 2017, Montero received a salary of \$299,927 from Dell Technologies, Inc. Montero claimed to be exempt from federal income tax, so Dell withheld only \$4,882.94. On his tax return, Montero reported zero wages and asked for a refund. The Commissioner of Internal Revenue determined that Montero owed \$88,872 in income tax. Montero appealed the tax deficiency to the tax court. The

¹ This opinion is not designated for publication. See 5th Cir. R. 47.5.

tax court granted the Commissioner's motion for summary judgment and imposed a \$25,000 sanction for advancing frivolous arguments. Montero appeals.

This is not Montero's first appeal challenging the tax court's conclusions. Montero v. Comm'r, 354 F. App'x 173 (5th Cir. 2009) (per curiam). There, a panel of this court affirmed the tax court, explaining that Montero's income from Dell is taxable and the tax court did not abuse its discretion in issuing a \$20,000 sanction for making frivolous arguments. *Id.* at 176.

Here, Montero raises numerous issues, generally asserting error in the tax court's grant of the Commissioner's motion for summary judgment and imposition of the \$25,000 sanction.

In assigning error to the summary judgment order, Montero raises questions of law, which we review *de novo*. *Whitehouse Hotel Ltd. v. Comm'r*, 615 F.3d 321, 333 (5th Cir. 2010). Montero asserts that regulations relating to withholding exemptions and agreements are a trump card to avoid income tax. See *Treas. Reg* §§ 31.3401(a)-3, 31.6051-1(b). Not so. There is a difference between withholding of income taxes and taxable income. The regulations Montero points to address the former, and do not implicate the latter. Put simply, Montero cannot avoid income tax by claiming to be exempt from withholding.¹ The tax court properly granted summary judgment.

Additionally, the tax court did not abuse its

¹ Montero also makes the long-rejected argument that income tax is an excise tax, and Montero is not liable for such a tax. *Davis v. United States*, 742 F.2d 171, 172 (5th Cir.1984) (per curiam). We continue to reject that argument.

discretion in issuing a sanction for maintaining frivolous positions. I.R.C. § 6673(a); Stearman v. Comm'r, 436 F.3d 533, 535 (5th Cir. 2006) (per curiam). Montero has been repeatedly warned—in the proceeding below, as well as numerous prior proceedings—of the risk of advancing frivolous arguments, yet he continues to advance those arguments. Given Montero's extensive history advancing groundless arguments, imposing the maximum sanction of \$25,000 was not an abuse of discretion. Montero, 354 F. App'x at 176.¹

The judgment of the tax court is AFFIRMED.

¹ Montero cursorily asserts error in the tax court's denial of his motion in limine and motion for reconsideration. Regarding the motion in limine, Montero asserts prejudice, but fails to explain how the denial was an abuse of discretion. *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 643 (5th Cir. 2005) (reviewing decision on motion in limine for prejudice and abuse of discretion). Regarding the motion for reconsideration, Montero simply rehashed rejected arguments, which does not warrant granting a motion for reconsideration. *Templet v. HydroChem Inc.*, 367 F.3d 473, 478–79 (5th Cir. 2004). We are also unconvinced by Montero's allegations of the tax court's bias. See *Liteky v. United States*, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.").

A-6

Docket:22454-21 Document:56 Filed: 12/04/23

United States Tax Court
Washington, DC 20217
Docket No. 22454-21

Adolfo Sandor Montero,
Petitioner

v.

Commissioner of Internal Revenue
Respondent

Motion to Vacate or Revise Pursuant to Rule 162
Docket No. 22454-21

It is ORDERED as follows: This motion is DENIED

-As Supplemented-

(Signed) Maurice B. Foley
Judge

Served 01/17/24

United States Tax Court
Washington, DC 20217
Docket No. 22454-21

Adolfo Sandor Montero,
Petitioner

v.

Commissioner of Internal Revenue
Respondent

ORDER AND DECISION
Docket No. 22454-21

On January 18, 2023, the Court filed respondent's Motion for Summary Judgment. The Court, on February 3, 2023, filed petitioner's Response to Respondent's Motion for Summary Judgment. On February 6, 2023, the Court filed petitioner's Motion for Summary Judgment. The Court, on February 21, 2023, filed respondent's Response to Petitioner's Motion for Summary Judgment. Unless otherwise indicated, section references are to the Internal Revenue Code in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

On March 9, 2021, respondent issued petitioner a notice of deficiency relating to 2017 in which respondent determined that petitioner failed to report \$299,927.00 in wage income and disallowed petitioner's personal exemption. Respondent also determined that petitioner was liable for an I.R.C. § 6662(a) accuracy-related penalty. Petitioner, while residing in Pflugerville, Texas, timely filed his Petition asserting numerous frivolous

contentions similar to those that we rejected in his previous case before the Court. See *Montero v. Commissioner*, 354 Fed. Appx. 173, 175 (5th Cir. 2009), aff'd., Transcript of Bench Opinion, No. 23166-07L (Oct. 28, 2008). In his Motion for Summary Judgment, respondent conceded the section 6662(a) penalty but now requests that the Court impose an I.R.C. § 6673(a) penalty for petitioner's assertion of frivolous arguments.

Pursuant to section 6673, the Court may sanction a taxpayer for raising frivolous or groundless contentions. I.R.C. § 6673(a)(1)(B); see *Wnuck v. Commissioner*, 136 T.C. 498, 513-514 (2011). Petitioner has repeatedly raised such contentions (dkt. nos. 10587-22, 7697-20, 8509-11, and 24355-10). The Court, in 2008, imposed a \$20,000 section 6673(a) penalty on petitioner and admonished that "the Court will consider imposing a larger penalty if petitioner returns to the Court and advances similar arguments." Transcript of Bench Opinion, No. 23166-07L (Oct. 28, 2008). In addition, the Fifth Circuit has cautioned petitioner to stop advancing frivolous contentions, yet he has persisted. Subsequently, in an Order dated August 9, 2021, the Court warned petitioner that "he risks a substantial penalty if he continues on his current trajectory." Accordingly, petitioner is liable for a section 6673(a) penalty.

Respondent has established that there is no genuine dispute relating to any material fact and that he is entitled to judgment as a matter of law. See *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). Petitioner does not contest receiving the unreported wages paid to him from his employer.

Petitioner's contentions on whether those wages are taxable are "contrary to established law and unsupported by a reasoned, colorable argument for change in the law." See Wnuck, 136 T.C. at 513 n.14 (quoting *Coleman v. Commissioner*, 791 F.2d 68, 71 (7th Cir.1986)). Accordingly, pursuant to Rule 121, summary judgment in favor of respondent is appropriate.

Upon due consideration of the foregoing, it is

ORDERED that respondent's Motion for Summary Judgment, filed January 18, 2023, is granted and petitioner's Motion for Summary Judgment, filed February 6, 2023, is denied. It is further

ORDERED and DECIDED that there is a \$88,872.00 deficiency in income tax due from petitioner relating to 2017; and

That there is no section 6662(a) accuracy-related penalty due from petitioner relating to 2017. It is further

ORDERED and DECIDED that petitioner shall pay a \$25,000 penalty to the United States pursuant to section 6673(a).

(Signed) Maurice B. Foley
Judge

A-10