

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4265

MAX AND LILLY WIDER,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent-Appellee.

Appeal from the United States Tax Court
(22688-81)

(January 12, 1993)

Before JOHNSON, GARWOOD, and JONES, Circuit Judges.

PER CURIAM:¹

This is an appeal from the United States Tax Court, Dallas Division, by Max and Lilly Wider contesting a penalty against them for tax fraud. On appeal the Widens argue that the tax court was clearly erroneous in its findings. We disagree with this argument as to Max Wider and affirm the tax court. However, as is conceded by the Commissioner, we vacate the portion of the judgment against Lilly Wider.

¹ 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 Pursuant to that rule, we have determined that this opinion should not be published.

BACKGROUND

Max Wider has operated a wholesale jewelry business since 1956. In 1967, at the conclusion of an audit of his 1964-1965 tax returns, Wider was given an inadequate records notice which detailed various deficiencies in his record keeping practices.

Upon conducting an audit of Wider's income tax returns for 1973 and 1974, the IRS found that many of these record keeping deficiencies continued. Although Wider represented during the course of this audit that all his sales were documented by invoices, a revenue agent determined they were not. The agent also determined that the proceeds of all Wider's sales were not deposited into bank accounts and that Wider used unrecorded customer checks or cash receipts to purchase inventory. Wider also made an interest-bearing loan to another individual during the years under audit, requesting that payments of interest be made directly to his daughter. No record of these interest payments was kept by Wider, and he did not report the income.

While auditing Wider's income tax returns for 1975, 1976 and 1977, the IRS found that many of these conditions persisted. Wider's failure to correct the fundamental deficiencies in his record keeping practices, his failure to record all sales and his failure to deposit all receipts in the bank forced the IRS to review Wider's bank deposits and cash expenditures in order to determine his true taxable income for the years 1973-77. This analysis established that Wider had omitted massive amounts of taxable income from his returns for each of these five years. For

instance, Wider represented in financial statements that he had a profit or gross profit of approximately \$180,000 in 1974 and \$150,000 in 1975 while his tax returns reflected a net profit of only \$3,893.00 in 1974 and a net operating loss of \$33,508 in 1975.

At the completion of the audits, the IRS determined that at least part of Wider's underpayment in tax for those years was due to fraud. It accordingly assessed an additional 50% penalty for the underpayment pursuant to section 6653(b) of the Internal Revenue Code. The tax court agreed, finding that the large scale understatement of income over the five year period, the failure to maintain adequate books and records (particularly in light of the IRS's previous admonishment), and the practice of using unreported customer checks or cash to purchase inventory, established that at least part of the taxpayer's underpayments of taxes were due to fraud. The tax court further found that the taxpayer's failure to heed the IRS's notice regarding the inadequacies in his books and records negated any consideration of his lack of business training as a mitigating factor to his fraud.

DISCUSSION

Both parties agree that in assessing the tax court's determination of fraud we must use the "clearly erroneous" standard of review. Appellants admit that this is a very high standard. The United States Supreme Court elaborated on this standard in Anderson v. City of Bessemer City, 470 U.S. 564, 105 S. Ct. 1504,

84 L.Ed.2d 518 (1985). In Anderson the court stated that the clearly erroneous standard

plainly does not entitle reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse, even though convinced it had been differently sitting as a trier of fact it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson, 470 U.S. at 573-74, 105 S. Ct. at 1511.

Against this high standard of review Wider presents two arguments. Neither one, however, even if taken as true, would reach the level of clear error demanded by the Supreme Court in Anderson. Wider first asserts that the tax court found only that he had acted illegally half the time, which by some spurious reference to statistics, proved that the court's findings were clearly erroneous. Wider also contends that because of his unique and tragic history, the court did not correctly determine his intent with regard to fraud. The tax court heard these arguments and chose not to believe them. Even if we were to find some merit in Wider's arguments, we do not find it implausible for the tax court to have made its contrary choice. Therefore, there is no basis on which to find the tax court to be in clear error.

As to the charges of fraud against Lilly Wider, the government has in essence confessed error. The Commissioner states in his brief that:

The tax court's decision nevertheless fails to distinguish between Max Wider and Lilly Wider for this purpose. Thus, we concede the tax court decision should be modified by vacating the determination that Lilly Wider is liable for the additions to tax for fraud. . . . As so modified, however, the tax court's decision should be affirmed.

Since both parties agree that Lilly Wider should not be liable, the judgment should be reformed in this respect.

Accordingly, the judgment is **AFFIRMED** with respect to Max Wilder and **VACATED** in respect to Lilly Wider.

AFFIRMED in Part, **VACATED** in Part.