

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 22 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RICHARD KELBY; MABEL KELBY,

Petitioners -Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent - Appellee.

No. 09-73286

Tax Ct. No. 13268-03L

MEMORANDUM*

Appeal from a Decision of the
United States Tax Court

Submitted July 12, 2011**

Before: SCHROEDER, ALARCÓN, and LEAVY, Circuit Judges.

Richard and Mabel Kelby appeal from the Tax Court's decision denying their request for litigation costs pursuant to 26 U.S.C. § 7430. We have jurisdiction under 26 U.S.C. § 7482(a)(1). We review for an abuse of discretion. *Huffman v. Comm'r*, 978 F.2d 1139, 1143 (9th Cir. 1992). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The Tax Court did not abuse its discretion in determining that the Commissioner's position on the 1989 tax liability was substantially justified, and thus the Kelbys were not the prevailing party, given the Kelbys' failure to turn over Mabel Kelby's notes until more than three years after the Kelbys filed their petition for review. *See* 26 U.S.C. § 7430 (a party is not a "prevailing party" if the Commissioner's position was substantially justified); 26 C.F.R. § 301.7430-5(c)(1) ("A significant factor in determining whether the position of the Internal Revenue Service is substantially justified as of a given date is whether, on or before that date, the taxpayer has presented all relevant information under the taxpayer's control . . . to the appropriate Internal Revenue Service personnel.").

The Kelbys' remaining contentions are unpersuasive.

AFFIRMED.