

Ernest N. DELANEY and Marjorie M. Delaney, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 83-7627.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 2, 1984.

Decided Sept. 21, 1984.

[*671](#)Ernest Delaney, in pro per.

John P. Griffin, Atty., Dept. of Justice, Washington, D.C., for respondent-appellee.

Before KENNEDY, SKOPIL, and NELSON, Circuit Judges.

KENNEDY, Circuit Judge:

The Tax Court affirmed the IRS's determination that \$43,000 in Swiss gold coins and \$305 in unexplained bank deposits constituted unreported income. The Delaneys now appeal, challenging the assessment of a deficiency and a negligence penalty pursuant to [26 U.S.C. § 6653\(a\)](#). We affirm.

The Commissioner's deficiency determination is entitled to a presumption of correctness "once some substantive evidence is introduced demonstrating that the taxpayer received unreported income." *Edwards v. Commissioner*, [680 F.2d 1268](#), 1270 (9th Cir.1982) (per curiam), *quoted in United States v. Stonehill*, [702 F.2d 1288](#), 1293 (9th Cir.1983), *cert. denied*, — U.S. —, [104 S.Ct. 1440](#), [79 L.Ed.2d 761](#) (1984). To rebut the presumption, the taxpayer must establish by a preponderance of the evidence that the determination is arbitrary or erroneous. *Keogh v. Commissioner*, [713 F.2d 496](#), 501 (9th Cir.1983); *United States v. Stonehill*, [702 F.2d at 1294](#).

The presumption of correctness arose as to the gold coins. The Delaneys concede as true the IRS's evidence that the Delaneys brought into the country over \$40,000 in gold coins over a two-year period. In the course of an IRS audit of their [*672](#)tax returns, the Delaneys gave what the IRS deemed incomplete or unsatisfactory answers to inquiries concerning the acquisition of the gold. The presumption of correctness applies in these circumstances. *Calhoun v. United States*, [591 F.2d 1243](#), 1245 (9th Cir.1978), *cert. denied*, [439 U.S. 1118](#), [99 S.Ct. 1025](#), [59 L.Ed.2d 77](#) (1979); *Ruark v. Commissioner*, [449 F.2d 311](#), 312 (9th Cir.1971) (per curiam).

The Government correctly distinguishes *Weimerskirch v. Commissioner*, [596 F.2d 358](#) (9th Cir.1979), as a case in which the Commissioner failed to connect the taxpayer to alleged assets that were the basis of the deficiency. By contrast, the Delaneys are the admitted owners of the asset that is the basis of the deficiency. *Weimerskirch* is thus inapplicable.

The Delaneys' case consisted solely of Dr. Delaney's testimony that the coins were purchased with taxed or tax-free income. Dr. Delaney produced no receipts for the purchase of the Swiss coins. He could not recall the name of the company that sold him the coins, even though the company had stored the coins for two years between the time the Delaneys purchased them and the time they received them. He also could not remember where he had obtained the cashier's checks he allegedly used to purchase the coins or the accounts from which he had withdrawn the money.

The primary question for the Tax Court was Dr. Delaney's credibility, and the evidence supports the court's determination to reject his vague and implausible testimony. *Ruark*, [449 F.2d at 312](#); *see Dudley v. United States*, [428 F.2d 1196](#), 1202 (9th Cir.1970). There was no other evidence in the record, and the Delaneys therefore did not rebut the presumption of correctness.

The IRS assessed a 5 percent negligence penalty for failure to report the gold coins as income. [26 U.S.C. § 6653\(a\)](#). The IRS's assessment of a negligence penalty is presumed correct. *Hall v. Commissioner*, [729 F.2d 632](#), 635 (9th Cir.1984). The taxpayer has the burden of showing that the assessment is incorrect. *Id.*

The Delaneys again failed to sustain their burden of proof. They did not present any evidence to establish that their failure to report the income represented by the coins, or even to produce records concerning them, was due to anything other than negligence or disregard of the tax laws. The Tax Court did not err by upholding the assessment of a negligence penalty with respect to the coins.

The IRS also included \$305 in bank deposits in its judgment of deficiency. The Delaneys claim that this item was settled prior to trial. It is clear from the record that the \$305 bank deposit was in issue. The bank deposit appeared in a pretrial stipulation of issues, and although some of those issues were conceded by the IRS prior to trial, the \$305 bank deposit was not among the issues conceded. The Delaneys introduced no evidence concerning the bank deposit or the negligence penalty based upon failure to report the bank deposit, and we must therefore affirm the Tax Court.

AFFIRMED.