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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NEIL FEINBERG; ANDREA E. FEINBERG; KELLIE McDONALD,

Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee.

No. 18-9005

Appeal from the United States Tax Court
(Tax Court Nos. 10083-13 and 10084-13)

James D. Thorburn (Richard Walker with him on the briefs), Thorburn Walker LLC, Greenwood Village, Colorado, for Petitioners–Appellants.

Francesca Ugolini, Tax Division Attorney (Richard E. Zuckerman, Principal Deputy Assistant Attorney General, Gilbert S. Rothenberg, Tax Division Attorney, and Nathaniel S. Pollock, Tax Division Attorney, with her on the briefs), Department of Justice, Washington, D.C., for Respondent–Appellee.

Before **LUCERO**, **McHUGH**, and **MORITZ**, Circuit Judges.

McHUGH, Circuit Judge.

Neil Feinberg, Andrea Feinberg, and Kellie McDonald (collectively, the Taxpayers) were shareholders in Total Health Concepts, LLC (THC), a Colorado company allegedly engaged in selling medical marijuana. After the Taxpayers claimed THC's income and losses on their tax returns, the IRS conducted an audit and disallowed certain deductions under 26 U.S.C. § 280E, which prohibits deductions for businesses engaged in unlawful trafficking of controlled substances. The IRS then recalculated the Taxpayers' tax liability and issued a notice of deficiency for the unpaid balance. The Taxpayers challenged that determination in the tax court, which affirmed on the basis that the Taxpayers had failed to substantiate the business expenses.

Both parties agree the tax court erred by injecting a substantiation issue into this case not raised in the notice of deficiency, and then placing the burden for refuting that claim on the Taxpayers. But the Commissioner argues we should affirm on the alternative ground that the Taxpayers did not meet their burden of proving the IRS's determination that THC was unlawfully trafficking in a controlled substance was erroneous. The Taxpayers disagree and contend placing the burden on them would violate their Fifth Amendment privilege. Because we conclude allocation of the burden of proof does not constitute "compulsion" under the Fifth Amendment, and because the Taxpayers have made no attempt to meet their evidentiary burden, we affirm the tax court on the alternative ground that § 280E prohibited the deductions.

I. BACKGROUND

THC was a Colorado limited liability company organized to "promote the cultivation and sale of medical marijuana products" and was licensed by Colorado to operate two medical marijuana dispensaries. App. at 3586–87. Ms. McDonald was a shareholder for tax years 2009–2011, and Mr. Feinberg, who filed joint tax returns with

Ms. Feinberg, was a shareholder for tax years 2010–2011. Because THC elected to be treated as an S corporation for tax purposes, its income and losses were reported on the Taxpayers' individual income tax returns.

The deficiencies identified by the IRS were in the years in which the Taxpayers reported THC's income and losses on their individual returns. These deficiencies were mostly attributable to income adjustments the IRS made after determining THC was ineligible for deductions pursuant to § 280E because THC "operates medical marijuana dispensaries and marijuana growing facilities," App. at 41, and was therefore engaged in a trade or business that "consists of trafficking in controlled substances." As a result, the IRS disallowed deductions for business expenses otherwise permitted by the Tax Code. *See* 26 U.S.C. § 162(a). During its audit, the IRS also reclassified many of THC's claimed business expenses as Costs of Goods Sold (COGS), resulting in their exclusion from gross income. But because the net upward adjustments to COGS did not exceed the disallowed deductions for business expenses, THC's overall taxable income for the audited years increased.

The Taxpayers filed a petition with the United States Tax Court seeking redetermination of the deficiencies. As part of the proceedings, the Taxpayers filed a motion *in limine* seeking a ruling that the Commissioner bore the burden of proving § 280E applied. Concluding the Taxpayers had the burden of proving § 280E did not apply, the tax court denied the motion.

During discovery, the IRS issued a request for information about the nature of THC's business. *Feinberg v. Comm'r*, 808 F.3d 813, 814 (10th Cir. 2015) [hereinafter

Feinberg I]. The Taxpayers resisted the request and asserted their Fifth Amendment privilege against self-incrimination. *Id.* at 814–15. The IRS responded by filing a motion to compel production, which the tax court granted. *Id.* at 815.

The Taxpayers next sought to enforce their Fifth Amendment privilege through a writ of mandamus filed in this court. *Id.* We noted the tax court proceedings "took an especially curious turn" when the Commissioner sought to compel discovery because "[i]n tax court, after all, it's the petitioners who carry the burden of showing the IRS erred in denying their deductions—and by invoking the privilege and refusing to produce materials that might support their deductions the petitioners no doubt made their task just that much harder." *Id.* We then denied the writ, concluding the Taxpayers' Fifth Amendment privilege could be protected by an appeal in the normal course. *Id.* at 816.

After the ruling in *Feinberg I*, the Commissioner abandoned the discovery request and instead filed a motion for summary judgment. The tax court denied the motion because "there [were] material issues of fact in dispute." App. at 2227. The parties stipulated that the two issues for trial were (1) whether the Taxpayers have "substantiated that they should be allowed [COGS] greater than those allowed" by the IRS's examination report and (2) whether the IRS "properly disallowed business expense deductions pursuant to section 280E." *Id.* at 3586.

After trial, the tax court concluded the Taxpayers had failed to substantiate higher COGS. But the tax court refused to consider whether § 280E applied to the business expenses, concluding instead that the Taxpayers failed to substantiate any of the business expenses for which the deductions were disallowed. The Taxpayers filed a motion for reconsideration, arguing the tax court should not have relied on the Taxpayers' failure to substantiate their expenses because substantiation was not a basis for the IRS disallowing the deduction. The Commissioner agreed and urged the tax court to consider the § 280E arguments. The tax court denied the motion for reconsideration, and the Taxpayers appealed. Exercising jurisdiction pursuant to 26 U.S.C. § 7482(a)(1), we affirm, but on different grounds than those relied on by the tax court.

II. DISCUSSION

We begin our analysis of the issues on appeal with a discussion of the applicable standard of review. We then pause to provide legal context for our review. Turning next to the ground on which the tax court relied, we consider whether judgment against the Taxpayers was warranted by their failure to substantiate their business expenses. Concluding that it was not, we address the Commissioner's argument that judgment in its favor can be affirmed on the alternative ground that the Taxpayers failed to disprove the applicability of § 280E. In doing so, we reject the Taxpayers' argument that placing the burden of proof on them to disprove their business is engaged in the trafficking of a controlled substance violates their Fifth Amendment right against self-incrimination. And because the Taxpayers offered no evidence that THC was engaged in a business other than trafficking, we affirm the tax court's decision upholding the deficiency.

A. Standard of Review

"We review Tax Court decisions 'in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.'" *Anderson v. Comm'r*, 62 F.3d 1266, 1270 (10th Cir. 1995) (quoting 26 U.S.C. § 7482(a)(1)). Therefore, "[w]e review the Tax Court's factual findings under the clearly erroneous standard and review its legal conclusions de novo." *Id.*

B. Legal Background

The Sixteenth Amendment grants Congress the power "to lay and collect taxes on incomes, from whatever source derived." U.S. Const. amend. XVI. The Internal Revenue Code differentiates between two types of income: "'gross income' and 'taxable income.'" *Alpenglow Botanicals, LLC v. United States,* 894 F.3d 1187, 1199 (10th Cir. 2018). Gross income includes "all income from whatever source derived, including . . . [g]ross income derived from business." *Id.* (quoting 26 U.S.C. § 61(a)). "Congress has the unquestioned constitutional and statutory authority to tax gross income." *Id.* But "[t]o ensure taxation of *income* rather than sales, the 'cost of goods sold' is a mandatory exclusion from the calculation of a taxpayer's gross income." *Id.*

Taxable income, on the other hand, "is the taxpayer's 'gross income minus the deductions allowed' by statute." *Id.* (quoting 26 U.S.C. § 63(a)). For example, businesses may deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." 26 U.S.C. § 162(a). But deductions "are matters of legislative grace specifically authorized by statute, and Congress has unquestioned power to condition, limit, or deny deductions from gross income in arriving at the net which is to be taxed." *Alpenglow*, 894 F.3d at 1199–1200 (citations omitted) (internal quotation marks omitted). One such limitation appears in 26 U.S.C. § 280E, which prohibits deductions

> for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

Despite its legality in many states, marijuana is still a schedule I "controlled substance" under federal law. 21 U.S.C. § 812(c)(Schedule I)(c)(10); *Green Sol. Retail, Inc. v. United States*, 855 F.3d 1111, 1113 (10th Cir. 2017). And although the Justice Department did not criminally pursue dispensaries acting in accordance with state law during the relevant time period, "the IRS . . . show[ed] no similar inclination to overlook federal marijuana distribution crimes." *Alpenglow*, 894 F.3d at 1193 (internal quotation marks omitted).

C. Substantiation of Business Expenses

The parties both contend the tax court erred in denying the business expense deductions for failure to substantiate them under § 162 because the IRS based the deficiency notice solely on § 280E. We agree.

A notice of deficiency must "describe the basis for, and identify the amounts (if any) of, the tax due." 26 U.S.C. § 7522. In tax court, the petitioner usually bears the burden of proof, T.C. Rule 142(a), including the burden of proving the IRS incorrectly determined a deficiency provided in the notice. *See Feinberg I*, 808 F.3d at 815 ("[I]t is the petitioners who carry the burden of showing the IRS erred in denying their deductions . . . ."). But, if there is a "new matter" raised in the tax court that was not included in the deficiency notice, the burden is on the respondent. *Id.* "A new theory that is presented to sustain a deficiency is treated as a new matter when it either alters the original deficiency or requires the presentation of different evidence." *Shea v. Comm'r*, 112 T.C. 183, 191 (1999) (quoting *Wayne Bold & Nut Co. v. Comm'r*, 93 T.C. 500, 507 (1989)).

Here, the IRS deficiency notice determined THC was engaged in unlawful trafficking and disallowed its business deductions under § 280E. But the tax court upheld the deficiency based on THC's failure to substantiate its business expenses. Because proving THC was not engaged in unlawful trafficking requires presentation of different evidence than substantiating the business expenses, the substantiation theory constitutes a new matter. The burden of proof on that new matter, and thus any failure of proof, falls on the Commissioner, as the respondent, not on the Taxpayers. As a result, the tax court erred by affirming the denial of the deductions based on the Taxpayers' failure to adduce evidence to substantiate the expenses.

D. Section 280E

Despite the tax court's error, the Commissioner argues this court may affirm on the alternative ground that the Taxpayers failed to meet their burden of proving the IRS erred in denying the deductions based on § 280E. This court has "discretion to affirm on any ground adequately supported by the record." *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004). "In exercising that discretion [the court] consider[s] whether the ground was fully briefed and argued here and below, whether the parties have had a fair opportunity to develop the factual record, and whether, in light of factual findings to which we defer or uncontested facts, [the court's] decision would involve only questions of law." *Id.* (citations omitted) (internal quotation marks omitted).

The Taxpayers do not object to this court deciding the question in the first instance. But they contend that requiring them to bear the burden of proving the IRS erred in applying § 280E violates their Fifth Amendment privilege against self-incrimination. The Taxpayers further argue that if the burden is properly assigned to the IRS, it must bear the consequences of any failure of proof. The parties presented these issues both to this court and to the tax court, had a fair opportunity to develop the factual record, and are not asking this court to make any factual determinations. Therefore, we will consider on appeal the alternative ground that the deficiency is justified by § 280E.

To begin, we address the Taxpayers' contention that requiring them to prove the IRS erred in applying § 280E violates their Fifth Amendment privilege against self-incrimination. Concluding the burden does not violate the Fifth Amendment, we next consider whether the Taxpayers met their burden to prove § 280E is inapplicable.

1. Fifth Amendment Challenge

The Taxpayers claim that assigning them the burden of proving the IRS erred in applying § 280E to THC would violate their Fifth Amendment privilege. In *Feinberg I*, this court rejected the Taxpayer's motion for a writ enjoining the tax court from compelling the production of documents because we concluded the Fifth Amendment claims could be addressed on appeal after final judgment. 808 F.3d at 818. In predicting some of the more difficult Fifth Amendment questions that might arise on appeal, we explained:

> [I]f the petitioners stand on their privilege we would face the difficulty of separating out a permissible adverse inference . . . from an impermissible sanction. . . . Similarly, if the petitioners choose to produce the discovery under compulsion we might have to confront the question whether any error by the tax court in ordering production was harmless and so beyond our power to remedy after final judgment.

Id. at 817. But none of those concerns came to fruition. The Taxpayers did not produce discovery under compulsion. Nor did the tax court impose a sanction for the Taxpayers' failure to do so. Instead, the case went to trial without any additional discovery and with the Taxpayers bearing the burden of proving the IRS erred in applying § 280E.

Recent pronouncements from this court confirm that taxpayers normally bear the burden of proving the IRS erred in determining a business was engaged in unlawful trafficking. *See Feinberg I*, 808 F.3d at 815 ("In tax court . . . it's the petitioners who carry the burden of showing the IRS erred in denying their deductions . . . ."); *Alpenglow*, 894 F.3d at 1198 ("But in an action to recover taxes paid to the IRS, the taxpayer has the burden to show not merely that the IRS's assessment was erroneous, but also the amount of the refund to which the taxpayer is entitled. Under this rule, the burden falls on [the taxpayer] to show error, not on the IRS to prove trafficking." (citation omitted) (internal quotation marks omitted)). But those cases did not consider whether that placement of the burden would violate the taxpayers' Fifth Amendment rights, *see Alpenglow*, 894 F.3d at 1197 ("Alpenglow has not raised a Fifth Amendment challenge on appeal . . . ."), an issue we now consider in the first instance.

In support of their argument that imposition of the burden violated their privilege against self-incrimination, the Taxpayers cite a series of Supreme Court cases recognizing the Fifth Amendment "right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act." *Leary v. United States*, 395 U.S. 6, 28 (1969) (considering a petitioner's claim that compliance with transfer tax provisions would expose him to prosecution under state narcotics laws); *see also Haynes v. United States*, 390 U.S. 85, 95 (1968) (considering a petitioner's claim that "satisfaction of his obligation to register would have compelled him to provide information incriminating to himself"); *Grosso v. United States*, 390 U.S. 62, 66–67 (1968) (dealing with a statute where the petitioner "is obliged, on pain of criminal prosecution, to provide information which would readily incriminate him, and which he may reasonably expect would be provided to prosecuting authorities"); *Marchetti v. United States*, 390 U.S. 39, 42 (1968) (concluding statutory registration requirements "may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination"). The petitioners in those cases, however, were prosecuted for failing to comply with a statute compelling them to provide self-incriminating information, and the Court determined the Fifth Amendment privilege provided a complete defense to that failure. *See, e.g.*, *Haynes*, 390 U.S. at 95 (considering the petitioner's contention that "satisfaction of his obligation to register would have compelled him to provide information incriminating himself"); *Marchetti*, 390 U.S. at 61 ("[T]hose who properly assert the constitutional privilege as to [the provisions requiring incriminatory conduct] may not be criminally punished for failure to comply with their requirements."). In other words, the Fifth Amendment privilege barred prosecution for failing to provide self-incriminating information.

The Taxpayers fail to explain how requiring them to bear the burden of proving the IRS erred in applying § 280E to calculate their civil tax liability is a form of compulsion equivalent to a statute that imposes criminal liability for failing to provide information subjecting the party to liability under another criminal statute.[1] Here, the Taxpayers must choose between providing evidence that they are not engaged in the trafficking of a controlled substance or forgoing the tax deductions available by the grace of Congress. In the cases cited by the Taxpayers, the petitioners were faced with a choice of whether to be prosecuted criminally because they did not provide the information, or

[1] The Taxpayers devote a large portion of their reply brief discussing the application of these cases to "substantiation" and COGS. In this appeal, the Taxpayers did not challenge the tax court's determination that the Taxpayers did not substantiate higher COGS than those allowed by the IRS. Therefore, they waived any argument relating to substantiation of COGS. *See Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived . . . ."). And neither substantiation nor COGS is relevant to the issue of whether the Taxpayers' Fifth Amendment privilege is violated by requiring them to prove the IRS erred in rejecting THC's business deductions under § 280E. First, § 280E does not have a substantiation component. Second, the IRS did not use § 280E to deny any COGS in this case. In fact, the IRS's position is that § 280E does not apply to COGS because COGS is an "exclusion," not a "deduction." Comm'r's Br. at 7 (citing *Alterman v. Comm'r*, T.C. Memo. 2018-83 at *30).

In their first letter submitted under Federal Rule of Appellate Procedure 28(j), the Taxpayers also point this court to *Speiser v. Randall*, 357 U.S. 513 (1958). But *Speiser* involved a due process argument that the taxing framework restricted speech in violation of the First Amendment, and it never mentions the Fifth Amendment privilege against self-incrimination. *Speiser*, 357 U.S. at 523–25.

to be prosecuted criminally because they did. The circumstances are easily distinguishable.

Nor can we adopt the Taxpayers' position without running afoul of Supreme Court precedent "squarely reject[ing] the notion . . . that a possible failure of proof on an issue where the defendant had the burden of proof is a form of 'compulsion' which requires that the burden be shifted from the defendant's shoulders to that of the government." *United States v. Rylander*, 460 U.S. 752, 758 (1983). Such a concept "would convert the [Fifth Amendment] privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his." *Id.* The Fifth Amendment privilege "has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production." *Id.*

To be sure, "by invoking the privilege and refusing to produce the materials that might support their deductions the [Taxpayers] no doubt made their task [of proving the IRS erred in denying their deductions] that much harder." *Feinberg I*, 808 F.3d at 815. But "a party who asserts the privilege against self-incrimination must bear the consequences of [the] lack of evidence." *United States v. Goodman*, 527 F. App'x 697, 700 (10th Cir. 2013) (quotation marks omitted). *Rylander* teaches that the Taxpayers' possible failure of proof on an issue on which they bear the burden is not "compulsion" for purposes of the Fifth Amendment. *Id.*[2] Therefore, we reject the Taxpayers' contention

[2] Although the Commissioner argued *Rylander* in its response brief, the Taxpayers did not address the case in its reply. Instead, after this court expressed interest in

that bearing the burden of proving the IRS erred in rejecting THC's business deduction under § 280E violated the Taxpayers' Fifth Amendment privilege.

2. Taxpayers' Evidence in Support of Meeting Burden

Because we conclude the Taxpayers bear the burden of proving the IRS erred in applying § 280E, we must determine whether the Taxpayers met that burden. The

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Rylander at oral argument, the Taxpayers attempted to challenge the applicability of *Rylander* through a second rule 28(j) letter. The Taxpayers argue "*Rylander* is not dispositive because taxation of illegal activity is 'fundamentally different' than taxation for revenue raising or regulatory purposes, with a fully different set of rules." Taxpayers' Jan. 31, 2019 28(j) Letter (quoting *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 782 (1994)). The distinction *Kurth Ranch* drew between taxation of illegal activity and taxation for revenue raising purposes was based on a double jeopardy clause analysis and makes no mention of the privilege against self-incrimination. 511 U.S. at 778–83. In their rule 28(j) letter, the Taxpayers also make arguments for the first time in this appeal about the government's burden in forfeiture cases and the tax court's ability to preempt nontax state law regarding marijuana.

None of these are proper uses of a rule 28(j) letter. The Taxpayers' attempt to interject issues of double jeopardy, forfeiture, and preemption is a "tactical shift [that] comes far too late in the day." *Niemi v. Lasshofer*, 728 F.3d 1252, 1262 (10th Cir. 2013). "[W]e generally refuse to consider any . . . new issue introduced for the first time in a reply brief, let alone in a Rule 28(j) letter." *Id.* A rule 28(j) letter's purpose is "not to interject a long available but previously unmentioned issue for decision." *Id.* And to allow a party to use a rule 28(j) letter for such purpose

> risks leaving opponents with no opportunity (at least if they abide by the rules of appellate procedure) for a proper response; it risks an improvident opinion from this court by tasking us with the job of issuing an opinion without the full benefits of the adversarial process; and it invites an unsavory degree of tactical sandbagging by litigants in future cases: why bother pursuing a potentially winning issue at the outset when you can wait to introduce it at the last second and leave your opponent without a chance to respond?

Id. Therefore, we will not consider the Taxpayers' arguments regarding double jeopardy, forfeiture, or preemption. And, for the reasons discussed above, we conclude *Rylander* is dispositive of the only question we are faced with in this appeal—whether placing the burden of proof on the Taxpayers violates the Fifth Amendment privilege.

Taxpayers do not point to any evidence they introduced to meet this burden. Instead, they contend there is a complete absence of proof that the Taxpayers unlawfully trafficked a controlled substance for purposes of § 280E. In support, the Taxpayers quote a portion of the tax court's opinion that noted "there is not enough evidence in the record to make a finding of fact that THC sold medical marijuana," App. at 3597, and claim it "is fatal to the IRS's assertion that Section 280E applies," Taxpayers' Br. at 14. We reject this argument for two reasons.

First, the Taxpayers take the tax court's comment out of context. The tax court was considering whether the Taxpayers could substantiate higher COGS than allowed by the IRS by relying on a rule that allows it to "estimate the amount of a deductible expense if a taxpayer establishes that an expense is deductible but is unable to substantiate the precise amount." App. at 3596 (citing *Cohan v. Comm'r*, 39 F.2d 540 (2d Cir. 1930)). The Taxpayers wanted the tax court to make this estimate of COGS "based on industry standards for the medical marijuana industry." *Id.* at 3595. Recognizing that "THC held licenses for selling medical marijuana in Colorado" during the relevant tax years, the tax court decided to "proceed as if THC was in the business of selling medical marijuana," even though "there is not enough evidence in the record to make a finding of fact that THC sold medical marijuana." *Id.* at 3596–97. In other words, the tax court refused to allow the Taxpayers to rely on industry standards for the marijuana industry while simultaneously refusing to meet their burden of establishing that they had indeed incurred COGS in that industry. The tax court did not find the Taxpayers were not unlawfully trafficking a controlled substance; it simply chided the Taxpayers for failing to meet their evidentiary burden.

Second, as with COGS, "the burden falls on [the taxpayer] to show error [as to the application of § 280E], not on the IRS to prove trafficking." *Alpenglow*, 894 F.3d at 1198. Therefore, the question is not whether the Commissioner introduced sufficient evidence to support the IRS's finding of unlawful trafficking, but whether the Taxpayer introduced evidence to prove THC was not unlawfully trafficking a controlled substance. Thus, an absence of proof on the issue weighs against the taxpayers, not in their favor.

The Taxpayers have not pointed to any evidence showing the IRS erred in determining they were engaged in unlawfully trafficking a controlled substance. Therefore, the Taxpayers failed to meet their burden of proving the IRS's determination that the deductions should be disallowed under § 280E was erroneous, and we affirm the tax court on this alternative ground.

III. CONCLUSION

The tax court erred in determining the Taxpayers were not entitled to the business expense deductions because they failed to substantiate the expenses at trial. But we affirm on the alternative ground that the Taxpayers failed to meet their burden of proving the IRS erroneously concluded THC was unlawfully trafficking in a controlled substance. As a result, § 280E precluded the deduction of the Taxpayers' business expenses, and the tax court properly rejected their challenge to the deficiency.[3]

[3] The Taxpayers are understandably frustrated with the loss of their business expense deductions under § 280E. Despite operating in accordance with state law controlling the distribution of medical marijuana, the Taxpayers are subject to greater federal tax liability than other legitimate state businesses. But state legalization of marijuana cannot overcome federal law. *See Hancock v. Train*, 426 U.S. 167, 178 (1976) ("It is a seminal principle of our law 'that the [United States C]onstitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them.'" (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 426 (1819))). Thus, the Taxpayers' remedy must come from Congressional change to § 280E or 21 U.S.C. § 812(c)(Schedule I) rather than from the courts.

T.C. Memo. 2017-211

UNITED STATES TAX COURT

NEIL FEINBERG AND ANDREA E. FEINBERG, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

KELLIE MCDONALD, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 10083-13, 10084-13. Filed October 23, 2017.

James D. Thorburn and Richard A. Walker, for petitioners.

Luke D. Ortner, Matthew A. Houtsma, and Michael W. Lloyd, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

KERRIGAN, Judge: Petitioners in these consolidated cases are Neil Feinberg (N. Feinberg) and Andrea E. Feinberg (together, Feinbergs), and Kellie

[*2] McDonald (K. McDonald). For K. McDonald respondent determined deficiencies of $13,369, $63,641, and $12,262 for tax years 2009-11, respectively. For the Feinbergs respondent determined deficiencies of $47,203 and $35,809 for 2010 and 2011, respectively. Most of the deficiencies are attributable to income adjustments for Total Health Concepts, LLC (THC).

After concessions the issues for consideration are whether petitioners have substantiated that they should be allowed costs of goods sold (COGS) greater than those allowed in respondent's examination report for THC and whether respondent properly disallowed business expense deductions pursuant to section 280E. Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the tax years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

FINDINGS OF FACT

The stipulation of facts and the attached exhibits are incorporated herein by this reference. Petitioners resided in Colorado when they timely filed their petitions.

THC's Business Activity

THC was a limited liability company organized under the laws of the State of Colorado. Articles of organization for THC were filed with the Colorado

[*3] secretary of state on October 12, 2009. K. McDonald was a shareholder of THC for tax years 2009-11. N. Feinberg was a shareholder for tax years 2010-11.

The State of Colorado licensed THC to grow and sell medical marijuana, and THC's operating agreement stated that its purpose was to "promote the cultivation and sale of medical marijuana products." Its business operations began in December 2009. During the tax years in issue it held licenses to operate at least two medical marijuana dispensaries. THC leased a separate warehouse facility, for which it held a license to operate a cultivation premises.

Tax Reporting

For the tax years in issue THC elected to be treated as an S corporation for Federal income tax purposes and filed Forms 1120S, U.S. Income Tax Return for an S Corporation. It reported ordinary business losses of $105,478, $295,321, and $54,231 for tax years 2009-11, respectively. Each year THC calculated its total income by subtracting COGS from gross receipts.

THC claimed deductions from total income for ordinary and necessary business expenses (below-the-line deductions). It claimed below-the-line deductions for salaries and wages, repairs and maintenance, rents, depreciation, advertising, and "other deductions", which it detailed on attached statements. It

[*4] claimed total below-the-line deductions for business expenses of $110,405, $687,093, and $498,723 for the tax years in issue, respectively.

Petitioners did not receive any compensation from THC. They reported passthrough losses from THC on Schedules E, Part II, Income or Loss From Partnerships and S Corporations, attached to their respective income tax returns. The Feinbergs filed joint income tax returns for 2010-11.

Respondent's Determination

On December 6, 2012, respondent issued THC an examination report for its tax returns for the tax years in issue. The examination report proposed adjustments to taxable income based on respondent's determination that section 280E applied to THC. The report also made adjustments to COGS.

Respondent reclassified as COGS a number of THC's expenses that were claimed originally as below-the-line deductions. For both 2010 and 2011 respondent's net adjustments allowed greater COGS than THC had actually claimed on its original returns. However, respondent disallowed deductions for all other business expenses not reclassified as COGS. The adjustments increased THC's taxable income for the tax years in issue by $104,051, $630,835, and $375,442, respectively.

[*5] On February 6, 2013, respondent issued K. McDonald and the Feinbergs notices of deficiency that reflected the adjustments determined for THC. The notices of deficiency reflected K. McDonald's shares from THC as $52,025, $157,708, and $93,861 for tax years 2009-11, respectively, and N. Feinberg's shares as $223,946 and $114,030 for 2010 and 2011, respectively.

OPINION

I. Burden of Proof

Generally, the taxpayer bears the burden of proving that the Commissioner's determinations set forth in the notice of deficiency are erroneous. Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933). The taxpayer likewise bears the burden of proving his or her entitlement to deductions and of substantiating the amounts of items underlying claimed deductions. INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992); sec. 1.6001-1(a), Income Tax Regs. At a minimum petitioners must produce business records or other evidence substantiating the amounts and the purpose of the deductions that they assert respondent improperly disallowed. Higbee v. Commissioner, 116 T.C. 438, 440 (2001). Under section 7491(a) in certain circumstances the burden of proof may shift from the taxpayer to the Commissioner. Petitioners have not claimed or

[*6] shown that they meet the requirements of section 7491(a) to shift the burden of proof to respondent as to any relevant factual issue.

II. <u>Evidentiary Issues</u>

During the trial petitioners produced no contemporaneous records or any other business records pertaining to THC's operations. Instead they rely exclusively on an expert report.

In accordance with the Court's standing pretrial order and Rule 143(g), petitioners exchanged and submitted the expert report of Jim Marty, C.P.A., whom they contend is an expert in cost accounting, with an emphasis in the marijuana industry. In his report Marty opines on COGS for medical marijuana businesses in Colorado during the tax years in issue. Petitioners contend that the report establishes that the COGS respondent allowed THC for the tax years in issue were incorrect.

Before trial respondent filed a motion in limine, asserting that the Marty report should be excluded on the following grounds:

> (1) Admitting the report is improper where petitioners have refused to comply with any discovery requests; (2) the report is an attempt to usurp the Court's own role insofar as it attempts to substitute Mr. Marty's legal conclusions and unsupported factual assertions for the Court's role in applying the law to the facts of this case; and (3) the report's factual conclusions are not reliable.

[*7] At the trial the Court deferred ruling on respondent's motion in limine because of the substantial effect on the case of eliminating petitioners' primary evidence. The Marty report was marked, and the related testimony of petitioners' expert was heard solely as an offer of proof. Whether the report and testimony will be received in evidence and considered in determining THC's COGS for tax years 2009-11 depends on application of principles expressed in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and rule 702 of the Federal Rules of Evidence.

Respondent contends the Marty report reaches a number of speculative conclusions regarding the amount of allowable COGS based wholly on his "unscientific, unprincipled opinion". Respondent further contends that there is no analysis or reliable data for figures in the report. Petitioners contend that Daubert does not apply to a bench trial.

Rule 702 of the Federal Rules of Evidence provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

> **[*8]** (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

In Daubert, 509 U.S. at 592, the Supreme Court stressed the trial court's role as a "gatekeeper" in excluding at the outset evidence that is unreliable or irrelevant. The trial judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-593. The reliability and relevancy standards are embodied in rule 702 of the Federal Rules of Evidence, and they apply equally to expert testimony that is not "scientific". Kumho Tire Co. v. Carmichael, 526 U.S. 137, 148 (1999). Although special considerations apply to jury trials, the Daubert analysis applies to bench trials as well as jury trials. Boltar, L.L.C. v. Commissioner, 136 T.C. 326, 334 (2011) (citing Att'y Gen. of Okla. v. Tyson Foods, Inc., 565 F.3d 769, 779 (10th Cir. 2009)).

The Marty report is brief and summary, and its content is unreliable. Multiple statements in the report refer to no underlying source of information. For other statements that do cite an underlying source, Marty has failed to include the

[*9] information or data on which he relied. In many instances the report does not reference or provide sufficient information or data for us to conclude that the opinions expressed are based on anything other than his own conjecture.

The report states that during the tax years in issue the average wholesale purchase price for medical marijuana remained between $2,000 and $3,000 per pound. The report later posits an average purchase price of $2,500 per pound and reconstructs an income and expense schedule for THC "assuming" that COGS equaled 55% of gross sales. The report does not explain how or on what basis Marty determined these sales figures, and the exhibits do not include any sales records or other documents that would support them. The report asserts that tax returns Marty's firm prepared show that "actual" COGS for medical marijuana businesses during the tax years in issue was between 66% and 100% (or more) of gross sales.

The conclusions in the Marty report are an attempt to present reconstructed income tax returns as evidence of petitioners' correct tax liabilities. The report is not based on personal knowledge of THC's business. To determine the correct COGS for THC, substantiation of THC's expenses is necessary. A reconstructed income tax return based on industry averages does not take the place of substantiation and does not help determine a fact in issue.

[*10] By relying on returns that Marty and his firm prepared for other businesses, the Marty report provides the Court with legal conclusions as to which types of expenses may be treated as COGS. Expert testimony about what the law is or that directs the finder of fact on how to apply the law does not assist the trier of fact. Stobie Creek Invs., LLC v. United States, 81 Fed. Cl. 358, 364 (2008). Expert opinions on law are inadmissable. Fed. R. Evid. 702(a); see Hosp. Corp. of Am. v. Commissioner, 109 T.C. 21, 59 (1997).

For the reasons stated above, we conclude that the Marty report is not admissible under rule 702 of the Federal Rules of Evidence because is it is not helpful in understanding evidence or in determining a fact and it includes legal conclusions.

During the trial respondent offered Exhibits 32-R and 34-R through 39-R. All were offered in relation to the Marty report, and the ruling on these exhibits was reserved. These exhibits are not admitted because the Marty report was excluded.

III. Cost of Goods Sold

A taxpayer engaged in manufacturing or merchandising can subtract COGS from gross receipts to arrive at gross income. See secs. 1.61-3(a), 1.162-1(a), Income Tax Regs.; see also Rodriguez v. Commissioner, T.C. Memo. 2009-

[*11] 22, slip op. at 6. COGS is not a deduction but an offset to income for the purpose of calculating gross income and is subtracted from gross income to arrive at taxable income. See Kazhukauskas v. Commissioner, T.C. Memo. 2012-191, slip op. at 24; Rodriguez v. Commissioner, slip op. at 6-7.

Petitioners must show that they are entitled to COGS for THC above and beyond those respondent allowed. See Kazhukauskas v. Commissioner, slip op. at 24. The substantiation rules require a taxpayer to maintain sufficient reliable records to allow the Commissioner to verify the taxpayer's income and expenditures. See sec. 6001; sec. 1.6001-1(a), Income Tax Regs.; see also Olive v. Commissioner, 139 T.C 19, 32 (2012), aff'd, 792 F.3d 1146 (9th Cir. 2015).

COGS is determined under section 471 and the accompanying regulations. See secs. 1.471-3(c), 1.471-11(c), Income Tax Regs. Petitioners contend we should allow the COGS in THC's income tax returns under the Cohan rule. See Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930). Petitioners further contend that they should be able to subtract an amount for COGS based on industry standards for the medical marijuana industry during the tax years in issue. Respondent allowed COGS that were substantiated and also recharacterized below-the-line expenses as COGS to the extent allowable under section 471.

[*12] Petitioners produced no evidence to substantiate COGS higher than those which respondent allowed.

The Court may estimate the amount of a deductible expense if a taxpayer establishes that an expense is deductible but is unable to substantiate the precise amount. See Cohan v. Commissioner, 39 F.2d at 543-544; Vanicek v. Commissioner, 85 T.C. 731, 742-743 (1985). This principle is often referred to as the Cohan rule. See, e.g., Van Dusen v. Commissioner, 136 T.C. 515, 537 n.39 (2011). The Cohan rule also applies to COGS. See Goldsmith v. Commissioner, 31 T.C. 56, 62 (1958).

In Cohan v. Commissioner, 39 F.2d at 544, the Court of Appeals for the Second Circuit held that this Court should in some cases make "as close an approximation as it can" with respect to a taxpayer's deductible expenses, "bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making." The Court of Appeals for the Second Circuit stated that "to allow nothing at all appears to us inconsistent with saying that something was spent." Id.

During the tax years in issue THC held licenses for selling medical marijuana in Colorado. We will proceed as if THC was in the business of selling

[*13] medical marijuana. However, there is not enough evidence in the record to make a finding of fact that THC sold medical marijuana.

Respondent did allow for some COGS. Under the Cohan rule there must be sufficient evidence in the record to provide a basis upon which an estimate can be made. Vanicek v. Commissioner, 85 T.C. at 742-743. There is no evidence to support higher COGS for THC. We sustain respondent's allowances for COGS.

IV. Business Expenses

Deductions are a matter of legislative grace, and a taxpayer must prove his or her entitlement to deductions. INDOPCO, Inc. v. Commissioner, 503 U.S. at 84; New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934). Section 162(a) permits a taxpayer to deduct ordinary and necessary expenses incurred during the taxable year in carrying on a trade or business. Section 261 provides that "no deduction shall in any case be allowed in respect of items specified in this part." "[I]tems in this part" refers to part IX of subchapter B of chapter 1, entitled "Items Not Deductible", and this includes section 280E, "Expenditures in Connection With the Illegal Sale of Drugs". See Californians Helping to Alleviate Med. Problems, Inc. v. Commissioner, 128 T.C. 173, 180 (2007). Section 280E provides:

> **[*14]** No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substance Act) which is prohibited by Federal law or the law of any state in which such trade or business is conducted.

We do not need to address whether section 280E applies because petitioners have failed to substantiate any expenses for which respondent disallowed deductions. Petitioners did not produce any business records or any other supporting documents. They have not met their burden of proving respondent's determinations in the notices of deficiency are incorrect. Respondent's determinations will be sustained.

To reflect the foregoing,

Decisions will be entered

for respondent.