UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2381
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MALCOLM C. McCALLUM,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-89-2095)

(March 23, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

DUHÉ, Circuit Judge:[1]

After an earlier appeal of this case, we remanded for a trial on the question whether income tax assessments against the Defendant taxpayer were preceded by a sufficient notice of deficiency. United States v. McCallum, 970 F.2d 66, 70-71 (5th Cir. 1992). The Government concedes that the district court erred on remand in refusing Defendant's request for a jury trial on this issue. The Government maintains that the error was harmless, however, because it would have been entitled to a directed verdict

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[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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

if the case had been tried before a jury. The question before us on this second appeal narrows to whether competent evidence established as a matter of law that the assessments were preceded by an adequate notice of deficiency.

I. The Notice

The Defendant first contends that evidence that he did not receive the notice of deficiency creates an issue of fact for a jury and rebuts the presumption that the notice of deficiency was sufficient. Section 6212 of the Internal Revenue Code authorizes the Secretary to send the taxpayer notice of a deficiency by certified or registered mail. I.R.C. § 6212(a); see also Treas. Reg. § 301.6212-1(a). The dispositive issue is whether the notice required by § 6212 was *sent* not *received*. The notice "shall be sufficient" if mailed to the taxpayer's last known address. I.R.C. § 6212(b)(1); Treas. Reg. § 301.6212-1(b).

The mailing of the notice of deficiency by certified or registered mail to the Defendant's last known address[2] fully satisfies the requirements of § 6212 as a matter of law, even if the notice was not received by Defendant. McCarty v. United States, 929 F.2d 1085, 1089 (5th Cir. 1991); Keado v. United States, 853 F.2d 1209, 1211-12 (5th Cir. 1988). The statutory

[2] Defendant does not dispute that the address used by the IRS was his address on the date the notice of deficiency was mailed. There is thus no question whether the IRS used due diligence in ascertaining Defendant's address. Cf. Mulder v. Commissioner, 855 F.2d 208, 211-12 (5th Cir. 1988) (holding that IRS did not exercise due diligence in ascertaining taxpayer's last known address in view of return of two previous mailings to taxpayer as undeliverable and lack of an executed return receipt if notice was sent return receipt requested).

scheme does not impose on the Commissioner "the virtually impossible task of proving that the notice actually has been received by the taxpayer." Jones v. United States, 889 F.2d 1448, 1450 (5th Cir. 1989). In denying receipt of the notice, Defendant has not raised a question bearing on the sufficiency of the notice.

Defendant's remaining complaints about the sufficiency of notice are unfounded. See Mulder v. Commissioner, 861 F.2d 1333, 1333 (5th Cir. 1988) (recognizing that absence of return receipt is irrelevant if notice was sent without request for return receipt) (denying reh'g on Mulder, 855 F.2d 208); Keado, 853 F.2d at 1214 (holding that rules adopted by the IRS are not law); see also United States v. Ahrens, 530 F.2d 781, 785-86 (8th Cir. 1976) (presuming validity of contents of notice of deficiency under "presumption of official regularity" when Government proved all elements of proper notice except contents).

II. The Evidence

To determine whether the notice of deficiency was duly sent, we must next address Defendant's evidentiary objections. Defendant objected to two items of evidence of mailing, a certified mail list (postal form 3877) and an IRS control card, on the bases that they were copies and that they were not properly authenticated under Federal Rule of Civil Procedure 44 (Proof of Official Record). We review the court's admission of evidence only for abuse of discretion. Jon-T Chems., Inc. v. Freeport Chem. Co., 704 F.2d 1412, 1417 (5th Cir. 1983).

The use of a copy is permitted "to the same extent as an

original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Fed. R. Evid. 1003. When asked whether his objection that the documents were photocopies was Defendant's only objection, he replied, "I am just saying in accordance with Rule 444 [Federal Rule Civil Procedure 44], I am objecting. That is why." Tr. 4. With this objection Defendant did not "meet[] the burden of showing that there [was] a genuine issue as to the authenticity of the unintroduced original, or as to the trustworthiness of the duplicate, or as to the fairness of substituting the duplicate for the original." United States v. Georgalis, 631 F.2d 1199, 1205 (5th Cir. Unit B 1980).[3]

Accordingly, the court did not abuse its discretion in admitting the two exhibits. With these documents in evidence, there is no question that the evidence conclusively establishes that the notice was sent via certified mail to Defendant's last known address.

III. The Jury Demand

As discussed in Part I, evidence that Defendant did not

[3] Even if we were to consider Defendant's authenticity objection, developed for the first time on appeal, we note that the two documents were authenticated by Revenue Agent Panepinto's testimony that he obtained the documents from the Service's Chicago Review Staff. See Fed. R. Evid. 901(b)(7)(evidence that a public record or report is "from the public office where items of this nature are kept" satisfies authentication requirement); see also Fed. R. Civ. P. 44(c) (Rule 44 does not prevent proof of official records by any other method authorized by law).

receive the notice of deficiency does not create an issue of fact regarding whether the notice was duly sent; the notice is sufficient if sent via certified mail to his last known address. Because the properly admitted evidence establishes as a matter of law that the assessments were preceded by a sufficient notice of deficiency, the failure of the district court to grant Defendant's request for a jury trial was indeed harmless error. See Beighley v. FDIC, 868 F.2d 776, 786 (5th Cir. 1989) (holding that any error in denial of a party's jury demand where the party has failed to raise an issue of fact for a jury to decide is harmless).

AFFIRMED.