

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4856

CONSOLIDATED CABLE, LTD.,
VICTOR M. WILDER, TAX MATTERS PARTNER, et al.,
Petitioners-Appellants,

VERSUS

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the United States Tax Court
TC #19221 87

June 3, 1993

Before JOHNSON, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

I.

In 1982, Consolidated Cable, Ltd. ("Consolidated"), was formed to install television equipment in apartment and mobile home complexes and to obtain franchise rights for cable television. On March 23, 1987, the Internal Revenue Service (IRS) issued a notice of Final Partnership Administrative Adjustment (FPAA) for Consoli-

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

dated, making adjustments to partnership items for the 1982 and 1983 tax years. Victor Wilder, Consolidated's Tax Matters Partner, filed a timely petition with the United States Tax Court for redetermination of the partnership items pursuant to 26 U.S.C. § 6226 (1988).¹

Later, Wilder filed a motion to dismiss for lack of jurisdiction as to the 1982 tax year, contending that Consolidated's taxable year began before September 4, 1982, the date on which the partnership audit and litigation procedures became effective, thereby invalidating the FPAA. Prior to the implementation of these procedures, a partnership could not be audited as an entity; the service audited each partner individually. While this motion was pending, Wilder settled individually with the IRS, but the settlement did not affect his status as Tax Matters Partner.

The Tax Court conducted a hearing on the motion to dismiss on March 12, 1990. After subsequent briefing, the Tax Court issued a memorandum opinion denying the motion to dismiss. After the Tax Court issued its final decision regarding adjustments to the partnership items for 1982 and 1983, the partners and the partnership filed a timely notice of appeal.

II.

Consolidated first argues that the Tax Court improperly

¹ Appellants Wilder, Zoran Cupic, S. Y. Ghobrial, Paul Kaufman, William Higgins, Lorenzo Lorente, Stephen McEachern, Eghtedar Sadeghpour, Arnold Peskin, Deanna Dale, Charles Veldekens, H.S. Chana, and E.P. Descant were partners of Consolidated.

shifted the burden of proving subject matter jurisdiction. The IRS asserts that tax cases are somehow special and that the taxpayer should have the burden to disprove subject matter jurisdiction. The IRS contends that determinations of the Commissioner are entitled to a presumption of correctness and that it is the taxpayer's burden to prove any error in the determination. See Welch v. Helvering, 290 U.S. 111, 115 (1933).

The IRS misreads Welch. There, the Court held that the Commissioner's rulings as to various tax items have a presumption of correctness. In other words, the taxpayer has the burden of proving that the IRS has made an improper determination on the merits. The Welch opinion does not discuss who has the burden of proving that subject matter jurisdiction exists.

Here, the IRS included jurisdictional facts in the FPAA. Specifically, the FPAA included the startup date of the partnership. The IRS may not shift its burden of establishing that the Tax Court has subject matter jurisdiction simply by including facts relevant to subject matter jurisdiction in the FPAA. Like any other litigant acting as the proponent of subject matter jurisdiction, the IRS has the burden of proof.²

Although the Tax Court erred by shifting the burden of proving

² See Treaty Pines Inv. Partnership v. Commissioner, 967 F.2d 206, 211-12 & n.7 (5th Cir. 1992) (placing burden of proving jurisdiction on the IRS); Clapp v. Commissioner, 875 F.2d 1396, 1399 (9th Cir. 1989) (Tax Court jurisdictional issues to be resolved in the same manner as for any Article III court); Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir.), cert. denied, 449 U.S. 953 (1980) (burden of proof for subject matter jurisdiction on party seeking to assert jurisdiction); 2A JAMES MOORE, ET AL., MOORE'S FEDERAL PRACTICE, ¶ 12.07[2.-1] (2d ed. 1993) ("Once the existence of subject matter jurisdiction is challenged, the burden of establishing it always rests on the party asserting jurisdiction.").

jurisdiction to Consolidated, this was harmless error. The Tax Court's determination of when the partnership commenced was a factual finding based upon the weight of the evidence and does not depend upon the improperly shifted burden. Accordingly, we now must consider whether the court properly determined when the partnership commenced.

III.

The test for determining whether an entity is a partnership is whether

considering all the facts)) the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationships of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent)) the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.

Commissioner v. Culbertson, 337 U.S. 733 (1949). As we read Culbertson, the Court has decided that the issue of intent to form a partnership is a question of fact. Id. at 741. We therefore review the Tax Court's conclusion that Consolidated became a partnership after September 4, 1982, under a clearly erroneous standard.

During July or August 1982, Consolidated's attorney, Paul Smith, prepared drafts of the Certificate and Agreement of Limited Partnership and drafts of a recourse promissory note, franchise agreement, and bill of sale between the partnership and Southern Cable, which was in the business of acquiring and selling franchise

rights for cable television and was to enter into a transaction with Consolidated. Southern Cable, in turn, did business with United Cable Communications Company (UCC), which also bought and sold cable franchise rights. Consolidated was to acquire franchise rights owned by UCC through Southern.

Originally, the partners intended to begin business on October 31, 1982, as the partnership agreement reflects. Later, Wilder decided that business should commence on September 1, 1982. Smith was supposed to make this change, along with other substantial changes, in the draft of the partnership agreement. Smith could not produce any modified agreement at trial, however, and the record contains no evidence that a modified agreement ever was drafted.

Wilder, as sole general partner, executed the original agreement on September 1, 1982, and filed it with the Texas Secretary of State. Wilder testified that he also executed the agreement on behalf of several limited partners listed on an attachment to the agreement. Although Wilder claimed to have powers of attorney for each limited partner, he never produced these documents.

The agreement provided that the partnership was to commence on October 31, 1982. It required all funds obtained from limited partner subscriptions to be held in escrow until at least \$800,000 in total subscriptions were received and the limited partners making the subscriptions were admitted to the partnership. If, by the close of business on the commencement date, limited partners

making initial capital contributions of \$800,000 had not been admitted, the partnership would dissolve, and the subscription funds would be returned.

Because the total franchise fee was to be a function of the number of cable subscribers obtained by December 31, 1982, Wilder claimed that he needed to commence business earlier to have the benefit of a longer market testing period. Wilder claims to have entered into agreements with Southern on September 1, 1982, thus commencing business, yet between September 1 and September 15, 1982, Wilder did not perform any duties for the partnership or hire any employees.

The only financial records introduced in the Tax Court indicate that the first capital contribution was received on September 20, 1982. Only \$327,000 was received as of October 12, 1982, and Consolidated did not transfer money to UCC until September 29, 1982.

Consolidated notes that Wilder filed an application for a taxpayer identification number that indicated that September 1, 1982, was the date that the partnership commenced. Future partnership tax returns also reflected this date. We note that this evidence may have little probative value, as claiming an earlier startup date was in Consolidated's self-interest by allowing it to take larger depreciation deductions for 1982.

Taking all of these facts into account, we conclude that the decision of the Tax Court was not clearly erroneous. General partners often will take personal actions for the benefit of the

partnership prior to the actual commencement of partnership operations. As we read the record, that is apparently what happened here, as Wilder was personally liable on the contracts with Southern Cable. The record contains no evidence that Wilder had authority to execute the partnership agreement on behalf of the limited partners.

According to the partnership agreement, business was to commence on October 31, 1982, and Wilder failed to produce a later draft that would corroborate his explanation. Moreover, no capital contributions were received until after the critical date. Even if capital contributions had been received, \$800,000 had to be received, or the limited partners would have received their funds back in October. Until the capital interests of the limited partners vest, a partnership is not created for federal tax purposes. Sparks v. Commissioner, 87 T.C. 1279, 1284 (1986).

AFFIRMED.³

Judge Garza concurs in the judgment.

³ Consolidated also argues that the Tax Court erred in not issuing sanctions against the IRS for alleged misstatements regarding IRS regulations. Although we find the service's position regarding those regulations questionable, we do not think the Tax Court abused its discretion in denying sanctions.