

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

ESTATE OF JULIUS SCHALLER,)	
DECEASED, FRANCES M. ODZA, CO-)	
EXECUTRIX,)	
)	
Petitioner,)	
)	Docket No. 30561-08.
v.)	
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
)	

O R D E R

On October 28, 2011, petitioner filed a motion in limine to preclude respondent from introducing any evidence of alleged fraud occurring after the filing of the estate tax return. On November 18, 2011, respondent filed a response objecting to the granting of petitioner's motion in limine. On November 30, 2011, petitioner filed a reply to respondent's response. On December 7, 2011, respondent filed a response to petitioner's reply.

This case involves, among other things, the application of a fraud penalty pursuant to section 6663(a) with respect to a charitable deduction as claimed on the estate tax return of Julius Schaller for a contribution to the Educational Assistance Foundation for the Descendants of Hungarian Immigrants in the Performing Arts, Inc. (Foundation).¹

Petitioner seeks to exclude "any evidence of alleged fraud occurring after the estate tax return for Julius Schaller was filed on September 27, 2005, for purposes of attempting to establish application of the I.R.C. § 6663 penalty." In particular, petitioner objects to the admission into evidence of numerous documents that petitioner alleges were created mainly after the estate tax return had been filed and relate "almost entirely" to the alleged conduct of one of the co-executors, Barrett N. Weinberger. Petitioner contends that such evidence,

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

as well as anticipated testimony of respondent's revenue agent who handled the Foundation's audit, is not relevant, probative, or admissible and relates to a taxpayer (the Foundation) that is not a party to this case.

Respondent counters that post-filing evidence is admissible to show

that the executors' intent to operate the Foundation as a sham charitable organization was conceived before the return was filed. Accordingly, evidence that the executors operated the Foundation as a sham, even if the operations occurred after the return was filed, is evidence that the executors intended to evade tax at the time the estate tax return was filed.

Respondent also contends that alleged misstatements that Mr. Weinberger made to the revenue agent during the course of the examination constitute evidence of the executors' fraudulent intent when the return was filed.

Federal Rule of Evidence 402, applicable to this Court pursuant to section 7453 and Rule 143(a), provides the general rule that relevant evidence is admissible, and irrelevant evidence is not admissible. Federal Rule of Evidence 401 provides that evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence".

To sustain a civil fraud penalty, the Commissioner must show by clear and convincing evidence that the taxpayer intended to evade taxes known or believed to be owing by conduct intended to conceal, mislead, or otherwise prevent the collection of taxes. Secs. 6663(b), 7454(a); Rule 142(b); see Stoltzfus v. United States, 398 F.2d 1002, 1004-1005 (3d Cir. 1968); Rowlee v. Commissioner, 80 T.C. 1111, 1123 (1983). This intent must exist at the time the return was filed. See Gleis v. Commissioner, 24 T.C. 941 (1955), affd. per curiam 245 F.2d 237 (6th Cir. 1957); Wheeler v. Commissioner, T.C. Memo. 1978-15. When the taxpayer is an estate, the fraudulent intent of the executors is treated as that of the estate. Estate of Pittard v. Commissioner, 69 T.C. 391 (1977); Estate of Fox v. Commissioner, T.C. Memo. 1995-30, affd. without published opinion 100 F.3d 945 (2d Cir. 1996); Estate of Edens v. Commissioner, T.C. Memo. 1981-557, affd. without published opinion 969 F.2d 989 (4th Cir. 1982).

Fraud is never presumed but must be proved by clear and convincing evidence. See Petzoldt v. Commissioner, 92 T.C. 661, 699 (1989). Because direct proof of a taxpayer's intent is

rarely available, however, fraudulent intent may be established by circumstantial evidence. See Spies v. United States, 317 U.S. 492, 499 (1943); Bradford v. Commissioner, 796 F.2d 303, 307 (9th Cir. 1986), affg. T.C. Memo. 1984-601; Korecky v. Commissioner, 781 F.2d 1566, 1568 (11th Cir. 1986), affg. T.C. Memo. 1985-63; Stephenson v. Commissioner, 79 T.C. 995, 1005-1006 (1982), affd. 748 F.2d 331 (6th Cir. 1984). The taxpayer's entire course of conduct may be examined to establish the requisite intent. See Stone v. Commissioner, 56 T.C. 213, 224 (1971); Otsuki v. Commissioner, 53 T.C. 96, 105-106 (1969). Evidence of the taxpayer's actions before and after the tax filings in question is relevant to the extent it gives rise to inferences regarding the taxpayer's intent as of the time the return was filed. See, e.g., Richardson v. Commissioner, 509 F.3d 736, 743-744 (6th Cir. 2007) ("Although we consider * * * [the taxpayer's] intent at the time of filing * * * we may consider his actions after the tax filings to ascertain his earlier state of mind"), affg. T.C. Memo. 2006-69; Solomon v. Commissioner, 732 F.2d 1459, 1461-1462 (6th Cir. 1984) (court considered taxpayer's lack of cooperation with the IRS in finding fraud), affg. T.C. Memo. 1982-603; United States v. Upton, 799 F.2d 432, 433 (8th Cir. 1986) ("Evidence of * * * [a taxpayer's] questionable compliance with tax laws, both in the years prior to and subsequent to * * * [the relevant filing,] is probative of willfulness"); United States v. Johnson, 386 F.2d 630 (3d Cir. 1967) (taxpayer's failure to file returns in earlier years was relevant evidence in establishing a pattern of conduct suggestive of willfulness in failing to file returns for later years); Estate of Fox v. Commissioner, *supra* (badges of fraud included statements that the executor made to a CPA after the estate tax return had been filed); Tipton v. Commissioner, T.C. Memo. 1994-624 (significant badges of fraud included criminal convictions for tax evasion in years immediately after the years at issue and the taxpayer's failure to appear at trial and contest the determinations against him).

Petitioner has not persuaded us that the evidence in question has no potential relevance or probative value in shedding light upon the question of whether fraudulent intent existed as of the time the estate tax return was filed. The fact that the Foundation is a separate legal entity does not preclude this Court from considering evidence relating to it, especially in the light of respondent's assertions that the Foundation is a sham and that the estate's executors also serve as directors and officers of the Foundation. See, e.g., Zmuda v. Commissioner, 79 T.C. 714 (1982) (in case involving individual taxpayers, holding that alleged business trusts were shams), affd. 731 F.2d 1417 (9th Cir. 1984); Richardson v. Commissioner, T.C. Memo. 2006-69 (holding that alleged business trust and nonexempt charitable trust were shams, the income and

allowable expenses of which were taxable to individual taxpayer), affd. 509 F.3d 736 (6th Cir. 2007).

The trial of this case has been continued pending a ruling by the Federal District Court for the District of Columbia as to whether the Foundation is exempt from Federal income tax under section 501(c)(3). We express herein no opinion on the evidentiary effects, if any, in this proceeding of the District Court's ultimate ruling. In the light of the foregoing, it is

ORDERED that petitioner's previously mentioned motion in limine is denied.

**(Signed) Michael B. Thornton
Judge**

Dated: Washington, D.C.
December 22, 2011