

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

ADRIAN D. SMITH & NANCY W. SMITH,	)	
ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket Nos. 13382-17, 13385-17,
	)	13387-17.
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

The adjustments at issue in these consolidated cases derive from a partnership-level examination of Adrian Smith + Gordon Gill Architecture, LLP (AS+GG), covering the taxable years 2008 through 2010, wherein respondent disallowed certain credits for increasing research activities claimed under section 41.<sup>1</sup> On March 13, 2020, petitioners, who were partners of AS+GG during the relevant period, filed a Motion to Shift the Burden of Proof, requesting that the Court “issue an order shifting the burden of proof with respect to any new matters raised by the Respondent with regard to reasonable compensation under \* \* \* [sections] 162 or \* \* \* 174.” Respondent filed a Response thereto on March 20, 2020. For the reasons that follow, we will deny petitioners’ Motion.

Generally, the Commissioner’s determination of a deficiency is presumed correct, and the taxpayer bears the burden of proving it incorrect. Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933). An exception to the foregoing rule applies, however, with respect to “any new matter” that the Commissioner raises in a proceeding. Rule 142(a); Shea v. Commissioner, 112 T.C. 183, 197 (1999) (holding that where a notice of deficiency fails to describe the basis on which the Commissioner relies to support a deficiency determination and that basis requires the presentation of evidence that is different than that which would be necessary to

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<sup>1</sup>Section references are to the Internal Revenue Code of 1986, as amended and in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

resolve the determinations that were described in the notice of deficiency, then the new basis is treated as a new matter upon which the Commissioner bears the burden of proof).

As noted, by the foregoing Motion petitioners argue that respondent should bear the burden of proof with respect to any matters concerning the issue of whether petitioners' compensation as partners of AS+GG was reasonable under section 174(e) during the relevant period.<sup>2</sup> Petitioners assert that the sole issue raised by respondent during the examinations in these cases was whether the research conducted under the sample contracts was "funded research" under section 41(d)(4)(H), and they argue that "[t]he presentation of experts opining of the reasonableness of compensation requires an entirely different set of evidence as compared to the contractual analysis of funded research which actually gave rise to this case." On the foregoing basis petitioners argue that the issue of reasonable compensation "is clearly beyond the scope of the Notice of Deficiency" and constitutes a "new matter" for purposes of Rule 142(a).

Respondent argues that petitioners' position that the issue of reasonable compensation is a "new matter" for purposes of Rule 142(a) is unfounded. Citing the principle that the Court generally will not look behind the notice of deficiency,<sup>3</sup> respondent argues that the notices in these cases should serve as the basis for determining whether the issue of reasonable compensation is a "new matter" and that what occurred during the examinations is irrelevant. Additionally, respondent argues that the explanations provided in the notices of deficiency regarding the bases of the adjustments therein "indicate[] that petitioners will have to demonstrate (i.e., introduce evidence) that expenses claimed by \* \* \* [AS+GG] qualify for the credit" and that "this necessarily includes introducing evidence that the expenses are reasonable." On the foregoing basis respondent argues that his position "that a portion of the expenses were, in fact, unreasonable \* \* \* does not

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<sup>2</sup>See Suder v. Commissioner, T.C. Memo. 2014-201 (holding that the taxpayer's compensation was not allowable as a qualified research expense to the extent it was unreasonable under section 174(e)).

<sup>3</sup>See Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324 (1974) (holding that, because a trial in the Tax Court in a deficiency case is a de novo proceeding, the Court's "determination as to a petitioner's tax liability must be based on the merits of the case and not any previous record developed at the administrative level").

require the introduction of any new evidence” and does not constitute a “new matter” for purposes of Rule 142(a).

We agree with respondent that the issue of the reasonableness of petitioners’ compensation during the relevant period does not constitute a “new matter” for purposes of Rule 142(a). In determining whether the Commissioner has raised a “new matter” for purposes of Rule 142(a), “[t]he objective language in the notice of deficiency remains the controlling factor.” Shea v. Commissioner, 112 T.C. at 192. Petitioners’ position that an issue is “new matter” if it was not explicitly raised during the examination cannot be reconciled with Shea; the existence of “new matter” is determined with reference to the objective language of the notices of deficiency.

The objective language of the notices of deficiency was broad, stating that the expenses claimed by AS+GG for the relevant periods do not qualify for the credit for increasing research activities under section 41.<sup>4</sup> We agree with respondent that the notices’ language determining that the claimed expenses did not qualify for the section 41 research credit indicated to petitioners that they would thereafter have to demonstrate--that is, introduce evidence--that the claimed expenses did so qualify. We also agree with respondent that this necessarily would include introducing evidence that the expenses, including petitioners’ compensation, were reasonable under section 174(e). See Suder v. Commissioner, T.C. Memo. 2014-201, 2014 WL 4920724 at \*24-\*29. Consequently, to the extent petitioners argue that the issue of reasonable compensation requires them to present different evidence than that required by the objective language of the notices of deficiency, we find their argument unavailing.

Instead, we find that respondent’s reasonable compensation argument does not require the presentation of new evidence but merely clarifies or develops the original determination in the notices. See Kikalos v. Commissioner, 434 F.3d 977, 982 (7th Cir. 2006) (“A new position taken by the IRS Commissioner is not a ‘new matter’ if it ‘merely clarifies or develops [the] Commissioner’s original determination without requiring the presentation of different evidence, being

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<sup>4</sup>Each of the notices advised: “It is [sic] has been determined that the partnership known as Adrian Smith + Gordon Gill Architecture, LLP’s expenses do not qualify for the credit for increasing research activities as shown on the partnership’s tax return Form 6765 for the tax years December 31, 2008 and December 31, 2010.”

inconsistent with [the] Commissioner’s original determination, or increasing the amount of the deficiency.”) (quoting Friedman v. Commissioner, 216 F.3d 537, 543 (6th Cir. 2000), aff’g T.C. Memo. 1998-196), aff’g T.C. Memo. 2004-82; see also Cavallaro v. Commissioner, 842 F.3d 16, 23 (1st Cir. 2016), aff’g on this issue T.C. Memo. 2014-189; Estate of Jayne v. Commissioner, 61 T.C. 744, 748-749 (1974); Muniz v. Commissioner, T.C. Memo. 2015-125, 2015 WL 4126356, at \*3, aff’d, 661 F. App’x 1027 (11th Cir. 2016). Consistent with the foregoing authorities, the issue of the reasonableness of petitioners’ compensation does not require the presentation of different evidence, nor is it inconsistent with the original determinations in the notices of deficiency, nor does it increase the amount of the deficiencies. Accordingly, we find that respondent has not raised a “new matter” for purposes of Rule 142(a) and will deny petitioners’ Motion.

The foregoing considered, it is

ORDERED that petitioners’ Motion to Shift the Burden of Proof, filed March 13, 2020, is denied.

**(Signed) Joseph H. Gale**  
**Judge**

Dated: Washington, D.C.  
April 13, 2020