

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

MOACIR SANTOS, )  
)  
Petitioner, ) **CT**  
)  
v. ) Docket No. 11847-15.  
)  
COMMISSIONER OF INTERNAL REVENUE, )  
)  
Respondent )

**ORDER**

This case has been tried and briefed, but we will order the parties to file supplemental briefs.

After concessions, the main issue remaining for decision in this case is whether petitioner Moacir Santos received constructive dividends from his wholly owned corporation, Santos Engineering Santos Pavers, Inc. (“SESP”) in 2010 and 2011, under sections 301 and 316. The Commissioner argues he did.

Mr. Santos did not file Federal income tax returns for 2010, 2011, or 2012. (First Stip. of Facts ¶ 2). Through an analysis of Mr. Santos’s and SESP’s bank statements, the Commissioner determined that Mr. Santos received unreported Schedule C gross receipt income. (ECF 29 at 40). On January 30, 2015, the Commissioner issued a Notice of Deficiency (“NOD”) to Mr. Santos for, among other things, deficiencies of \$166,635 and \$70,701 for the 2010 and 2011 tax years. (ECF 1 at 3). Mr. Santos timely petitioned this Court and argued, “No debits or checks written against my account were considered; [n]o deductions or any costs to operate my business [were] considered.” (ECF 1 at 1). That is, the petition seemed to assume that he did receive the gross receipts determined in the NOD but to contend that he was entitled to deductions therefrom.

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At trial Mr. Santos moved to amend his petition to treat the gross receipts as income attributable not to himself but to SESP. The Commissioner did not oppose this motion and conceded that the gross receipts were income to SESP. (ECF 27 at 14). The Commissioner then proceeded to contend that, after allowable deductions and expenses, Mr. Santos received constructive dividends from SESP in the amounts of \$156,470 and \$93,009 for the tax years at issue. (ECF 29 at 44). The Commissioner argues that this contention is not “new matter”, see Rule 142(a), and that Mr. Santos has the burden to prove that this contention is incorrect. (ECF 29 at 39-43.)

Dividends are calculated under sections 301 and 316, and are taxed according to section 301(c). Pursuant to section 301(c) a distribution is: income to the extent of a corporation’s earnings and profits; then nontaxable return of capital, to the extent of the shareholder’s basis in corporate stock; and then gain from the sale or exchange of property for the balance in excess of basis.

Normally, the petitioner bears the burden of proving the Commissioner’s determinations are wrong, with the exception (among others) that the burden of proof will be on the Commissioner as to any “new matter” that he introduces. See Rule 142(a). The Commissioner acknowledges in his opening brief (ECF 29 at 40-41) that “[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 presentation of different evidence.” Citing Wayne Bolt & Nut Co. v. Commissioner, 93 T.C. 500, 507 (1989).

In his answering brief (ECF 32 at 12), Mr. Santos argues that the Commissioner’s theory of constructive dividends constitutes new matter; that the burden of proof therefore shifted to the Commissioner; and that the Commissioner “failed to carry the burden”. In his reply brief, the Commissioner maintains that Mr. Santos has the burden to prove his adjusted basis in SESP and that he failed to do so, arguing that even if the burden shifted the Commissioner had provided sufficient evidence to meet this burden. (ECF 35 at 8, 18, citing Rule 142(a); Robins v. Commissioner, T.C. Memo, 1979-451; O’Neill v. Commissioner, 271 F.2d 44, 50 (9th Cir. 1959)).

However, Commissioner conceded in its opening brief that SESP did not have current earnings and profits in 2011 (at 27), and neither party has pointed us to evidence in the record that shows Mr. Santos’s adjusted basis in SESP.

While the Commissioner's contention as to constructive dividends does not propose an increase in the deficiency determined in the NOD, that issue at least arguably requires consideration of different evidence. The determination in the NOD was based on a bank deposit analysis and an assumption that deposits were attributable to Mr. Santos. Mr. Santos answered that determination by his assertion that the deposits did not belong to him but to SESP, and the Commissioner conceded that point. The Commissioner's constructive dividend contention makes relevant two new issues--SESP's earnings and profits and Mr. Santos's adjusted basis in SESP. If the Commissioner's theory of constructive dividends constitutes new matter, then the Commissioner has the burden of proof as to it. We have previously held that when the burden of proof shifts to the Commissioner to prove distributions, the Commissioner then also bears the burden of proving earnings and profits and adjusted basis. See Lerch v. Commissioner, T.C. Memo 1987-295, 1987 Tax Ct. Memo LEXIS 295, at \*59-62, aff'd, 877 F.2d 624 (7th Cir. 1989). The Court would benefit from the parties' responses to these observations.

It is therefore

ORDERED that, no later than December 22, 2017, the Commissioner shall file a supplemental brief that comments on the foregoing. The brief should include a discussion that assumes *arguendo* that the burden of proof has shifted to the Commissioner and that explains whether, relying on evidence in the record, the Commissioner can prove a calculation of SESP's earnings and profits and Mr. Santos's adjusted basis in SESP for the 2011 tax year. It is further

ORDERED that, no later than January 22, 2018, Mr. Santos may file a supplemental reply brief.

**(Signed) David Gustafson**  
**Judge**

Dated: Washington, D.C.  
November 15, 2017