**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 91-4758

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JOSEPH W. DOXEY, JR. and JO ANN DOXEY,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

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Appeal from a Decision of the United States Tax Court
(38143-87)

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(November 20, 1992)

Before KING, WIENER, Circuit Judges, and LAKE, District Judge.[*]

PER CURIAM:[**]

Joseph W. Doxey, Jr. and Jo Ann Doxey, husband and wife, appeal the Tax Court's decision upholding the assessment against them of deficiencies in income tax and additions to tax for

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[*]District Judge of the Southern District of Texas, sitting by designation.

[**]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

negligence or intentional disregard of tax rules and regulations and for substantial understatement of their income tax liability. Finding that the Tax Court was not clearly erroneous in concluding that the Doxeys had not successfully contested the assessment of deficiencies, we affirm that aspect of the Tax Court's decision. As the additions to tax for negligence are contested by the Doxeys for the first time on appeal, we also affirm the Tax Court's holding that they are liable for those additions. And, finally, finding that the Doxeys have not borne their burden of showing reliance on substantial authority for their tax positions, we affirm the Tax Court's holding that they are liable for additions to tax for substantial understatement as well.

I.

FACTS

The Commissioner of Internal Revenue (Commissioner) determined deficiencies in the federal income taxes of the Doxeys for tax years 1981, 1982 and 1983. The Doxeys had four children whose ages during the tax years in question were as follows:

| Name | 1981 | 1982 | 1983 |
|---|---|---|---|
| Duncan | 18 | 19 | 20 |
| Denine | 16 | 17 | 18 |
| Joey | 12 | 13 | 14 |
| Bryan | 11 | 12 | 13 |

During the 1970's and through the tax years in question, the Doxeys owned and operated Doxey Marine Services, Inc. (DMS) in Cameron Parish, Louisiana. DMS sold petroleum products to the marine industry. The Doxeys' children worked for DMS during the summers and school vacations, as well as on weekends and after school when

school was in session. DMS compensated the children for their services, albeit the actual disbursement of wages was somewhat irregular.

In 1978, DMS executed eight notes payable to the children totalling $50,047.99, bearing interest at the rate of twelve percent. The proceeds for four of those notes were funds transferred to DMS from savings accounts in the children's names. The other four notes were executed in exchange for wages due to the children from DMS. On January 8, 1980, DMS paid the eight notes by issuing checks to the children in a total amount equal to the principal of the notes. The checks carried notations indicating that they represented full satisfaction of the notes. There is no evidence in the record of the interest on the notes ever having been paid.

During the period from October 15, 1980 through May 20, 1983, the Doxeys purchased a total of fifteen certificates of deposit (CDs) in the names of the children--fourteen in the amount of $100,000 and one in the amount of $200,000. Apparently, as some of the CDs matured, the funds from those CDs were used to purchase new CDs, but the record does not contain sufficient documentation to trace the funds to determine the total amount of funds invested in CDs throughout that period. Approximately seventy seven percent of the funds used to purchase those CDs was loaned from the Doxeys to the children in exchange for interest-free demand notes signed by the children. The remaining funds consisted of (1) money from savings accounts owned by the child in whose name the CD was

purchased, (2) loans from the other children to the child in whose name the CD was purchased, and (3) salary and interest payments due from DMS to the child in whose name the CD was purchased. On each of the CDs, either Joseph, Jo Ann, or both were listed as custodian.

Jo Ann Doxey controlled the investments in those CDs. She decided when to purchase a CD, in whose name to purchase the CD, the amount to invest, the source of funds, and the terms of the notes executed to provide the funds. The children reported the interest from the CDs during the years 1981 through 1983 on their individual federal income tax returns for those years. The Commissioner concluded that the Doxeys were actually the beneficial owners of the CDs and were liable for the income tax on that interest. The Commissioner assessed deficiencies against the Doxeys for tax years 1981, 1982 and 1983, as well as additions to tax pursuant to Internal Revenue Code (Code) sections 6651(a)(1), 6653(a)(1), 6653(a)(2), and 6661(a). On December 7, 1987, the Doxeys filed a petition in the United States Tax Court seeking a redetermination of those deficiencies and additions to tax.

The Doxeys contended that, although they controlled and managed the investments in the CDs, their actions were as agents or custodians for the children and the children used the interest earned on the investments to pay for their educations. Therefore, they argued, the children were both the legal and beneficial owners of the CDs. The Tax Court rejected that argument, finding that the Doxeys had produced no evidence showing that the interest generated

by the CDs was used for the benefit of the children. Additionally, record evidence demonstrates that substantial checks on the children's accounts were cashed but the use of those funds were not accounted for; and some funds belonging to the children were spent on such legal obligations of their parents as car payments, food, clothing and other household expenses. That lack of evidence, coupled with the Doxeys' arrangement of numerous loans between themselves and the children and between individual children, convinced the Tax Court that the Doxeys retained control over the CDs and that they had failed to meet their burden of proving that the Commissioner's determination of deficiencies was incorrect. On May 28, 1991, the Tax Court entered a decision in favor of the Commissioner, determining deficiencies and additions to tax in the following amounts:

| Year | Deficiency | Additions to tax | | | |
|---|---|---|---|---|---|
| | | §6651(a)(1) | §6653(a)(1) | §6653(a)(2) | §6661(a) |
| 1981 | $15,345.26 | $1,269.63 | $924.16 | 50% of the interest due on $15,345.26 | -- |
| 1982 | $17,411.83 | -- | $895.59 | 50% of the interest due on $17,411.83 | $4,352.96 |
| 1983 | $10,388.00 | -- | $519.40 | 50% of the interest due on $10,388.00 | $2,597.00 |

The Doxeys appeal that decision.

II.

ANALYSIS

A. Determination of Deficiencies

A determination of deficiency formally set forth by the Commissioner in a statutory notice of deficiency is entitled to a presumption of correctness when it is based on a firm evidentiary foundation.[1] The Doxeys thus bore the burden of overcoming that presumption and persuading the Tax Court that the Commissioner's conclusion that the interest from the CDs should have been included in their taxable income was incorrect.[2] The Tax Court's holding that the Doxeys failed to meet that burden is a finding of fact which we review for clear error.[3]

Because we are bound by that standard of review, we must, reluctantly, affirm the decision of the Tax Court. The Doxeys attempted to structure a financial planning scheme, in compliance with the tax law as it existed at the time, that would allow their children to earn interest income for use in their education. As that income would be used by the children, presumably it would also be subject to a lower tax rate than if the income belonged to the parents. We see nothing illegal in what the Doxeys attempted to accomplish. The record portrays an admirable picture of a hard-

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[1] Helvering v. Taylor, 293 U.S. 507, 515, 55 S. Ct. 287, 291, 79 L. Ed. 623 (1935); Welch v. Helvering, 290 U.S. 111, 115, 54 S. Ct. 8, 9, 78 L. Ed. 212 (1933); Portillo v. Commissioner, 932 F.2d 1128, 1133 (5th Cir. 1991).

[2] See Welch, 290 U.S. at 115, 54 S. Ct. at 9.

[3] Commissioner v. Duberstein, 363 U.S. 278, 291, 80 S. Ct. 1190, 1200, 4 L. Ed. 2d 1218, 1228 (1960).

working, rural family in which both parents and all children pitched in to maintain a demanding business which knew no regular hours, weekends or holidays. And there is nothing improper about efforts to minimize the tax burden produced by such work as long as such efforts are legal and, more importantly here, properly documented.

The Commissioner questioned the methods employed by the Doxeys, however, and they had the burden of proving that they had properly structured their plan. The Tax Court concluded that the Doxeys did not meet that burden because they had failed to keep adequate records of the investments, of the sources of the funds therefor, or of the disposition of the income therefrom. Had we been the fact finder, we may well have found otherwise. Based on a review of the record, however, we cannot say that the Tax Court's conclusion was clearly erroneous.[4] We thus affirm the Tax Court's determination that there were deficiencies in the Doxeys' income taxes for tax years 1981, 1982 and 1983.

B. Additions to tax under Code sections 6653(a)(1) and (2).

The Commissioner assessed the Doxeys additions to tax for tax years 1981, 1982 and 1983 pursuant to Code sections 6653(a)(1) and (2). Those sections authorize additions to tax if any part of an underpayment of tax is the result of negligence or intentional disregard of the tax rules and regulations. The Doxeys argue that the Tax Court erred in upholding the Commissioner's assessments

[4] See Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518, 528 (1985).

under those sections.

The Doxeys had the burden of proving that they were not liable for the additions to tax. The Tax Court held that they did not meet that burden because they "failed to address these issues at trial or on brief and appear to have abandoned these issues." Our review of the record confirms that conclusion by the Tax Court. Thus, the Doxeys raise this issue for the first time on appeal. We will consider an issue not raised at trial only if it involves a purely legal question and a refusal to consider it would result in a miscarriage of justice.[5] That is not the case here, however, as the Tax Court's determination that a taxpayer did not carry the burden of proof in challenging additions to tax under Code section 6653 is a finding of fact.[6] Consequently, we will not consider the Doxeys' argument on this issue.

C. Additions to tax under Code section 6661.

The Doxeys contend that the Tax Court erred in upholding the Commissioner's assessments of additions to tax under Code section 6661 for a substantial understatement of the Doxeys' income tax liability for tax years 1982 and 1983. An understatement of income tax liability is not subject to an addition to tax under section 6661 if there was substantial authority to support the taxpayer's treatment of an item which caused the understatement. This Circuit has not addressed the standard of review for additions to tax under

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[5] Interfirst Bank Abilene, N.A. v. Federal Deposit Ins. Corp., 777 F.2d 1092 (5th Cir. 1985).

[6] Masat v. Commissioner, 784 F.2d 573, 577 (5th Cir. 1986).

Code section 6661. The Ninth Circuit has held that, as the existence of substantial authority to support a position is a legal question, de novo review is proper.[7] The Fourth Circuit, however, treats the determination as one of fact and applies the clearly erroneous standard.[8] Here, the Doxeys cannot prevail in fact or in law, so we need not and therefore do not now decide the proper standard for reviewing issues under Code § 6661.

In the Tax Court, the Doxeys proffered Dickman v. Commissioner[9] as substantial authority for their position that they were not liable for income tax on the interest from the children's CDs. In Dickman, the Supreme Court held that interest-free demand loans from the taxpayers to their child were taxable gifts of the reasonable value of the use of the money lent.[10] The Court stated that its holding was consistent with the purpose of the federal gift tax to protect the income tax.[11] The Court noted that:

> A substantial no-interest loan from parent to child creates significant tax benefits for the lender quite apart from the economic advantages to the borrower. This is especially so when an individual in a high income tax bracket transfers income-producing property to an individual in a lower income tax bracket, thereby reducing the taxable income of the high-bracket taxpayer at the expense, ultimately, of all other taxpayers and the Government. Subjecting interest-free loans to gift taxation minimizes the potential loss to the federal

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[7] Norgaard v. Commissioner, 939 F.2d 874, 877-78 (9th Cir. 1991).

[8] Antonides v. Commissioner, 893 F.2d 656, 660 (4th Cir. 1990).

[9] 465 U.S. 330, 104 S. Ct. 1086, 79 L. Ed. 2d 343 (1984).

[10] Id. at 338, 79 L. Ed. 2d at 350-51.

[11] Id.

> fisc generated by the use of such loans as an income tax avoidance mechanism for the transferor.[12]

The Doxeys pointed to that language from Dickman as standing for the proposition that the use of money lent interest-free is taxed as a gift because it is not subject to income tax. The Tax Court dismissed the Doxeys' argument. That court repeated its conclusion that the Doxeys were the beneficial owners of the funds used to purchase the CDs and stated that "[n]othing in Dickman suggests that the beneficial owner of an investment could escape tax by placing the investment in the name of his or her children."

Both the Doxeys and the Tax Court needlessly addressed Dickman's impact on this case. The additions to tax were for the years 1982 and 1983; Dickman was not decided until 1984. Thus, the Doxeys could not possibly have relied on that case either when they made the loans to their children or when they filed their tax returns for 1982 and 1983. It was not Dickman but the seminal interest-free loan case of Crown v. Commissioner[13]--the case implicitly overruled by Dickman--that had the potential of constituting substantial authority for the Doxeys' position that they are not liable for income tax on the interest from the CDs had they made bona fide loans to their children of the funds used to purchase the children's CDs.

In Crown, the Seventh Circuit held that the value of interest foregone by the lender from interest-free loans to his children was

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[12] Id. at 339, 79 L. Ed. 2d at 351.

[13] 585 F.2d 234 (7th Cir. 1978).

not subject to gift tax.[14] The inference from Crown was that if the borrower in an interest-free loan exercised complete control over the proceeds of the loan, there was no income or gift attributed to the lender, and the proceeds were moved from the lender's estate to the borrower's estate both for gift tax and income tax purposes. We speculate that it was upon that inference that the Doxeys, like many other taxpayers,[15] relied when they made the loans to their children. Unfortunately, the Doxeys failed adequately to document the transactions and to trace the interest generated from the proceeds to prove that the children were the beneficial owners of the proceeds. Consequently, they failed to meet their burden of proving that they had executed valid Crown loans. Moreover, having failed properly to document the loans and having retained and exercised dominion and control over the funds ostensibly loaned to their children, the Doxeys' position prevents their ever reaching the point of asserting substantial objective authority for what they did--as distinguished from what subjectively they may have planned to do. The Tax Court committed no reversible error in concluding that the Doxeys were liable for additions to tax under

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[14] Id. at 235.

[15] Prior to Dickman, tax and financial planners and writers urged the use of "Crown loans" for comprehensive gift, estate and income tax planning, largely as a substitute for or supplement to the more expensive, complex and less flexible "Clifford trusts" for taxpayers with excess assets and income who were willing to shift temporarily the earning power of assets without permanently alienating such assets by gift, sale or other irrevocable transfer. And the advice so widely disseminated was widely followed--unfortunately not always with benefit of competent professional assistance.

Code section 6661.

## III.

## CONCLUSION

The Doxeys failed properly to execute and document a valid tax-planning device that would have enabled them to provide for their children's education and to reduce their own income tax liability. Because the Tax Court was not clearly erroneous in its conclusion that the Doxeys failed to prove proper execution of their plan or disprove Mrs. Doxey's exercise of dominion and control over the income from the CDs, we affirm the holding of that court that the Doxeys are liable for deficiencies in income tax. We also affirm the holding of the Tax Court that the Doxeys are liable for additions to tax under Code sections 6653(a)(1) and (2), as the Doxeys contest those additions for the first time on appeal. And we affirm the Tax Court's holding that the Doxeys are liable for additions to tax under Code section 6661. Whether reviewed for clear error or de novo, we conclude that the Doxeys failed to demonstrate that there was substantial authority to support their attempted (but poorly executed and poorly documented) tax plan.

AFFIRMED.