

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40702
Summary Calendar

PHILLIP B. SCHUPP, JR.,
and LINDA A. SCHUPP

Plaintiffs-Counter
Defendants-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Counter
Claimant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

(4:91-CV-247)

(June 6, 1995)

Before THORNBERRY, HIGGINBOTHAM, AND BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge*:

Appellants Phillip B. Schupp, Jr., and Linda A. Schupp, appeal the district court's grant of summary judgment in favor of the government in this suit to quiet title, complaining that the Internal Revenue Service (henceforth IRS) failed to comply with the mandatory provisions of its administrative procedures to collect Appellants' income tax liabilities for the years 1983 through 1988.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Finding no material fact dispute exists we affirm the district court's judgment.

I.

Appellants filed this suit pursuant to 28 U.S.C. § 2410 (1994), challenging the procedural validity of notices of federal tax liens filed against their property. The IRS filed a counterclaim seeking to reduce tax-deficiency assessments for the years 1983 through 1988 to judgment. Cross motions for summary judgment were filed. In support of its motion, the IRS adduced evidence establishing that on November 26, 1990, the United States Tax Court had determined, and Appellants had stipulated to, income tax deficiencies for the years 1983 through 1988. Additional evidence demonstrated that on March 29 1991, the IRS made "Quick Assessments" of the outstanding taxes due based on the Tax Court determination, and had sent to Appellants via U.S. mail a notice and demand for payment for each of the years in question on Forms 3553 and 6335. The government also noted that attached to its motion were the declarations of Mark O'Brien and Jane Gough, IRS personnel, and Joe Pitzinger, the attorney who represented IRS in this cause. However, Pitzinger's declaration does not appear in the record. Appellants acknowledged receiving Notices of Intent to Levy prepared on June 3, 1991, for joint unpaid tax liabilities.

In response to the government's motion, Appellants argued in their memorandum in opposition that the documents and declarations offered in support did not establish that the IRS provided them with notice and demand as required by 26 U.S.C. § 6303(a) (1986),

and the IRS's failure to include Pitzinger's declaration violated Fed R. Civ. P. 5 and 56(e), precluding entry of summary judgment. Also attached to Appellants' memorandum were the affidavits of Phillip B. Schupp, Jr., and Linda A. Schupp, reciting that neither had ever received any part of Forms 3552 or 6335, or § 6303(a) notice and demand for the years 1983 through 1988.

On January 26, 1993, the district court denied Appellants' motion for summary judgment and granted the government's motion. The court held the United States had met its burden of establishing how notices were sent, and that Appellants' bare assertions to the contrary were insufficient to rebut it. The court further found that, even if notices had not been sent, Appellants received the requisite notice through their stipulation in the tax court and through notices of intent to levy mailed to them, and the notice was not invalid simply because Appellants may not have received notice and demand within sixty days of the date of making the assessments, as required by § 6303(a).

Appellants moved to amend and/or for reconsideration and rehearing, arguing that summary judgment in favor of the IRS was erroneous because IRS did not attach its attorney's declaration to its motion, and because the district court did not have subject matter jurisdiction. The court denied this motion, reasoning that the failure to attach the attorney's declaration was irrelevant because the summary judgment evidence was supported by the declarations of Mark O'Brien and Jane Gough.

II.

A.

Appellants first assert that the district court had no subject matter jurisdiction over IRS's counterclaim because the IRS had not included a specific pleading that it had received authorization from the Secretary of the Treasury to proceed against them, in violation of 26 U.S.C. §§ 7401 and 7402(a) (1986). They also argue that the authorization letter produced by the IRS was defective and that the district court abused its discretion by ordering IRS to amend its counterclaim to reflect the authorization.

Section 7401 requires the Secretary of the Treasury to authorize or sanction any civil action for collection or recovery of taxes, and the Attorney General or her delegate to direct commencement of the action. Section 7402(a) invests the United States district courts with jurisdiction "to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." In United States v. McCallum, 970 F.2d 66, 69 (5th Cir. 1992), this Court held that absent a denial, the authorization of the Secretary of the Treasury or his delegate and the direction of the Attorney General or her delegate may be presumed. Here, contrary to Appellants' assertions, there is no denial of, or defective, authorization. Rather, the record includes a specific request by the District Counsel for the Southwestern Region of the IRS, a delegate of the Secretary as provided by 26 U.S.C. §§ 7701(a)(11)(B) and 7701(a)(12) (1986) to take any legal action against Appellants to effect collection, in

whole or in part, of the federal tax liabilities outstanding against them. This contention is without merit.

B.

This court conducts a de novo review of a district court's grant or denial of summary judgment. Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991). "For summary judgment to be granted, the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, must demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." L & B Hosp. Ventures, Inc. v. Health Int'l, Inc., 894 F.2d 150, 151 (5th Cir.), cert. denied, 498 U.S. 815 (1990). The opposing party must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986); Fed. R. Civ. P. 56(e). On appeal from summary judgment, this court examines the evidence in the light most favorable to the nonmoving party. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992).

Evaluating the evidence in the light most favorable to Appellants, and assuming *arguendo* that Appellants' allegations that they failed to receive notice and demand are true, Appellants do not contest the validity of the tax court's determinations of their tax liability for the years 1983 through 1988. Nor do they challenge the district court's findings that: even if the notices were not sent, Appellants received the requisite notice through

their stipulation in the tax court and through notices of intent to levy mailed to them on June 3, 1991, which satisfy the § 6303(a) requirement; failure to receive notice within sixty days of the date assessments were made did not invalidate the notice; lack of prior notice does not bar the United States from bringing a civil action against a taxpayer, and; failure to attach Pitzinger's declaration was irrelevant because the summary judgment evidence was supported by the declarations of O'Brien and Gough. None of Appellants' arguments regarding unattached documents and the validity, procedural regularity, and receipt of the forms constituting § 6303(a) notice and demand documents address these determinations of the district court. The law of this circuit, as correctly applied by the district court, does not require IRS to demonstrate compliance with § 6303(a) in order to reduce unpaid tax assessments to judgment in a civil rather than an administrative proceeding. McCallum, 970 F.2d at 71. Accordingly, because the IRS demonstrated there was no genuine issue as to the stipulated tax liabilities of Appellants and that it was entitled to judgment as a matter of law, and because Appellants failed to adduce any evidence, aside from bare assertions, controverting an essential element of the IRS's case, the grant of summary judgment in favor of the IRS was appropriate.

AFFIRMED.