

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 6, 2026

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

STEVEN NESS; TOBIE NESS,

Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent - Appellee.

No. 25-9006
(Tax Court No. 7945-23L)
(U.S. Tax Court)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **MATHESON**, and **PHILLIPS**, Circuit Judges.

Steven and Tobie Ness, representing themselves, appeal the Tax Court's decision upholding the IRS's assessment of back taxes against them. We have jurisdiction under 26 U.S.C. § 7482(a)(1). We affirm.¹

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ The IRS did not file a response brief in this case, but instead filed a letter stating it would waive that opportunity. The letter then added two paragraphs explaining why the Nesses' appellate arguments fail. The Nesses viewed this letter as a de facto response brief. In light of this court's instructions for pro se litigants—which state that no reply is permitted when no response brief is filed—the Nesses

I. BACKGROUND & PROCEDURAL HISTORY

This dispute began in 2021, when the IRS notified the Nesses that they owed about \$655,000 in taxes for the years 2015 through 2018, based on returns filed for each of those years. The Nesses responded that they filed no returns for those years, and they speculated that this must be a case of identity theft. An IRS settlement officer assessed past-due taxes, and the Nesses appealed to the Tax Court.

In that appeal, the Nesses argued they did not receive fair process before the settlement officer. They attached a letter dated March 16, 2023, which they claimed to have sent to the settlement officer before the assessment. The letter asked the settlement officer to “provide a copy of the tax returns for 2015–2018 or provide [the Nesses] with enough time to obtain them from the IRS Service Center.” R. vol. 1 at 157.² The letter further requested that the settlement officer reschedule a hearing “[o]nce [we] have obtained the copies of the documents.” *Id.*

The Tax Court noted it could not find the Nesses’ March 16, 2023 letter in the appellate record. In the court’s view, this created “uncertainty as to if and when the March 16 letter was received by [the settlement officer],” and raised “the possibility that the administrative record is incomplete, and there may be relevant facts in a

moved for leave to file a reply letter, attaching the intended filing. We agree with the Nesses that the IRS’s letter was effectively a response brief, and we therefore grant the motion. We have considered the Nesses’ reply (Dkt. No. 17-2) in our disposition of this matter.

² The only consecutive pagination in the record is in the CM/ECF header. We therefore cite to that page number.

complete administrative record that [the settlement officer] did not consider.” R. vol. 2 at 140. The court therefore directed the parties to come to an upcoming in-person hearing prepared to discuss the possibility of remand.

Before the hearing date, the IRS filed an unopposed motion to remand. The IRS stated that remand would allow it to clarify the record, not only regarding the March 16 letter, but also as to the Nesses’ tax returns. The IRS stated it had located their 2016, 2017, and 2018 returns, and it was still searching for the 2015 return. The Tax Court granted the motion.

On remand, various documents were added to the record, including the 2016, 2017, and 2018 tax returns. With those returns now produced, the Nesses no longer disputed their authenticity. But they continued to insist that the IRS produce the 2015 return. The settlement officer told them she was unable to locate it. The settlement officer re-assessed taxes for all four years. The Nesses again appealed to the Tax Court, and the Tax Court set a trial date.

On the day of trial, Mr. Ness appeared pro se and handed the court a motion to decide the case on the administrative record, rather than holding a trial. The court denied the motion because the Nesses denied they owed the assessed taxes, a matter the Tax Court reviews de novo after a trial, rather than on the underlying record. The court also denied a request to submit written briefs because Mr. Ness could not say what he wanted to brief. The parties then stipulated to all their proposed trial exhibits and the administrative record, and the court held a trial. Mr. Ness and counsel for the IRS both declined to make opening statements, to put on evidence

beyond what they had already stipulated to, or to make closing arguments. The court therefore deemed the case submitted.

After considering the matter, the Tax Court issued a decision on the merits. The court held that the IRS followed all required procedures. As to the Nesses' challenge to their tax liability, the court noted that "[t]hey did not present any evidence tending to show that their returns were not their returns; they did not present any evidence tending to show that their returns were incorrect. More broadly, they did not present any evidence, period." R. vol. 3 at 48. The court therefore upheld the IRS's assessment.

This appeal followed.

II. ANALYSIS

This court reviews Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."

26 U.S.C. § 7482(a)(1). "The Tax Court's legal conclusions are subject to de novo review, and its factual findings can be set aside only if clearly erroneous." *Katz v. Comm'r*, 335 F.3d 1121, 1126 (10th Cir. 2003).

The Nesses raise two issues on appeal, both procedural: (1) whether the IRS was required to prove their 2015 tax liability by producing their tax return for that year or some other document besides what the IRS actually produced; and (2) whether the Tax Court erred when it denied the Nesses an opportunity to submit written briefs. We will address these issues in order.

A. Documents Supporting Tax Liability for 2015

The Nesses claim that the IRS fails to establish tax liability unless it produces the taxpayer's return or it sets forth the relevant information in IRS Form 4340. The Nesses cite no authority to support the notion that the IRS must produce the tax return. We therefore reject that argument. *See Carney v. Okla. Dep't of Pub. Safety*, 875 F.3d 1347, 1351 (10th Cir. 2017) (stating that this court construes pro se papers liberally but “we cannot make arguments for [the pro se litigant]”).

The Nesses' argument about Form 4340 also fails. The IRS uses this form to satisfy its statutory obligation to provide a taxpayer, upon request, a record of assessment. *See* 26 U.S.C. § 6203 (“Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.”); 26 C.F.R. § 301.6203-1 (“If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.”); *March v. IRS*, 335 F.3d 1186, 1187–89 (10th Cir. 2003) (holding that Form 4340 satisfies the IRS's obligations under the foregoing statute and regulation). The Nesses emphasize this court's statement that “Form 4340[] is presumptive proof of a valid assessment,” *Ford v. Pryor*, 552 F.3d 1174, 1179 (10th Cir. 2008) (internal quotation marks omitted). They contrast Form 4340 with the allegedly “general, uncertified, IRS account transcript” produced in this case. *Aplt. Opening Br.* at 3 (capitalization

normalized). Therefore, in their view, Form 4340 is the minimum the IRS must produce to establish tax liability for a particular year.

The problem for the Nesses is threefold. First, this court has stated only that Form 4340 is presumptive proof of a valid assessment, not that it is the only adequate proof or the minimum possible proof.³ Second, the IRS issues a Form 4340 upon request, and the Nesses have not pointed us to anything in the record showing they requested one. Third, they have not pointed us to anything in the record showing they raised the Form 4340 issue with the Tax Court. *See Micheli v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 846 F.2d 632, 635 (10th Cir. 1988) (“[I]n the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceeding at the appropriate time.” (internal quotation marks omitted)). We therefore reject the claim that the IRS must at least produce a Form 4340 to prove tax liability.

Finally, the Nesses cite a Tax Court decision, *Hoyle v. Commissioner*, 131 T.C. 197 (2008). The issue in *Hoyle* was whether the taxpayer had received a statutorily required notice of deficiency in advance of collection proceedings. *Id.* at 199–200, 205. The record before the court did not establish that the IRS had properly sent the notice. *Id.* at 204. The court therefore remanded the matter “to clarify the record.”

³ We further note that the information provided on Form 4340 appears to be the same information found on the transcripts produced by the IRS. *Compare* 26 C.F.R. § 301.6203-1 (requiring the IRS to produce “the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed”), *with* R. vol. 2 at 432–33 (the Nesses’ account transcript for the 2015 tax year containing the same data called for in a Form 4340).

Id. at 205. And in a footnote, it noted an IRS Chief Counsel opinion stating that if “the taxpayer can identify an irregularity in the assessment procedure” then the IRS “may be required to examine underlying documents in addition to the tax transcripts, such as the taxpayer’s return, a copy of the notice of deficiency, and the certified mailing list.” *Id.* at 205 n.7 (italics and internal quotation marks omitted). The court found the Chief Counsel’s opinion “consistent with our view that, where a taxpayer alleges no notice of deficiency was mailed he has (in the words of the Chief Counsel Notice) identified an irregularity, thereby requiring the [IRS] to do more than consult the computerized records.” *Id.* (brackets and internal quotation marks omitted). Thus, the court said it was “remanding this case in order for the [IRS] to examine underlying documents and make a record of what was relied upon in making the determination that the notice of deficiency was properly sent.” *Id.* (internal quotation marks omitted).

The Nesses characterize *Hoyle* as establishing a rule that when a party disputes the existence of a tax return, the IRS is required to rely on something more than account transcripts. *Hoyle* establishes no such rule. *Hoyle* is about the statutorily required notice of deficiency that must precede a collection action. And again, the Nesses cite no authority that the IRS must produce the taxpayer’s return before it can institute a collection action.

For all these reasons, we reject the Nesses’ argument that the IRS needed to produce the 2015 tax return or a Form 4340 to establish their 2015 tax liability.

B. Request to Submit Briefs

The Nesses’ motion to resolve the case on the administrative record concluded with a proposed schedule calling for simultaneous briefing. In the pretrial discussion with the Tax Court about the motion, Mr. Ness emphasized, “I was trying to set it up where we could do a briefing schedule” R. vol. 3 at 28. The court responded, “Okay. And what are the issues you intend to brief?” *Id.* at 28–29. Mr. Ness could not articulate any, saying only that—contrary to his request for simultaneous briefing—he might be able to offer something once he sees the IRS’s brief. The court denied the motion, including the briefing request. The Nesses argue this was error.

We review this decision for abuse of discretion. *See* 26 U.S.C. § 7482(a)(1) (stating that this court reviews Tax Court decisions “in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury”); *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1112 (10th Cir. 2007) (“The district court’s refusal to allow [the plaintiff] additional pages of briefing is best characterized as a ‘supervision of litigation’ decision, which we review for an abuse of discretion.”). We cannot see an abuse of discretion here, where a party asked for briefing without knowing what they intended to brief. We therefore reject this argument.

III. CONCLUSION

We affirm the Tax Court's judgment.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge