

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

JAMES E. HOUSTON & DONNA C.	)	
HOUSTON,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 1445-06 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	

**ORDER**

We have already released a decision and order in this case. Petitioners moved for reconsideration under Rule 161. The Court assumes the parties know the background facts of the case and motion. In their motion petitioners urge the Court at the very least to correct a couple recurring botched phrases. The Commissioner sensibly agrees. These two phrases are:

    references to the punitive interest as 120% instead of what the Code itself said; i.e., 120% “*of the underpayment rate,*” I.R.C. § 6621(c)(1) (repealed 1989); and

    references to “sham partnership” instead of “sham partnership *transactions.*”

The Court is grateful for the parties’ noticing this failure of quality control in its proofreading and will make these corrections.

Petitioners’ more substantive argument is that the Court overlooked a distinction between transactions that lack economic substance and those that *both*

lack economic substance and are shams. (And by “shams” petitioners mean have a “lack of profit motive or business purpose.”) Petitioners then argue that a consequence of this is that it is impossible to conclude that the partnership-level decisions that triggered these partner-level proceedings contained definitive determinations that the challenged partnership transactions were tax motivated and thus subject to the punitive interest rate.

The problem for the Houstons is that their case remains indistinguishable from *Duffie v. United States*, 600 F.3d 362 (5th Cir. 2010), and the Fifth Circuit in *Duffie* held that the same language in the decision documents in that case amounted to a determination that the challenged transactions described in those decisions were tax-motivated transactions subject to I.R.C. § 6621(c). Underlying their argument, by contrast, is the Houstons’ insistence that there is a difference between a statement that “the transaction lacks economic substance” and a statement that “the transaction is a sham.” The Houstons then extend their argument into one about whether the absence of impure thoughts (i.e., a subjective intent to avoid tax) is enough to avoid a transaction’s characterization as a sham.

The Fifth Circuit, however, has since this case started definitively held that “a lack of economic substance is sufficient to invalidate the transaction regardless of whether the taxpayer has motives other than tax avoidance.” *Nev. Partners Fund v. United States*, 720 F.3d 594, 608 (5th Cir. 2013) (quoting *Klamath Strategic Inv. Fund ex rel. St. Croix Ventures v. United States*, 568 F.3d 537, 544 (5th Cir. 2009)), *vacated and remanded on other grounds*, 134 S. Ct. 903 (2014). We understand petitioners’ argument -- that I.R.C. § 6621(c) requires proof of a sham or fraudulent transaction (and not just a lack of economic substance) to trigger the punitive interest rate, which itself is a different inquiry than the question of whether a court should disregard a transaction in determining a tax liability.

But we just can’t see any daylight between this case and *Duffie*.

It is therefore

ORDERED that petitioners’ motion for reconsideration is granted in part, the Court’s April 17, 2017 order and decision is amended as follows:

On p. 8, first full paragraph, line 4, after “120%” insert “of the normal underpayment”;

On p. 11, first full paragraph, line 2, after “120%” insert “of the normal underpayment rate”;

On p. 11, second full paragraph, line 8, after “AMCOR” delete “partnerships” and replace it with “partnership transactions at issue here”;

On p. 11, last paragraph, line 8, after “decide” delete “whether their partnerships were shams”;

On p. 11, last paragraph, line 9, after “at the partnership level” insert “whether the partnership transactions that led to the adjustments were shams”;

On p. 12, first full paragraph, line 6, delete “whether the partnerships were shams”;

On p. 12, first full paragraph, line 6, after “proceedings” insert “whether the partnership transactions were shams”;

On p. 13, first paragraph, line 4, delete “partnerships” and replace it with “partnership transactions”;

On p. 13, first paragraph, line 6, delete “partnerships” and replace it with “partnership transactions”;

On p. 13, last paragraph, line 9, delete “partnerships” and replace it with “partnership transactions at issue”;

On p. 15, first full paragraph, line 2, delete “were the partnerships shams” and replace it with “was each of the partnership transactions at issue a ‘sham’”;

On p. 16, first full paragraph, line 6, delete “partnership was a sham” and replace it with “partnership transactions were shams”.

It is also

ORDERED that petitioners' motion for reconsideration is otherwise denied.

**(Signed) Mark V. Holmes**  
**Judge**

Dated: Washington, D.C.  
December 18, 2017