

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

ANTHONY I. PROVITOLA & KATHLEEN A.)	
PROVITOLA, ET AL.,)	
)	
Petitioners,)	
)	
v.)	Docket No. 12357-16, 16168-17.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

CT

ORDER

On August 17, 2018, petitioners filed in these consolidated cases¹ a Motion for Summary Judgment (petitioners’ motion). See Rule 121(a).² By order dated September 10, 2018, the Court denied petitioners’ motion. The consolidated cases were calendared for trial at the Jacksonville, Florida, trial session on October 22, 2018, before another division of this Court. At that trial session petitioners made an oral motion to recuse the trial judge from these cases. By order dated November 8, 2018, the Court granted petitioners’ oral motion and vacated and set aside so much of the Court’s September 10, 2018, order that denied petitioners’ motion. By order dated December 3, 2018, petitioners’ motion was assigned to the undersigned for disposition.

After review of the record on petitioners’ motion the Court concludes that there are genuine issues of material facts and petitioners are not entitled to judgment as a matter of law.

Petitioners resided in Florida at the time the petition in this case was filed.

¹ On July 23, 2018, the Court granted respondent’s Motion to Consolidate Docket Numbers and consolidated docket No. 12357-16 and docket No. 16168-17.

² All section references are to the Internal Revenue Code, as amended, in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

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Background

The Internal Revenue Service (IRS)³ issued a notice of deficiency dated March 7, 2016, after examining petitioners' 2013 joint Federal income tax return. The IRS proposed to disallow a deduction for legal and professional services in the amount of \$36,000 claimed by petitioners on a Schedule C, Profit and Loss of Business, with respect to the business of Viovision Ventures, LLC. The IRS also proposed an accuracy-related penalty of \$1,563.60 under section 6662(a).⁴

The IRS issued a notice of deficiency dated May 1, 2017, after examining petitioners' 2014 joint Federal income tax return. The IRS proposed to disallow a deduction for legal and professional services in the amount of \$22,000 and other expenses in the amount of \$20,326 claimed by petitioners on a Schedule C with respect to the business of Viovision Ventures, LLC. The IRS also proposed an accuracy-related penalty of \$2,265 under section 6662(a).⁵

Petitioners timely filed a petition commencing the case at docket No. 12357-16 on May 24, 2016. In that petition, petitioners dispute the proposed income tax deficiency and accuracy-related penalty for 2013 as stated on the notice of deficiency dated March 7, 2016. Petitioners timely filed a petition commencing the case at docket No. 16168-17 on July 31, 2017. In that petition, petitioners

³ The Court uses the term "IRS" to refer to administrative actions taken outside of these proceedings. The Court uses the term "respondent" to refer to the Commissioner of Internal Revenue, who is the head of the IRS and is respondent in this case, and to refer to actions taken in connection with this case.

⁴ The notice of deficiency also proposed computational adjustments to the amount of taxable social security benefits and the amount of itemized medical expense deductions. These proposed computational adjustments were the result of the change in petitioners' adjusted gross income flowing from the proposed disallowance of the deduction for legal and professional services expenses.

⁵ The notice of deficiency also proposed computational adjustments to the amount of taxable social security benefits and the amount of itemized medical expense deductions. These proposed computational adjustments were the result of the change in petitioners' adjusted gross income flowing from the proposed disallowance of the deduction for legal and professional services and other expenses.

dispute the proposed income tax deficiency and accuracy-related penalty for 2014 as stated on the notice of deficiency dated May 1, 2017.

On September 28, 2017, in docket No. 16168-17 petitioners filed a Motion for Summary Judgment (petitioners' motion for summary judgment number 1) and in support of that motion filed a Declaration of Anthony I. Provitola, the petitioner husband in that case. On October 25, 2017, petitioners filed a Second Motion for Summary Judgment (petitioners' motion for summary judgment number 2) in docket No. 16168-17. The Court by order dated October 27, 2017, denied petitioners' motion for summary judgment number 1 as premature because it had been filed only 22 days after respondent filed an answer in that case. The Court in that order also denied petitioners' motion for summary judgment number 2. The Court concluded that there were issues of fact that needed to be developed by evidence.

On September 29, 2017, in docket No. 12357-16 petitioners filed a Motion for Summary Judgment (petitioners' motion for summary judgment number 3) and in support of that motion filed a Declaration of Anthony I. Provitola that was essentially the same as the declaration filed with petitioners' motion for summary judgment number 1 in docket No. 16168-17. By order dated November 8, 2017, the Court denied petitioners' motion for summary judgment number 3 because it concluded that there were material issues of fact in dispute as to whether petitioners engaged in the Schedule C activity with an actual and honest profit motive, whether petitioners actually incurred legal fees for the purposes of section 162, and whether the legal and professional services fees paid by petitioners were ordinary and necessary expenses. At that time, the Court concluded that the cases required more evidentiary development by means of the stipulation or trial process.

Petitioners filed petitioners' motion in both docket Nos. 12357-16 and 16168-17. Petitioners' motion is essentially the same as the previously filed petitioners' motion for summary judgment number 1, petitioners' motion for summary judgment number 2, and petitioners' motion for summary judgment number 3. Petitioners move for summary judgment as to both 2013 and 2014.⁶

⁶ In petitioners' motion they move the Court to enter summary judgment as to the proposed disallowance of legal and professional services contained in the notice of deficiency dated March 7, 2016, for 2013. However, in the last paragraph of that motion petitioners' state that they are entitled to summary judgment as to "all claims made by the Respondent in the Notice of Deficiency dated March 7, 2016 - the Deficiency of \$7,010.00 claimed by the Respondent, and

Petitioners' motion references, but does not include, the declaration of Anthony I. Provitola that was filed with the petitioners' motion for summary judgment number 1 and petitioners' motion for summary judgment number 3.

Subsequent to the filing of petitioners' motion the parties filed on October 22, 2018, a First Stipulation of Facts, a First Supplemental Stipulation of Facts, and a Second Supplemental Stipulation of Facts (referred to collectively as the stipulations of facts). The Court by order dated December 10, 2018, directed petitioners, among other things, to file on or before January 10, 2019, a First Supplement to petitioners' motion to inform the Court whether the filing of the stipulations of facts had any impact on petitioners' arguments in petitioners' motion. Petitioners filed a response with the Court on January 3, 2019, declining to file the ordered first supplement. Petitioners did not serve a copy of that response on respondent.⁷

Discussion

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Either party may move for summary judgment upon all or any part of the legal issues in controversy. Rule 121(a). The Court may grant summary judgment

the Penalties/Additions to Tax under IRC Section 6662(a) of \$1,563.60; and on all of the claims made by the Respondent in the Notice of Deficiency dated May 1, 2017– the Deficiency of \$11,328.00 claimed by the Respondent, and the Penalties/Additions to Tax under IRC Section 6662(a) of \$2,265.60.” The deficiency in tax set forth in the March 7, 2016, notice of deficiency is \$7,818 not \$7,010 as petitioners assert. Petitioner husband is an attorney and has signed the motion as “Attorney for Petitioners”. Petitioner husband should be aware of the need to accurately draft the motion. Nonetheless, the Court will treat the petitioners' motion as a motion for summary judgment as to both 2013 and 2014 for the amounts set forth in the respective notices of deficiency.

⁷ In the order dated December 10, 2018, the Court further ordered respondent, among other things, to file a response to the First Supplement to Petitioners' Motion for Summary Judgment on or before January 31, 2019. On January 23, 2019, respondent filed a Motion for Extension of Time to file that response. However, because petitioners did not file the First Supplement to Petitioners' Motion for Summary Judgment the Court denied respondent's motion for extension of time as moot.

only “if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law.” Rule 121(a) and (b); see Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

Petitioners, as the moving party, bear the burden of proving that no genuine dispute exists as to any material fact and that petitioners are entitled to judgment as a matter of law. See FPL Group, Inc. v. Commissioner, 115 T.C. 554, 559 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, 85 T.C. at 529. In deciding whether to grant summary judgment, the factual materials and inferences drawn from them must be considered in the light most favorable to the nonmoving party. FPL Group, Inc. v. Commissioner, 115 T.C. at 559; Bond v. Commissioner, 100 T.C. at 36; Naftel v. Commissioner, 85 T.C. at 529. The party opposing summary judgment must set forth specific facts which show that a question of genuine material fact exists and may not rely merely on allegations or denials in the pleadings. Rule 121(d); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Grant Creek Water Works, Ltd. v. Commissioner, 91 T.C. 322, 325 (1988); King v. Commissioner, 87 T.C. 1213, 1217 (1986).

Summary judgment continues to not be appropriate in these cases. As the Court has concluded when it considered the three previously filed motions for summary judgment there still exists material questions of facts, namely whether petitioners engaged in the Schedule C activity with an actual and honest profit motive, whether petitioners actually incurred legal fees for the purposes of section 162, and whether the legal and professional services fees paid by petitioners were ordinary and necessary expenses. Neither the self-serving declaration of petitioner husband nor the stipulations of facts resolve any of these factual issues. Further, there is also a factual issue as to whether respondent obtained the required managerial approval under section 6571(b) with respect to the accuracy-related penalty imposed under section 6662(a) for 2013 and 2014.

The Court takes the opportunity to inform petitioners that the Court may impose a penalty up to \$25,000 if a petitioner institutes or maintains a frivolous or groundless position or institutes or maintains a proceeding primarily for delay. Petitioners are admonished that should they continue to pursue frivolous or groundless arguments before the Court or if they maintain these cases primarily for delay, they may be subject to penalties under section 6673 up to the amount of \$25,000 in the future.

Upon due consideration, it is

ORDERED that, petitioners' Motion for Summary Judgment filed August 17, 2018, is denied.

**(Signed) Diana L. Leyden
Special Trial Judge**

Dated: Washington, D.C.
February 6, 2019