

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DUANE PANKRATZ, ET AL.,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 21255-13, 27239-13.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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)	

ORDER

These cases were on the Court’s June 15, 2015 St. Paul, Minnesota trial calendar, and arise from the 2008 and 2009 tax years. We continued them on petitioner’s motion because the cases presented a very large number of issues. The parties reasonably proposed to take some time to corral the relatively noncontroversial issues, and then identify the remaining issues that both thought had a reasonable probability of needing to be tried. The Court issued a pretrial order whose deadlines were extended when no St. Paul calendar was set until September of this year. These cases are set to be tried at that calendar.

On September 1, 2017 petitioner moved *in limine* to preclude trial of another new matter -- disallowance of petitioner’s 2009 Schedule E losses for lack of basis -- from being tried.¹ He filed this motion after a Court-imposed deadline for filing such motions *in limine*. The Court finds good cause, however, since respondent didn’t even identify Schedule E basis as a triable issue until August 18 of this year.

¹ What’s a new matter? “[A] ‘new matter’ is one that reasonably would alter the evidence presented. A ‘new theory’ is just a new argument about the existing evidence.” *Hurst v. Commissioner*, 124 T.C. 16, 30 (2005). Proof of basis is fact-intensive, and we would not take seriously any argument that this issue would not require proof not in common with the issues that actually need to be tried.

As we did for the earlier such motion, we begin with the notice of deficiency -- the one for 2009. There is no mention of any determination to disallow anything on petitioner's Schedule E for that year. A check of the Court's dockets shows only a barebones answer and no amended answers at all.

From the attachments to petitioner's motion, it appears that respondent first raised this issue in email chains from just last month. This doesn't work:

Our Court refuses to consider issues which have not been pleaded. *See, e.g., Foil v. Commissioner*, 92 T.C. 376, 418 (1989), *affd.* 920 F.2d 1196 (5th Cir. 1990); *Bell v. Commissioner*, 102 T.C.M. 609, 611 (2011); *Troutman v. Commissioner*, 87 T.C.M. 953, 955 (2006).

"There shall be a petition and an answer, and, where required under these Rules, a reply. No other pleading shall be allowed, except that the Court may permit or direct some other responsive pleading." Rule 30.

Emails between counsel are not pleadings.

Respondent therefore has not properly pleaded any issue about petitioner's 2009 Schedule E losses. Yet again, it is

ORDERED that petitioner's September 1, 2017 motion *in limine* is granted and respondent shall be precluded from offering evidence at trial that the losses petitioner reported on the Schedule E to his 2009 tax return should be disallowed for lack of basis.

**(Signed) Mark V. Holmes
Judge**

Dated: Washington, D.C.
September 8, 2017