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

RYAN FOSTER,	)	
	)	
Petitioner,	)	**SR**
	)	
v.	)	Docket No. 7073-19.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

On February 20, 2020, petitioner filed Petitioner's Motion for Summary Judgment. On February 21, 2020, this Court ordered a response from respondent to petitioner's motion. In his motion for summary judgment, petitioner contends that he is entitled to summary judgment as a matter of law based on the following seven points:

I. Section 280E[1], as applied by the Commissioner, violates petitioner's right against self-incrimination under the Fifth Amendment to the Constitution.

II. Congress exceeded its authority under the Sixteenth Amendment to the Constitution in adopting section 280E.

III. Section 280E is unconstitutional under the Fifth Amendment Due Process Clause to the Constitution as its language is unconstitutionally vague.

IV. The Commissioner has no rules or regulations in place providing notice to taxpayers as to how and when section 280E would apply in 2014 and 2015. Without such rules, the application of section 280E by the Commissioner was arbitrary and capricious.

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[1]All section references are to the Internal Revenue Code as amended and in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

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V. Section 280E is unconstitutional as interpreted by the Commissioner because it is an excessive fine in violation of the Eighth Amendment to the Constitution.

VI. The Commissioner does not have the power to determine whether a federal law preempts a state law.

VII. Even if this Court finds that State law is preempted, the Commissioner does not have jurisdiction to make an administrative determination that petitioner committed a federal crime.

Petitioner, as the moving party, bears the burden of proving that no genuine dispute exists as to any material fact and that he is entitled to judgment as a matter of law. See FPL Group, Inc. & Subs. v. Commissioner, 115 T.C. 554, 559 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, 85 T.C. 527, 529 (1985); see also Rule 121. In deciding whether to grant summary judgment, the factual materials and the inferences drawn from them must be considered in the light most favorable to the non-moving party. See FPL Group, Inc. & Subs. v. Commissioner, 115 T.C. at 559.

A more detailed review of petitioner's motion by this Court has illuminated issues with his summary judgment motion that must be addressed before respondent should be obligated to respond. Importantly, the factual assertions in petitioner's summary judgment motion were not supported by affidavits or declarations made on personal knowledge or by documents.

As a general rule, documents that are not part of the record must be introduced to the Court, in support of a motion for summary judgment, by way of an authenticating affidavit or declaration made on personal knowledge. See Rule 121(d); see also 11 James Wm. Moore, Moore's Federal Practice, para. 56.92[3], at 56-209 (3d ed. 2014). Statements in briefs do not constitute evidence. See Rule 143(c). In addition, documents referred to in a motion for summary judgment should be attached thereto and properly authenticated. See Fed. R. Evid. 901 and 902.[2] Without documents identified by a proper affidavit or otherwise made

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[2]Federal Rule of Evidence 901(a) states that a proponent of evidence must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Federal Rule of Evidence 902 describes certain evidence that is self-authenticating and requires no extrinsic evidence of authenticity.

admissible in evidence, factual assertions in a summary judgment motion are not admissible evidence, and they cannot be properly relied on by this Court in considering petitioner's motion. See, e.g., Martz v. Union Labor Life, 757 F.2d 135, 138 (7th Cir. 1985). Furthermore, Rule 121(d) provides as follows:

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of such party's pleading, but such party's response, by affidavits or declarations or as otherwise provided in this Rule, must set forth specific facts showing there is a genuine dispute for trial. [Emphasis added.]

Petitioner's summary judgment motion includes numbered paragraphs making various factual assertions, but they are not supported by an affidavit or declaration of the type described in Rule 121(d) nor by documents. The factual inquiry key to all seven of petitioner's above delineated legal and Constitutional challenges to respondent's notice of deficiency is whether petitioner was trafficking in a controlled substance through an entity known as High Mountain Medz LLC (HMM), in which he was a principal. However, petitioner has put forth no evidence via affidavit or otherwise regarding HMM's line of business. Petitioner simply noted in his motion that "neither HMM nor its principals, including the Petitioner, have been convicted of any crime under the Controlled Substances Act." See Fed. R. Evid. 901 and 902.

We find that petitioner has not supported his factual assertions in his summary judgment motion as provided in Rule 121, and thus, it is premature to require a response from respondent.

Upon due consideration, it is

ORDERED that this Court's February 21, 2020 Order is hereby vacated. It is further

ORDERED that Petitioner's Motion for Summary Judgment, filed February 20, 2020, is denied without prejudice.

(Signed) Elizabeth A. Copeland
Judge

Dated: Washington, D.C.
March 10, 2020