

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4884

BETTY ANN FERGUSON,

Petitioner-Appellant,

VERSUS

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from the Decision of the United States Tax Court
(5680-89)

June 11, 1993

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

I.

The Commissioner of Internal Revenue issued notices of deficiency to Betty Ann Ferguson for the taxable years 1981 through 1985. These notices charged Ferguson with income tax deficiencies and additions to tax for failure to file returns, negligence or intentional disregard of rules and regulations, and underpayment of

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 Pursuant to that rule, the court has determined that this opinion should not be published.

estimated taxes. On March 23, 1989, Ferguson petitioned the Tax Court for a redetermination.

In March 1990, Ferguson agreed to stipulate that she was liable for the income tax deficiencies, the additions for failing to file returns, and the additions for underpayment of estimated taxes. The tax court then held a hearing on the negligence issue, at which Ferguson refused to be sworn because of her religious beliefs. The Tax Court refused to allow her testimony and rendered judgment for the Commissioner.

We reversed the Tax Court and remanded for further proceedings. Ferguson v. Commissioner, 921 F.2d 588 (5th Cir. 1991). On remand, Ferguson asked to revoke her stipulation to liability and moved for an in camera hearing with a sealed record prior to trial. The Tax Court denied both motions, and the case proceeded to trial on November 4, 1991. Ferguson declined to testify on Fifth Amendment grounds. The Tax Court rendered judgment in favor of the Commissioner.

II.

Appearing pro se, Ferguson first alleges that the trial court erred by not granting her an in camera hearing, prior to trial, to determine whether her testimony would incriminate her.¹ We do not think the Tax Court abused its discretion in failing to grant an in

¹ At first, the Commissioner contended that Ferguson was not under criminal investigation. Later, however, Ferguson apparently discovered, through a Freedom of Information Act request, that she was under investigation. The record does not reveal whether the Commissioner deliberately misrepresented this fact.

camera hearing. In cases involving a notice of deficiency, the taxpayer has the burden of proving error in the Commissioner's findings. Welch v. Helvering, 290 U.S. 111, 115 (1933); Tweeddale v. Commissioner, 841 F.2d 643, 645 (5th Cir. 1988). Because the taxpayer initiates the proceedings and has the burden of proof, he or she may not use the Fifth Amendment as a shield to avoid meeting that burden. Tweeddale, 841 F.2d at 645.

The Tax Court found that Ferguson's claim of Fifth Amendment privilege did not merit an in camera hearing because she had not proven a reasonable fear of prosecution. We agree. Trial courts often employ in camera hearings when a witness has refused to answer a specific question and the judge feels that the question possibly could produce incriminating testimony. Here, Ferguson never took the stand and simply alleged that she would be forced to make incriminating statements if she took the stand. Under these circumstances, an in camera hearing would have been fruitless, as the Tax Court had no way of knowing what testimony the Commissioner would attempt to elicit. In other words, any Fifth Amendment concerns were not ripe when Ferguson made her request.

We likewise reject Ferguson's suggestion that her due process rights were violated by the Tax Court's failure to conduct an in camera hearing. Ferguson alleges that she was prevented from adequately responding to the negligence charges. As we noted above, we previously have rejected such a claim in a similar proceeding. See Tweeddale, 841 F.2d at 645. The taxpayer may not use the Fifth Amendment as a shield to avoid meeting his burden of

proof. Moreover, because the Tax Court did not err in failing to grant the in camera hearing, there likewise can be no due process violation.

Ferguson also argues that the trial court erred in a pretrial proceeding by asking her whether she was currently employed and whether she had filed returns for years not at issue. She apparently claims this violated her Fifth Amendment rights as well. Even if the Tax Court erred in asking these questions, any error was harmless, as Ferguson cannot identify anything in the Tax Court's decision that would indicate these questions affected the court's judgment in any way.

III.

Next, Ferguson argues that the Tax Court erred in denying her motion to be relieved of her stipulations. As we discussed above, the parties stipulated to liability for past tax deficiencies as well as several additions to tax. Ferguson argues that she was coerced into these stipulations. Even if Ferguson was coerced into stipulating to liability, she did not come forward with any evidence suggesting that the stipulations were incorrect. Without any evidence tending to disprove the truth of the stipulations, the trial court did not abuse its discretion in denying Ferguson's motion.

IV.

Finally, Ferguson argues that she cannot be penalized for the

failure to file income tax returns because the instructions for the Form 1040 do not contain an Office of Management and Budget Control number as required by the Paperwork Reduction Act. Citing 44 U.S.C. § 3512 (1988), Ferguson claims she cannot be subject to any penalties for failing to provide information to the IRS.² We previously have held that regulations and instructions concerning the filing of income tax returns do not constitute information requests within the meaning of the act. See United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991); see also United States v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990); United States v. Dawes, 951 F.2d 1189 (10th Cir. 1991). Thus, we find Ferguson's claim to be without merit.

The decision of the Tax Court is AFFIRMED.

² The statute provides, "Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter."