

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

|                                   |   |                                |
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| VINCENT J. FUMO, ET AL.,          | ) |                                |
|                                   | ) |                                |
| Petitioner(s),                    | ) |                                |
|                                   | ) |                                |
| v.                                | ) | Docket No. 17603-13, 17614-13. |
|                                   | ) |                                |
| COMMISSIONER OF INTERNAL REVENUE, | ) |                                |
|                                   | ) |                                |
| Respondent                        | ) |                                |

**ORDER**

These consolidated cases were originally calendared for trial at a special session of the Court starting on March 30, 2020, in Philadelphia, Pennsylvania. On March 11, 2020, the special session was cancelled due to concerns relating to coronavirus (COVID-19). Prior to the cancellation, respondent filed a Motion in Limine to preclude testimony “regarding the ‘manner and motives’ behind examination of petitioner’s income and excise tax liabilities for the years at issue.” We will grant the motion.

This case arises from respondent’s determination that petitioner failed to report income on account of benefits, services, and funds he received through a fraudulent scheme directed against the State of Pennsylvania and a non-profit organization. At its heart this case is about unreported income. “Gross income includes income realized in any form, whether in money, property, or services.” Sec. 1.61-1(a), Income Tax Regs. It is well established that gross income may include unlawful gains. See James v. United States, 366 U.S. 213, 218 (1961).

In his pretrial memorandum petitioner listed, among the witnesses he expected to call, an Assistant U.S. Attorney (AUSA) involved in his criminal case and two revenue agents (RAs) who participated in the IRS civil tax audit. Petitioner suggests that the testimony of these witnesses will supply evidence relating to the “manner and motives” behind the examination and his contention that the notices of deficiency are “arbitrary, capricious, and excessive.” In support of his belief that these witnesses will provide relevant testimony petitioner cites the following facts or assertions: (1) the United States appealed the sentence imposed

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upon his criminal conviction; (2) the IRS did not commence the civil examination until after the criminal case had ended; (3) the IRS did not agree to a settlement of his civil case; and (4) IRS officers declined to give him extensions of time and missed a scheduled appointment. Petitioner also contends that the IRS relied on facts established in the criminal case when preparing its notice of deficiency.

Accepting *arguendo* the truth of petitioner's allegations, we find testimony concerning the "manner and motives behind the examination" to be irrelevant. As a general rule, this Court will not look behind a notice of deficiency to examine the evidence considered by the IRS, the propriety of the Commissioner's motives, or the administrative policies that lie behind the IRS' determinations. The reason is that a trial before the Tax Court is a trial *de novo*; the Court's determination as to a taxpayer's liability in a deficiency case is based on the evidence before us, not on record developed at the administrative level. See Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324, 327-328 (1974), and cases cited therein.

"This Court has on occasion recognized an exception to the rule of not looking behind the deficiency notice when there is substantial evidence of unconstitutional conduct on \* \* \* [the Commissioner's] part." Greenberg's Express, 62 T.C. at 328. As we recognized in Greenberg's Express, "it is conceivable that there may be situations where a taxpayer should be accorded some relief, if he were able to prove that he was selected for audit on a clearly unjustifiable criterion. But we think that such situations will be extremely rare." Ibid.

Additionally, "[t]his Court has on rare occasions recognized a possible exception to this rule and has looked behind the notice of deficiency in cases involving unreported income where the \* \* \* [the Commissioner] introduced no substantive evidence but rested on the presumption of correctness and the petitioner challenged the notice of deficiency on the grounds that it was arbitrary." Jackson v. Commissioner, 73 T.C. 394, 401 (1979). "[A] naked assessment without factual foundation" is insufficient. Anastasato v. Commissioner, 794 F.2d 884, 887 (3d Cir. 1986). To leap over this hurdle the IRS need only "provide some predicate evidence connecting the taxpayer to the charged activity." Gerardo v. Commissioner, 552 F.2d 549, 554 (3d Cir. 1977).

Petitioner's allegations are not sufficient to justify looking behind the notice of deficiency. The facts that the Government appealed his criminal sentence and deferred commencement of the civil audit (as the IRS typically does) until conclusion of the criminal case are wholly irrelevant. The conduct of IRS officers before the notice of deficiency was issued are likewise irrelevant. Petitioner has set forth

no facts remotely suggesting unconstitutional conduct on their part: He appears to have been selected for examination, not for any improper reason, but because the criminal case established his participation in a fraudulent scheme to extract benefits from the State of Pennsylvania and a non-profit organization.

Nor does this case involve a “naked assessment” premised solely on the presumption of correctness. Respondent contends that the stipulated documents, coupled with additional testimony at trial, will offer the predicate evidence to “connect[] \* \* \* [petitioner] to the charged activity.” Gerardo, 552 F.2d at 554. The parties have already stipulated to hundreds of pages of documents concerning petitioner’s criminal case. These documents show that petitioner benefitted from the criminal scheme; the issue we must decide is the extent to which this benefit was taxable. At trial we will hear testimony directed at determining petitioner’s correct tax liability for the years at issue. Testimony regarding the motives behind and the manner of conducting the IRS examination will not be permitted.

In consideration of the foregoing, it is

ORDERED that respondent’s Motion in Limine, filed March 10, 2020, is granted in that AUSA Robert Zauzmer, Retired Revenue Agent Kenneth Kelly, and Revenue Agent Kenneth Roton will be precluded from testifying regarding the manner and motives behind the examination of petitioner.

**(Signed) Albert G. Lauber  
Judge**

Dated: Washington, D.C.  
May 6, 2020