NOT FOR PUBLICATION

FILED

OCT 30 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARLAND T. KEETON, AKA Arland Keeton; IMA JEAN KEETON, Petitioners - Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee.	No. 23-3750 D.C. No. 1358-21 MEMORANDUM[*]

Appeal from a Decision of the United States Tax Court

Submitted October 24, 2024[**]
Portland, Oregon

Before: LEE, VANDYKE, and H.A. THOMAS, Circuit Judges.

Arland and Ima Jean Keeton appeal a Tax Court decision sustaining the Commissioner of Internal Revenue's imposition of tax deficiencies and penalties against them. We have jurisdiction under I.R.C. § 7482(a)(1) and affirm.

[*] 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).

The Keetons and another couple, Robert and Lorene Riemenschneider, formed Keeton-Riemenschneider, LLC (KRLLC), with each couple owning 50% of the LLC. From 1994 to 2007, KRLLC sporadically made payments to Idaho Waste Systems, Inc. (IWS), and the Keetons and the Riemenschneiders each owned 34.5% of IWS. In 2012, all of the IWS shareholders signed a Unanimous Consent agreement converting their debt to equity, and IWS removed all notes payable to KRLLC from its balance sheet. IWS went into foreclosure in early 2018, and KRLLC recorded its outstanding balance due from IWS as a bad debt expense. The Keetons then reported their share of this bad debt expense as a loss on their 2017 and 2018 tax return. The Commissioner disallowed the loss, stating that the advances from KRLLC to IWS were equity infusions, not loans.

1. The Tax Court did not clearly err in finding KRLLC's advances to IWS were equity, not debt. The Keetons argue the Tax Court erred by finding that the 2012 Unanimous Consent agreement applies to KRLLC's advances, but this argument falters under the weight of the record. We review factual findings by the Tax Court about whether advances to a corporation are debt or equity for clear error. *See Hewlett-Packard Co. v. Comm'r*, 875 F.3d 494, 497 (9th Cir. 2017).

The Tax Court did not err in finding that KRLLC was not a third-party creditor and that rather it was a vehicle through which the Keetons and Riemenschneiders, as IWS shareholders, advanced funds to their floundering corporation. The Keetons

testified they gave no money directly to IWS and only used KRLLC. Despite the advances remaining on KRLLC's register as "Due from IWS" and Mr. Keeton's testimony that he did not believe the Unanimous Consent agreement affected KRLLC's debts,[1] the Tax Court had a sufficient basis to find the Unanimous Consent agreement converted all KRLLC's debt into equity.

The Tax Court also correctly weighed the *Hardman* factors because the IWS shareholders merely used a corporate formality to advance funds to their corporation. *See Hardman v. United States*, 827 F.2d 1409 (9th Cir. 1987). The *Hardman* multi-factor test was first applied to advances made by shareholders, but we look at "[s]ubstance, not form" when applying the test. *Id.* at 1411. The Tax Court correctly found the substance of the advances to be the two largest shareholders in IWS (the Keetons and Riemenschneiders) providing their corporation with the cash necessary to stay afloat. Looking to the *Hardman* factors, they overwhelmingly support an equity finding. To name a few: there was no fixed maturity date on KRLLC's purported loans; the repayments were not dependent upon earnings; KRLLC had no enforcement rights and it took a subordinate position to other creditors; IWS was thinly capitalized; and it had no ability to borrow from other sources. The Tax Court did not clearly err in finding the advances to be equity and sustaining the

[1] The Tax Court is not required to accept the testimony from a taxpayer that it finds lacking in credibility. *See Sparkman v. Comm'r*, 509 F.3d 1149, 1156 (9th Cir. 2007).

Commissioner's findings.

2. The Tax Court did not clearly err in sustaining the accuracy-related penalties. The Keetons contend that because they relied on the advice of their CPA, Jennifer Werner, they have a reasonable cause and good faith defense to the accuracy-related penalties. *See* I.R.C. § 6694(a)(3); *Collins v. Comm'r*, 857 F.2d 1383, 1386 (9th Cir. 1988). Where the Tax Court sustains an accuracy-related penalty, our court reviews its finding for clear error. *Dieringer v. Comm'r*, 917 F.3d 1135, 1141 (9th Cir. 2019).

Taxpayers cannot rely on the advice of a professional when such advice was not based on knowledge of all the facts. *See Collins*, 857 F.2d at 1386. Werner testified that she was unaware of the existence of the 2012 Unanimous Consent agreement and the fact that any note payable due to KRLLC was removed from IWS's books. She also testified that such information would have been relevant to her advice.

Henry v. Comm'r, 170 F.3d 1217 (9th Cir. 1999), does not apply here. In *Henry*, the transaction at issue involved complicated stock options, and the taxpayer directed his accountant to contact the stock options program manager if he had any questions. *Id* at 1220. Here, the facts are different. The Keetons did not provide Werner the Unanimous Consent agreement, and the court found Mr. Keeton's testimony that he did not think the agreement implicated KRLLC to be

"unambiguously refute[d]" by the record. Armed with such a finding, the court did not clearly err in finding that the Keetons could not avail themselves of the *Henry* defense and sustaining the penalty.

AFFIRMED.