Sub Rule 155 Wherry
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UNITED STATES TAX COURT

WASHINGTON, DC 20217

ZANE W. PENLEY AND MONIKA J. PENLEY,	)	
Petitioners	)	
	)	Docket No. 13243-15.
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER

The Court released its Memorandum Opinion (T.C. Memo. 2017-65) in this case on April 17, 2017. In that Opinion, we held petitioners failed to adequately substantiate that Mr. Penley worked more hours in rental real estate activities than in his other employment. That factual conclusion precluded a determination that he was a real estate professional whose rental real estate losses were not per se passive activity. We further held that petitioners did not act with reasonable cause with respect to underpayment of their Federal income tax, and therefore they were liable for the accuracy-related negligence penalty.

On May 16, 2017, the Court filed Petitioners' Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161.[1] The Court filed Respondent's Response to Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161 on June 5, 2017.

In their motion for reconsideration, petitioners assert that we erred in holding that Mr. Penley does not qualify as a real estate professional under section

[1]Unless otherwise indicated, Rule references are to the Tax Court Rules of Practice and Procedure and section references are to the Internal Revenue Code of 1986, as amended, and in effect for the applicable year at issue.

469(c)(7)(B) and that a section 6662 accuracy-related penalty applies. To support their position, petitioners reiterate the facts and argument provided at their trial, and provide a new tool and an estimate of the amount of time Mr. Penley spent on real estate activities by applying what appears to be a self-invented calculation method.

This calculation method is based on the national median pay for different occupations (such as electrician and plumber) obtained from the Bureau of Labor Statistics and an aggregated ratio of labor to renovation material purchase cost in Colorado obtained from homewyse.com, a website apparently intended to help consumers and contractors extrapolate estimated renovation and building costs. This was combined with petitioner's phone records (they apparently assume all, or at least most, calls were related to their rental real estate activities), an article about the necessity of working over 100 hours to get by on minimum wage, and an article about a corporate CEO allegedly working 130 hours per week. Petitioners also claim that Mr. Penley's calendar is credible and that they have substantiated that Mr. Penley worked approximately 2,520 hours on his real estate activities during the taxable year 2012.[2] Therefore, petitioners assert that the section 6662(a) penalty does not apply to them. Petitioners also contend that they had offered the rear unit of the Sterne property for rent in 2012.

The decision to grant motions to reconsider lies within our discretion. Estate of Quick v. Commissioner, 110 T.C. 440, 441 (1998). "Reconsideration is not the appropriate forum for rehashing previously rejected legal arguments or tendering new legal theories to reach the end result desired by the moving party." Id. at 441-442. Rather, motions to reconsider should aim "to correct substantial errors of fact or law and allow the introduction of newly discovered evidence that the moving party could not have introduced by the exercise of due diligence in the prior proceeding." Rule 1(a); Fed. R. Civ. P. 60(b); Knudsen v. Commissioner,

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[2] The determination of whether a taxpayer is a real estate professional because of material participation is made separately with respect to each rental property, unless the taxpayer properly elects to treat all interests in rental property as a single rental real estate activity. Sec. 469(c)(7)(A); sec. 1.469-9(e)(1), Income Tax Regs. Petitioners have not shown that they made an election to treat their asserted three rental properties as a single rental real estate activity. Sec. 1.469-9(g)(3), Income Tax Regs.

131 T.C. 185, 185 (2008); Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999, 1001-1002 (1978).

In their motion, petitioners primarily rehash previously rejected arguments that Mr. Penley's calendar is credible by providing their self-conceived calculation method and claim that we failed to properly and completely consider evidence supporting the credibility of Mr. Penley's calendar. Petitioners also offer some new evidence in the form of the aggregated ratio of labor to renovation material purchase cost obtained from homewyse.com (petitioners assume the purchase materials were all used in their rental activities during the calendar year of their purchase), a couple of website articles, and two background check documents. This evidence could have been raised before our decision was issued, but was not. Therefore, consideration of them, with respect to a motion for reconsideration, is inappropriate. Nonetheless, we will briefly address key points petitioners raised in their motion.

Petitioners contend, in their motion, that they have met their burden of proving Mr. Penley worked more hours in real estate activities than in his other employment during 2012. We remain unpersuaded. As discussed in our Opinion, petitioners' primary substantiation is Mr. Penley's calendar, which indicates that for 2012, Mr. Penley worked on his real estate activities 10-14 hours on each Saturday and Sunday and an additional 4-6 hours most weekdays, in addition to his full-time job. This monthly calendar does not specify a start or end time for the work, does not address the time spent driving to and from the property or what other errands or stops may have been made, if any, and does not separate out any time for meals or other breaks. Consequently, we found the calendar was untrustworthy as it seemed to significantly exaggerate the time Mr. Penley spent on rental real estate activities.

In their motion, instead of providing more details on tasks performed on specific calendar days which should have been presented at the trial and would potentially increase the credibility of this calendar, petitioners present us an estimate of Mr. Penley's working hours. This estimate is based on their indirect calculation method, without showing the validity of such method, which itself is unverified data obtained from a website that was not available to be tested by respondent at the trial. The two website articles provided by petitioners, one regarding a corporate CEO's working hours, the other regarding the necessity of working long hours on minimum wage in Colorado are, if true, evidence that it is indeed possible to work and occasionally maybe helpful to work more than 100

hours per week. That does not prove, however, that Mr. Penley, himself, worked more than 100 hours per week throughout 2012.

We appreciate that Mr. Penley is a hard worker and we take no pleasure in examining or questioning the efforts he put into his real estate business. However, we must make our decisions according to law, and the law provides that petitioners bear the burden of proving by a preponderance of the evidence that Mr. Penley worked more hours in real estate activities than in his other employment. Rule 142(a); sec. 469(c)(7)(B); INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992); Welch v. Helvering, 290 U.S. 111, 115 (1933). To assist in this determination, section 6001 and the regulation thereunder, require that each taxpayer "keep such records * * * and comply with such rules and regulations as the Secretary may from time to time prescribe." For purpose of section 469, a taxpayer can use "any reasonable means" to prove the extent of his or her participation in the real estate activities," but the use of a postevent "ballpark guesstimate" is not sufficient to prove participation in a real estate activity. Fowler v. Commissioner, T.C. Memo. 2002-223; sec. 1.469-5T(f)(4), Temporary Income Tax Regs., 53 Fed. Reg. 5727 (Feb. 25, 1988). Petitioners have not established that Mr. Penley's calendar is credible and, after consideration of all the evidence introduced at trial, the Court concludes they have failed to satisfy their burden of proof.[3]

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[3] Were we to have concluded that Mr. Penley's calendar was credible and mostly trustworthy, it would still remain unclear whether Mr. Penley would have qualified as a real estate professional under section 469(c)(7). Mr. Penley testified that, during the four-month period before his purchase of the Colorado Springs, Colorado (Evergreen Park) property, he spent numerous hours analyzing "whether the property would make economic sense" and conducting due diligence activities respect to the purchase. Mr. Penley also spent time reviewing financial and legal documents related to the purchase, providing funds for the purchase, and preparing the acquisition documents. We are unable to determine the exact amount of time that Mr. Penley spent on these investor-type activities, because as he acknowledged, his calendar usually did not "br[eak] down to the incremental detail[s]." However, the "numerous hours" Mr. Penley spent on pre-purchase Evergreen Park investor activities, including, by example and not by way of limitation, the time for his due diligence, financing arrangements, and his economic analysis of its acquisition, may not count as "personal services" towards

(continued...)

Petitioners also contend that they should not be liable for the section 6662(a) accuracy-related penalty. As discussed in our Opinion, petitioners have not proven reasonable cause for their underpayment. Therefore, they are liable for the section 6662(a) accuracy-related penalty for 2012. In their motion and Rule 155 computation for 2012, petitioners provide no reason to show that there is any

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[3](...continued)
Mr. Penley's real estate professional status.

"Personal services" means any work performed by an individual in connection with a trade or business. Sec. 1.469-9(b)(4), Income Tax Regs. The regulation specifically provides, however, that "personal services" do not include any work performed by an individual in the individual's capacity as an investor ("investor-type activity") as described in section 1.469-5T(f)(2)(ii), Temporary Income Tax Regs., "unless the individual is directly involved in the day-to-day management or operations of the activity." Id.

Section 1.469-5T(f)(2)(ii)(B), Temporary Income Tax Regs. defines investor-type activity as activities including: "(1) Studying and reviewing financial statements or reports on operations of the activity; (2) Preparing or compiling summaries or analyses of the finances or operations of the activity for the individual's own use; and (3) Monitoring the finances or operations of the activity in a non-managerial capacity."

In applying this standard, the Court focuses on whether a petitioner's work involves the management of or day-to-day operation of a real property, such as Evergreen Park, or whether the work is more related to the taxpayer's investment decisions with respect to the real property. See e.g., Barniskis v. Commissioner, T.C. Memo. 1999-258; Serenbetz v. Commissioner, T.C. Memo. 1996-510; Toups v. Commissioner, T.C. Memo. 1993-359. Whether Mr. Penley's time spent on Evergreen Park before its purchase counts as personal services would depend upon when the active management test is applied: if it is applied when the investor activities were performed, there would be a problem, as petitioners did not yet own Evergreen Park, and could not at that time actively participate in its day-to-day activities. If the test is applied at a later date, such as the end of the taxable year, then the investment activity hours may qualify. But we need not resolve that issue here, given petitioner's failure, in any event, to carry their burden of proof.

error in our determination. Rather, they simply state that because they hired an enrolled agent to prepare their Federal income tax returns and they have met their burden of proving Mr. Penley's real estate professional status, they are not liable for the section 6662(a) accuracy-related penalty. Use of a tax return preparer does not provide immunity to accuracy-related penalties, unless the three-prong test of Neonatology Assocs., P.A v. Commissioner, 115 T.C. 43, 99 (2000), aff'd, 299 F.3d 221 (3d Cir. 2002) is met. Petitioners have not established that they have met this test. In particular, one of the three tests requires that the petitioners provided all relevant facts accurately to the tax return preparer. Id.

In their motion for reconsideration petitioners have failed to show unusual circumstances, substantial error of fact or law, or any other reason justifying relief. Accordingly, it is

ORDERED that petitioners' motion for reconsideration is denied.

(Signed) Robert A. Wherry
Judge

Dated: Washington, D.C.
October 19, 2017