

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

NEIL FEINBERG & ANDREA E. FEINBERG, ET AL.,)		
)	SR
Petitioner(s),)	
)	
v.)	Docket No. 10083-13, 10084-13.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
)	

ORDER

A trial was held on January 11, 2017, during a special trial session in Denver, Colorado. The parties filed post trial briefs with the Court. A memorandum opinion, T.C. Memo. 2017-211, was issued on October 23, 2017. On November 22, 2017, petitioners filed a motion for reconsideration of findings or opinion pursuant to Rule 161.¹ On December 19, 2017, respondent filed a response to petitioners' Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161. On December 22, 2017, petitioners filed a reply to respondent's response. On January 25, 2018, respondent filed a response to petitioners' December 22, 2017 reply.

The Court concluded in Feinberg v. Commissioner, T.C. Memo. 2017-211, that petitioners did not meet their burden of proving respondent's determinations in the notices of deficiency are incorrect and sustained respondent's determinations. Petitioners contend that the Court erred by requiring petitioners to substantiate deductions when lack of substantiation was not a ground for denial of deductions in the notices of deficiency. They further contend that the Court should analyze the applicability of section 280E in connection with the denial of their deductions.

Generally, the taxpayer bears the burden of proving the Commissioner's determinations in a notice of deficiency are incorrect. Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933). A determination of deficiency issued by the Commissioner is generally given a presumption of correctness, which operates to place on the taxpayer the burden of producing evidence showing that the Commissioner's determination is incorrect. Sealy Power, Ltd. v. Commissioner, 46 F.3d 382, 386 (5th Cir. 1995), aff'g in part, rev'g in part T.C. Memo. 1992-168. Several courts have recognized that they need not give effect to the presumption of correctness and may instead shift the burden from the taxpayer to the Commissioner when the notice of deficiency is determined to be arbitrary or excessive. Id.

¹All section references are to the Internal Revenue Code for the years in issue and all Rule references are to the Tax Court Rules of Practice and Procedure.

If the Commissioner does not justify the notice's determination with some predicate evidence, the taxpayer should be relieved of the burden of going forward with the evidence. Id. In this case, petitioners self-reported the amount of income. The burden is on the taxpayer to show that it was entitled to the deduction which the Commissioner disallowed. Reinecke v. Spalding, 280 U.S. 227, 233 (1930). The burden of overcoming the presumption of correctness in a deduction case rests with the taxpayer, who is the best source of information for determining entitlement to the claimed deductions. Sealy Power, Ltd. v. Commissioner, 46 F.3d at 386. In a deduction case, we apply the general rule of not looking behind the notice of deficiency to determine whether it is arbitrary. Id. A taxpayer is required to maintain books or records sufficient to establish the amount of gross income and any deductions. Sec. 6001; sec. 1.6001-1, Income Tax Regs.

Petitioners' burden in this case includes providing evidence to substantiate the nature and amount of expenses that they contend should be treated as offsets to gross receipts (i.e., cost of goods sold (COGS)). See Rodriguez v. Commissioner, T.C. Memo. 2009-22, slip op. at 6-7. Petitioners did not meet this burden. Even though COGS is technically an adjustment to gross income and not a deduction, substantiation is still required. See id.

We may sustain the determination of a deficiency or any portion thereof on any appropriate ground, including grounds not stated in the notice of deficiency. Bennett's Travel Bureau, Inc. v. Commissioner, 29 T.C. 350, 356-357 (1957); Brainard v. Commissioner, 7 T.C. 1180, 1184 (1946). Petitioners faced no unfair surprise or disadvantage by our holding that they had the burden of substantiating the amounts they contend should be allowed as offsets and deductions. See Considine v. Commissioner, 74 T.C. 955, 964 (1980); Brainard v. Commissioner, 7 T.C. at 1185. Substantiation is a not a new matter for which respondent carries the burden of proof.

Petitioners raised constitutional issues, including whether respondent's enforcement of section 280E violates the Fifth Amendment and whether income for the purposes of the Sixteenth Amendment requires the allowance of business expenses. We need not decide a constitutional question if there is some other ground upon which to resolve a case. Escambia County, Fla. v. McMillan, 466 U.S. 48, 51 (1984) (per curiam); see Ashwander v. TVA, 297 U.S. 288, 345-347 (1936) (Brandeis, J. concurring).

It was unnecessary to resolve petitioners' arguments regarding section 280E to conclude these cases. We do not need to address questions on assumed facts. Cohen v. Commissioner, 20 B.T.A. 647, 648 (1930) ("The Board has repeatedly held that its function is to decide real issues in specific cases upon particular facts, the burden of proving the facts by proper evidence being upon petitioner.").

Upon due consideration, it is

ORDERED that petitioners' Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161 is denied.

**(Signed) Kathleen Kerrigan
Judge**

Dated: Washington, D.C.
April 2, 2018