Docket No. 19-2229

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DAMIAN K. GREGORY AND SHAYLA A. GREGORY,

Appellants,

v.

COMMISSIONER OF INTERNAL REVEUNE,

Appellee

On Appeal from the United States Tax Court (No. 1465-17) Honorable Ronald L. Buch

---

REPLY BRIEF FOR THE APPELLANTS

Professor T. Keith Fogg
Counsel for Appellants
Federal Tax Clinic at
the Legal Services Center
of Harvard Law School
122 Boylston Street
Jamaica Plain, MA 02130
(617) 390-2532
kfogg@law.harvard.edu

Audrey Patten, Esq.
Counsel for Appellants
Federal Tax Clinic at
the Legal Services Center
of Harvard Law School
122 Boylston Street
Jamaica Plain, MA 02130
(617) 390-2550
apatten@law.harvard.edu

Carlton M. Smith, Esq.
Counsel for Appellants
255 W. 23d Street #4AW
New York, NY 10011
(646) 230-1776
carltonsmth@aol.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY ARGUMENT

The Government's central argument is that the mere fact that instructions exist for taxpayers to formally change their address with the IRS controls whether a taxpayer has given "clear and concise" notice of their address for receiving a Statutory Notice of Deficiency ("SNOD"). This simple interpretation ignores both the severe consequences that befall a taxpayer who does not receive their SNOD and the judicial trend over the past five decades in granting an expansive interpretation of "clear and concise notice" of last known address for purposes of receiving a SNOD. This is especially so when, as in this case, a taxpayer has made efforts to communicate and cooperate with the IRS.

The Government's position also muddles the distinction between technical notification of a changed address to the IRS in general and "clear and concise" notice in situations where taxpayers are actively working with the IRS to resolve their cases. Furthermore, receipt of the SNOD is the jurisdictional ticket to the United States Tax Court. 26 U.S.C.§6213(a). The argument that any of the regulatory or policy guidance created by the IRS automatically subsumes the judicial case law over such an important right is by necessity an argument that such guidance be given judicial deference. However, the Government appears to have conceded any arguments on judicial deference by

stating they do not apply to this case and by not bothering to present those arguments. Brief for Appellee, 40-41 (hereinafter "Appellee"). Yet, the Government still expects such deference to be granted in practice, if not in name, by allowing instructions in a booklet, website pages, or a revenue procedure to automatically control whether the Appellants Damian and Shayla Gregory have access to judicial review of their tax case.

A. The Gregorys Actively Worked with the IRS and the Revenue Agent Assigned to Their Case.

The Government admits that receiving a Statutory Notice of Deficiency "is a matter of vital importance to both the IRS and taxpayers." (Appellee, 22). The failure of the taxpayer to receive and timely act upon a SNOD results in taxpayers losing judicial review of their case in the Tax Court. The Government points out that the taxpayer may instead obtain judicial review by paying the full amount of the deficiency and then filing a claim for refund in the United States District Court. (Appellee, 23). However, this legal remedy does not diminish the grave consequences for most taxpayers, including the Gregorys, whose deficiency, before interest, is $125,766 for tax years 2013 and 2014. (J.A., 94). Many taxpayers simply cannot afford to pay upfront such an amount to access judicial review. This is particularly true of the low income taxpayers the Tax Clinic at the Legal Services Center of Harvard Law School regularly represents.

To assess the reasonableness of how the IRS determined the taxpayer's last known address, the Government correctly states that the inquiry "focuses on the information available to the IRS at the time it issued the notice." (Appellee, 25) It is noteworthy that the cases the Government reference from sister circuits involve situations in which the taxpayer had made little or no effort to inform the IRS that they had moved. (Appellee, 25). In *Gyorgy* and in *Follum*, there was no documentary proof that the taxpayers had sent in any written or oral communications to the IRS with their new, valid addresses. *Gyorgy v.Comm'r*, 779 F.3d 466 (7th Cir. 2015); *Follum v. Comm'r* 128 F.3d 118 (2nd Cir. 1997). The IRS consequently tried to locate the taxpayers using information present on their W-2 and 1099 third party returns. *See Gyorgy*, 779 F.3d at 469; *Follum,* 128 F.3d at 120. In *Armstrong*, the taxpayer had supplied a non-existent address on his return and then refused to take receipt of the SNOD once the IRS had located his correct address by reviewing other information in his accounts. *Armstrong v. Comm'r*, 15 F.3d 970, 972-973 (10th Cir, 1994). Meanwhile, in *Eschweiler*, the taxpayer had had mail forwarded through the U.S. Postal Service to a friend's address even though he wanted his SNOD sent to his parents' address, which he did not report to the IRS. *Eschweiler v. United States*, 946 F.2d 45, 49 (7th Cir. 1991).

The *Gyorgy* Court contrasted such situations from those where the taxpayer had been in communication with the IRS. In those circumstances, "[r]easonable

diligence also requires the IRS to carefully determine whether the taxpayer had otherwise provided proper notification of an address change." *Gyorgy* at 478. When a taxpayer has provided unconventional notice of the change, "the IRS' duty of reasonable diligence is rooted in equity." *Id.* at 479.

In the present case, the facts do not suggest an absent taxpayer. Rather, the Gregorys were working vigorously, through their Certified Public Account, Michael Chaffee, to respond to the IRS audits.[1] (J.A. 136) A Revenue Agent, Lauren Buzzelli, was personally assigned to the case and in communication with the CPA. Ms. Buzzelli directly received two Form 2848s, one for Shayla Gregory and one for Damien Gregory, which had the Rutherford, NJ address and used those Form 2848s to communicate directly with Mr. Chaffee. (J.A. 136, 142). Yet the IRS still took the position that the address information supplied on those forms was irrelevant, even when the SNOD was ultimately returned as undeliverable by the post office.

B. It Is Not Controlling in Itself that Various IRS Guidance and Materials Contain Instructions for Changing a Taxpayer Address.

The Government next argues that because guidance as to how to change an address exists in Treas. Reg. 301.6212-2(a), Rev. Proc. 2010-16, the IRS website,

[1] The IRS prepared a copy of the SNOD to be mailed to Mr. Chaffee, but there is no evidence in the record that such copy was ever mailed to him, and he testified that he never received it.

and the forms themselves, the Gregorys should automatically lose their case. That guidance exists in these formats is not dispositive. With the exception of the treasury regulation which went through notice and comment rulemaking pursuant to 5. U.S.C. § 553, but which does not in itself state a definition of "clear and concise notice," each format mentioned is a mere unilateral pronouncement by the IRS. The IRS website and the instruction booklets attendant to the forms may change, without warning, at any time. This fungibility matters because the stakes are so high for the taxpayers. The determination of last known address for the SNOD is not a mere administrative or logistical guidepost. Rather it determines whether or not the taxpayers will be given a right to access the Tax Court at all. The timing of the taxpayers' petition from the date the SNOD was issued is what confers substantive jurisdiction on the Tax Court. It is a bright line rule. If a website, an instruction booklet, or a revenue procedure unilaterally produced by the agency, without any public notice or review, by its very existence is controlling, then that agency is practically able to change jurisdictional rights by closed – door fiat. *See Smith v. Berryhill*, 139 S.Ct, 1765, 1778 (2019) .

To the extent that the forms themselves are relevant, they are not as clear as the Government has described. The language specifically prohibiting their use for change of address purposes does not exist on either form. (J.A. 138 – 141). Rather, it is embedded, with no special highlights, within the separate instruction booklet.

See https://www.irs.gov/pub/irs-prior/i2848--2014.pdf (2014 version). Moreover, the "Caution" that the Government references on the Form 2848, reads "Form 2848 will not be honored for any purpose other than representation before the IRS." (Appellee, 6; J.A. 138 – 141) This general language of course indicates that the Form 2848 must not be used for such purposes as representation before the Tax Court or for use in extending time to file, such as a Form 4868 allows. However, it does not in itself suggest that any of the information actually supplied on the form will be disregarded.

The Government further argues that if courts which had credited taxpayers with giving the IRS clear and concise notice of a change of address in the past had seen this current version of the Form 2848, then they would have ruled against the taxpayer. For example, The Government dismisses the Gregorys' use of *Hunter v. Comm'r*, T.C. Memo 2004-81. (Appellee, 37-38). Yet the physical layout of the forms still raises doubts that if the logic in *Hunter* were applied, that the mere presence of that language and the instructions in the rule book would control and change the outcome. That is because *Hunter* did not turn on what Form 2848's alleged purpose was. Rather it hinged on the fact that the form required, and still requires, taxpayers to supply their address to make the form valid. The fact that a form requires taxpayers to supply their own address, in addition to that of their attorneys, "is not mere surplusage." *Id.* at 4. Looking to the trend of Tax Court and

circuit cases that had put an expanding burden on the IRS to review its own databases for information, the court pointed out that "the IRS is chargeable with knowing the information that it has readily available when it sends notices to the taxpayer." *Id.*

In the instant case, it is elevating form over substance to say that a "Caution" generally disallowing Form 2848 from being used for inappropriate legal purposes means the IRS can ignore the address information supplied by the taxpayer. *See Johnson v. Comm'r*, 611 F.2d 1015, 1019 (5th Cir. 1980). Likewise, Form 4868's address requirement also leads the taxpayer to expect "the IRS to process in a businesslike way the information that it receives." *Hunter* at 5. While the taxpayers did not follow the correct instructions and procedures that the IRS has proscribed for reporting their change of address, that should not automatically exclude them from accessing the tax court given the right at stake and given the long history of the Tax Court and Circuit Courts in reviewing the knowledge the IRS had at the time the SNOD was sent. (Appellant Brief, 21-29). The bottom line is that through Form 4868 and Form 2848, which was directly supplied to Revenue Agent Buzzelli, the IRS knew the Gregorys had moved and it simply failed to act on what it knew. It compounded its failure to take the information in its system and mail the SNOD to the Gregorys last known address by failing to make the change after learning that the SNOD was returned as undeliverable.

C. The Primacy of the Form Instructions and Revenue Procedure Over Judicial Case Law Can only be Argued Through Judicial Deference; An Argument The Government Has Waived.

The Government repeatedly claims that the question of whether the Gregorys could access their rights in the Tax Court hinge on the pronouncements in Revenue Procedure 2010-16 and in the written instructions in the booklets for Form 2848 and Form 4868. It simply states that the inquiry rests with the IRS having told taxpayers through its forms and instructions how to change an address. However, given the long history of what constitutes "clear and concise notice," and the arc in the case law towards an expansive definition that evolves with advances in computer technology, such a conclusion is akin to allowing IRS pronouncements, in whatever form, to alter substantive law. It can only make this argument with an analysis under doctrines of judicial deference, which it explicitly claims are not relevant. Appellee, 40-41. The Government wishes to apply what is in effect a legislative rule, without calling it a legislative rule. *See Chao v. Rothermal*, 327 F.3d 223, 228 (3d Cir. 2003).[2]

[2] To the extent that the Government might still argue that Revenue Procedure 2010-16 is entitled to deference under *Skidmore v. Swift*, 323 U.S. 134 (1944), as indicated in Appellee P. 41, FN 6, the Gregorys respectfully direct the Court to arguments presented in its main brief, Appellant Brief Pgs. 51-57.

CONCLUSION

For the reasons stated above, the Gregorys reassert that this Court should reverse the Tax Court and dismiss the Tax Court case for lack of jurisdiction on the ground that the SNOD was invalid.

Respectfully submitted,

s/ T. Keith Fogg

Professor T. Keith Fogg
Counsel for Appellants
Federal Tax Clinic at
the Legal Services Center
of Harvard Law School
122 Boylston Street
Jamaica Plain, Massachusetts 02130
(617) 390-2532
kfogg@law.harvard.edu

s/Audrey Patten

Audrey Patten
Counsel for Appellants
Federal Tax Clinic at
the Legal Services Center
of Harvard Law School
122 Boylston Street
Jamaica Plain, Massachusetts 02130
(617) 390-2550
apatten@law.harvard.edu

s/Carlton Smith

Carlton M. Smith, Esq.
Counsel for Appellants
255 W. 23d Street #4AW
New York, NY 10011
(646) 230-1776
carltonsmth@aol.com

February 11, 2020

COMBINED CERTIFICATIONS OF COMPLIANCE

1. All counsel for Appellant are members of the bar of the United States Court of Appeals for the Third Circuit.
2. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 2025 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).
3. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.
4. A copy of this Reply Brief was hereby served upon Janet Bradley and Thomas J. Clark, counsel for the Appellee, Internal Revenue Service, by electronic service using the Court's ECF service on February 11, 2020.
5. Pursuant to Third Circuit Local Appellate Rule 31.1(c), the text of the electronic brief is identical to the text in the paper copies.
6. Pursuant to Third Circuit Local Appellate Rule 31.1(c), a virus detection program was run on the electronic version of this brief, and its

attachments, using Symantec Endpoint Protection Cloud, version 22.11.2.7, and using Kaspersky Virus Desk, and that no virus was detected.

I hereby certify that all of the above is true and accurate.

Dated: February 11, 2020

Respectfully submitted,

s/Audrey Patten
Audrey Patten

Counsel for Appellants