

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 24 2024

FOR THE NINTH CIRCUIT

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

GEORGE J. SMITH; SHEILA ANN  
SMITH,

No. 23-70147

Petitioners-Appellants,

Tax Ct. No. 13383-22

v.

MEMORANDUM\*

COMMISSIONER OF INTERNAL  
REVENUE,

Respondent-Appellee.

Appeal from a Decision of the  
United States Tax Court

Submitted October 16, 2024\*\*

Before: SILVERMAN, R. NELSON, and MILLER, Circuit Judges.

George J. Smith and Sheila Ann Smith appeal pro se from the Tax Court's decision, after a bench trial, upholding the Commissioner of Internal Revenue's determination of deficiencies and penalties for tax years 2017 and 2018. We have jurisdiction under 26 U.S.C. § 7482(a)(1). We review de novo the Tax Court's

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

legal conclusions and for clear error its factual findings. *Hardy v. Comm'r*, 181 F.3d 1002, 1004 (9th Cir. 1999). We affirm in part, vacate in part, and remand.

The Tax Court properly upheld the Commissioner's deficiency determination because the determination was supported by "some substantive evidence" that the Smiths failed to report income, and the Smiths failed to show that the deficiency was "arbitrary or erroneous." *See id.* at 1004 ("If the Commissioner introduces some evidence that the taxpayer received unreported income, the burden shifts to the taxpayer to show by a preponderance of the evidence that the deficiency was arbitrary or erroneous."); *see also Maisano v. United States*, 908 F.2d 408, 409 (9th Cir. 1990) (recognizing that this court has rejected multiple variations of the "wages are not income" argument). Contrary to the Smiths' contentions, the burden-shifting provision of 26 U.S.C. § 6201(d) did not apply. *See* 26 U.S.C. § 6201(d) (shifting the burden of proof to the Commissioner only if taxpayer asserts a "reasonable dispute").

The Tax Court properly denied the Smiths' motion to dismiss for lack of jurisdiction because the notice of deficiency for tax year 2017 was timely, and both notices of deficiency were valid. *See* 26 U.S.C. § 6501(e)(1) (permitting assessment within 6 years where taxpayer omits more than 25 percent of gross income from the return unless the omitted amount was disclosed "in a manner adequate to apprise the Secretary of the nature and amount of such item"); *Benson*

*v. Comm'r*, 560 F.3d 1133, 1136 (9th Cir. 2009) (determining that extended limitations period applied where taxpayers failed to disclose any of the amounts of omitted income); *Urban v. Comm'r*, 964 F.2d 888, 889-90 (9th Cir. 1992) (explaining that no particular form or signature is required for a valid notice of deficiency and the Commissioner's compliance with Internal Revenue Manual requirements is not mandatory); *see also Elings v. Comm'r*, 324 F.3d 1110, 1111 (9th Cir. 2003) (standard of review).

The Tax Court did not abuse its discretion by denying the Smiths' motion to dismiss for failure to prosecute because the Smiths did not demonstrate grounds for dismissal. *See* T.C. R. 149(b) (setting forth circumstances under which the Tax Court may dismiss for failure to produce evidence); *Edelson v. Comm'r*, 829 F.2d 828, 831 (9th Cir. 1987) (standard of review).

The Tax Court did not abuse its discretion by imposing a \$2,500 penalty under 26 U.S.C. § 6673 against the Smiths because they maintained frivolous positions despite the Tax Court's warnings. *See Wolf v. Comm'r*, 4 F.3d 709, 716 (9th Cir. 1993) (setting forth standard of review and concluding that the Tax Court was within its discretion in imposing penalties under § 6673 against taxpayer who persisted in litigating frivolous positions following warning).

In light of the Commissioner's concession in the answering brief that accuracy-related penalties under 26 U.S.C. § 6662(a) should not be imposed

against the Smiths, we vacate the § 6662(a) penalties and remand for the Tax Court to reconsider the imposition of § 6662(a) penalties.

The parties will bear their own costs on appeal.

**AFFIRMED in part, VACATED in part, and REMANDED.**