Silver

UNITED STATES TAX COURT

Los Angeles, CA 90012

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L.A. DISTRICT COUNSEL

David L. and Linda M. Paig

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 13704-97S

O R D E R

Pursuant to the determination of the Court, as set forth in its Summary Opinion 1999-47, filed March 16, 1998, at Los Angeles, California, it is

ORDERED that respondent's motion for summary judgment filed November 9, 1998, is granted in part as to the deficiency determined by respondent due from petitioners for the taxable year 1993, and as to petitioner Linda M. Paig's liability for the penalty for fraud under the provisions of I.R.C. sec. 6663(a) for taxable year 1993 with regard to deductions claimed in the amount of $6,781.50.

Respondent's motion is denied as to petitioner David L. Paig's liability for the fraud penalty and petitioners' liability for the accuracy-related penalty under section 6662(a).

Decision will be entered under Rule 155.

(Signed) Larry L. Nameroff

Larry L. Nameroff
Special Trial Judge

Dated: March 16, 1999
Los Angeles, CA

T.C. Summary Opinion 1999-47

UNITED STATES TAX COURT

DAVID L. AND LINDA M. PAIG, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 13704-97S. Filed March 16, 1999.

Jason Silver, for respondent.

NAMEROFF, Special Trial Judge: This case was heard pursuant to the provisions of section 7463.[1] The decision to be entered is not reviewable by any other court, and this opinion should not be cited as authority.

By notice of deficiency dated April 1, 1997, respondent determined a deficiency in petitioners' 1993 Federal income tax in the amount of $7,564 and a penalty under section 6663(a) in the amount of $2,379. Respondent filed an answer to the petition making affirmative allegations of fact in support of his burden

[1] All section references are to the Internal Revenue Code in effect for the year at issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

of proof as to the fraud penalty. In the alternative, respondent alleged that petitioners are liable for the accuracy-related penalty for negligence under the provisions of section 6662(a).

This case was scheduled for trial at the Tax Court calendar in Los Angeles, California, on October 5, 1998. The notice setting case for trial, in pertinent part, clearly states:

> YOUR FAILURE TO APPEAR MAY RESULT IN DISMISSAL OF THE CASE AND ENTRY OF DECISION AGAINST YOU.

On October 1, 1998, the Court received a letter from petitioners which was filed as a statement in lieu of appearance and which stated, in part: "This letter is to notify the court that we do not intend to go forward with our tax court case. This is not because we agree with the assessment, but because we cannot afford the cost of representation." When the case was called at the calendar, there was no appearance by or on behalf of petitioners.

On November 9, 1998, respondent filed a motion for summary judgment to sustain the adjustments to income and addition to tax determined in the notice of deficiency. Petitioners were ordered to file an objection, if any, on or before December 15, 1998. No objection or any other response has been filed. For reasons stated below, we shall grant respondent's motion.

Background

Petitioners lived in Garden Grove, California, when they filed the petition in this case.

On July 21, 1998, respondent filed with the Court and served petitioners with a request for admissions. Petitioners did not file any response thereto, and pursuant to Rule 90(c), respondent's requests for admissions were deemed admitted. Based upon those deemed admissions, we find the following facts:

During tax year 1993, petitioner Linda M. Paig (Mrs. Paig) was a Revenue Officer with the Internal Revenue Service. Mrs. Paig is familiar with the provisions of the Internal Revenue Code. Mrs. Paig prepared petitioners' 1993 income tax return. Petitioner David L. Paig (Mr. Paig) has a doctorate degree in psychology. In 1993, Mr. Paig had operated several businesses and had some familiarity with the provisions of the Internal Revenue Code.

On March 9, 1993, Mr. Paig and petitioners' daughter Skye Paig were injured in an automobile accident (the accident) with a vehicle driven by Gerald Robinson (Mr. Robinson). Mr. Paig and Skye Paig were transported by ambulance to the Garden Grove Hospital emergency room after the accident. Mr. Paig's 1982 "Chevy" van suffered damage as a result of the accident and was out of service for more than 2 months.

Mr. Robinson's automobile was insured with State Farm Insurance Co. (State Farm). Subsequent to the accident, Mr. Paig and Skye Paig hired Kirk McIntosh as their attorney to represent them with regard to claims they might have as a result of the accident. State Farm paid Mr. Paig and Skye Paig the following amounts as a result of the accident:

a. $3,000.00 as bodily injury to Skye Paig.

b. $15,000.00 as bodily injury to Mr. Paig.

c. $2,910.65 property damage-vehicle rental.

d. $2,933.75 property damage-liability.

e. $937.11 property damage-loss of use.

The property damage-loss of use, referenced above, was to compensate petitioners for an additional automobile rental from Enterprise Rent-A-Car.

Petitioners' 1993 Federal income tax return included two Schedules C for business activities of Mr. Paig. One Schedule C, reflecting Mr. Paig's activity as a sales representative for Topper Hardware, reflected the following deductions and respondent's adjustments thereto in the notice of deficiency:

Item	Claimed	Disallowed
Car and truck	$2,306	-0-
Depreciation	2,067	$2,067
Insurance	1,289	1,289
Rent or lease	6,512	6,462
Repairs	3,211	3,211
Other	301	55

According to an accompanying depreciation schedule, the depreciation deduction claimed included $1,867 for a 1982 Chevy van.

The other Schedule C, reflecting Mr. Paig's activity as a clinical psychologist, reflected the following deductions and respondent's adjustments thereto in the notice of deficiency:

Item	Claimed	Disallowed
Car and truck	$2,653	$2,405
Depreciation	5,931	5,931
Insurance	1,907	1,599
Rent or lease	1,500	1,500
Office expense	1,732	1,075
Other	829	200

Mrs. Paig was aware in 1993 that the Internal Revenue Code allowed a deduction for a Schedule C business for either actual automobile expenses incurred in connection with its business or the standard mileage rate multiplied by the number of business miles driven, but not both. On both Schedules C for Mr. Paig's businesses, petitioners claimed both actual automobile expenses and mileage. On the Schedule C for Topper Hardware, petitioners claimed a deduction for automobile repairs which had been paid for by State Farm.

Mrs. Paig told respondent's examiner that an automobile was rented in 1993 because petitioners' van was being worked on. Mrs. Paig told respondent's examiner that the van was being fixed in 1993 so that Mr. Paig could use the van more easily for the Topper Hardware business. Mrs. Paig told respondent's examiner that the van's seats were being removed in 1993 to increase the room inside the van. Respondent's examiner asked Mrs. Paig whether the van was in an accident in 1993, and Mrs. Paig replied that the van was not in an accident in 1993. Respondent's

examiner asked Mrs. Paig whether she was reimbursed in 1993 for the automobile rental expenses, and Mrs. Paig told the examiner that she was not. When confronted by respondent's examiner about payments made from State Farm for automobile repair expenses in 1993, Mrs. Paig denied that payments for automobile repair expenses had been made.

Mrs. Paig misled the examiner when she told the examiner on more than one occasion that petitioners had not received reimbursement for the automobile repair expenses claimed on Schedule C for Topper Hardware for 1993.

On June 24, 1996, Mr. Paig met with respondent's examiner pursuant to a summons to both petitioners. Mr. Paig told respondent's examiner that Mrs. Paig was aware of the accident. When confronted by respondent's examiner about insurance payments of the claimed Schedule C automobile repair expenses for Topper Hardware for 1993, Mr. Paig avoided informing the examiner about the accident.

On December 9, 1998, Mrs. Paig entered into a plea agreement with the U.S. Attorney's office, which was filed in the U.S. District Court for the Central District of California on January 11, 1999, and entered on January 12, 1999. In the plea agreement, Mrs. Paig agreed to plead guilty to an Information

charging her with two counts of Making False Statements in violation of 18 U.S.C. sec. 1001.[2]

Discussion

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. See Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted with respect to all or any part of the legal issues in controversy "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b); see Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), affd. 17 F.3d 965 (7th Cir. 1994); Zaentz v. Commissioner, 90 T.C. 753, 754 (1988); Naftel v. Commissioner, 85 T.C. 527, 529 (1985). The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences will be read in a manner most favorable to the party opposing summary judgment. See Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985); Jacklin v. Commissioner, 79 T.C. 340, 344 (1982).

The Court finds that petitioners have clearly indicated that they no longer wish to contest any issue involved in this case.

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[2] On Jan. 26, 1999, respondent filed a Motion to Supplement the Motion for Summary Judgment which we have granted. Facts with regard to the plea agreement were established in the exhibits attached to that motion.

Therefore, we grant respondent's motion with respect to the deficiency for which petitioners have the burden of proof.

Respondent determined that petitioners are liable for the penalty for fraud under section 6663(a) for 1993. Section 6663(a) provides that, if any part of the underpayment of tax required to be shown on the return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment that is attributable to fraud.

Fraud is defined as an intentional wrongdoing designed to evade tax believed to be owing. See Edelson v. Commissioner, 829 F.2d 828, 833 (9th Cir. 1987), affg. T.C. Memo. 1986-223; Bradford v. Commissioner, 796 F.2d 303, 307 (9th Cir. 1986), affg. T.C. Memo. 1984-601. Respondent has the burden to prove fraud by clear and convincing evidence. See sec. 7454(a); Rule 142(b). Respondent's burden must be satisfied separately for each petitioner. See Hicks Co. v. Commissioner, 56 T.C. 982, 1030 (1971), affd. 470 F.2d 87 (1st Cir. 1972). As to the amount of the underpayment due to fraud, respondent may not rely on petitioners' failure to carry their burden of proof (or in this case their failure to contest the matter). See Stoltzfus v. United States, 398 F.2d 1002, 1004 (3d Cir. 1968); Parks v. Commissioner, 94 T.C. 654, 660-661 (1990).

In the notice of deficiency, respondent determined that the deductions claimed on the Topper Hardware Schedule C for Rent ($5,225) and Repairs ($2,664) created the underpayment due to fraud. In Exhibit A to respondent's motion for summary judgment,

respondent alleged that the fraudulent deductions were $3,847.76 for rent and $2,933.75 for repairs. These amounts are the amounts paid to petitioners by State Farm for repairs to the van and for rental of substitute vehicles necessitated by the accident.

Fraud is a question of fact to be resolved upon consideration of the entire record and is never presumed. See Estate of Pittard v. Commissioner, 69 T.C. 391, 400 (1977). Respondent's burden of proving fraud can be met by facts deemed admitted pursuant to Rule 90(c). See Marshall v. Commissioner, 85 T.C. 267, 272-273 (1985); see also Doncaster v. Commissioner, 77 T.C. 334 (1981). We hold that the facts deemed admitted pursuant to Rule 90(c) satisfy respondent's burden of proving fraud as to Mrs. Paig, but not as to Mr. Paig.

Mrs. Paig, an employee of the Internal Revenue Service and knowledgeable of the provisions of the Internal Revenue Code, prepared petitioners' 1993 Federal income tax return and claimed deductions for car rental and repairs which she knew had been reimbursed to them by State Farm as a result of the accident.[3] When queried by respondent's examining agent, Mrs. Paig falsely denied that there had been any reimbursements as the result of any accident. Subsequently, she entered into a plea agreement acknowledging her criminal guilt with regard to these false

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[3] Our findings of fact as to the double deductions for actual costs and mileage have not been considered in connection with the fraud penalty.

statements. We believe these facts clearly establish that the understatement attributable to these deductions was the result of Mrs. Paig's knowing and willful attempt to evade her proper income tax liability.

However, as to Mr. Paig, there are insufficient facts to establish that the understatement was due to his fraud. While he avoided admitting that there was an accident, there is no proof that he knew how the deductions on the tax return were calculated. Consequently, we do not sustain respondent with regard to the fraud penalty as to Mr. Paig.

As noted, respondent, in the alternative, alleged that petitioners are liable for the accuracy-related penalty for negligence. Consequently, we consider petitioners' liability under section 6662(a) for that portion of the understatement not attributable to the fraudulent understatement.[4] As negligence is a new matter raised in the answer, respondent bears the burden of proof. See Rule 142(a).

Section 6662(a) and (b)(1) imposes a penalty in an amount equal to 20 percent of the portion of an underpayment due to negligence. Accordingly, it is incumbent upon respondent to prove which part, if any, of the underpayment is due to negligence and not due to reasonable cause.

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[4] Mr. Paig would not be liable for the negligence penalty for that portion for which Mrs. Paig is liable for the fraud penalty. See, e.g., Alexander Shokai, Inc. v. Commissioner, T.C. Memo. 1992-41, affd. 34 F.3d 1480 (9th Cir. 1994).

It is a fact deemed admitted that Mrs. Paig claimed deductions for the business use of Mr. Paig's vehicles[5] using both the actual cost method and the mileage method. Inasmuch as respondent did not disallow the "car and truck" expense claimed on the Topper Hardware Schedule C, it is likely that the disallowed deductions included the expenses claimed by the actual expense method. However, we are unable to tell from this record to what extent that it is an accurate statement. Therefore, we are unable to determine the part of the understatement which might be due to the negligence of petitioners. Accordingly, we cannot sustain respondent's alternate position.

Reviewed and adopted as the report of the Small Tax Case Division.

In order to reflect our conclusions herein,

An order will be issued granting in part respondent's motion for summary judgment, and decision will be entered under Rule 155.

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[5] In addition to the Chevy van, the depreciation schedule reflects depreciation claimed on the psychology Schedule C with respect to a second undescribed vehicle.