

UNITED STATES TAX COURT
WASHINGTON, DC 20217

GEORGE E. JOSEPH,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 27759-15.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case is scheduled for trial at the Court's trial session beginning Monday, April 16, 2018, in Room 726, Earle Cabell Federal Building & U.S. Courthouse, 1100 Commerce Street, Dallas, Texas. The case involves a deficiency in income tax determined by respondent. At petitioner's request, the Court today held a conference call to discuss the availability of a witness, Nancy Driver, listed in petitioner's pretrial memorandum. Ms. Driver is an IRS Appeals Officer who, petitioner claims, "re-performed the audit of taxpayer based on serious deficiencies apparent from the original audit." Ms. Driver is unable to testify during the week of April 16, 2018. Petitioner wishes the Court to fashion a way for him to obtain the testimony of Ms. Driver. Respondent ask that the Court should do nothing because Ms. Driver has no relevant testimony to give and, if called, should be excluded as a witness. Respondent orally moved under Rule 104 of the Federal Rules of Civil Procedure to exclude the testimony of Ms. Driver. The gravamen of respondent's objection is that any testimony by Ms. Driver would be excludible under Fed. R. Evid. 408 as evidence of a compromise of the deficiency in tax determined by respondent. Also, respondent argues that petitioner bears the burden of proof, see Rule 142(a), Tax Court Rules of Practice and Procedure, and that Ms. Driver's testimony is not necessary or relevant for petitioner to meet his burden. Finally, the Court brought to the parties attention what the Court announced long ago in Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324, 327 (1974): "As a general rule, this Court will not look behind a deficiency notice to examine the evidence used or the propriety of respondent's motives or of the administrative policy or procedure involved in making his determinations."

Also, the Court has looked at the petition and is somewhat at a loss as to what, other than matters precluded by Fed. R. Evid. 408, Ms. Driver would testify to. Petitioner assigns error to respondent's deficiency determination claiming: "The amounts filed in the filed returns are the correct numbers." In support of that assignment of error, petitioner avers in relevant part: "Although a significant tax liability remains, the numbers are correct and are not nearly as large

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as the numbers seemingly pulled out of the air by the auditor." Rule 34, Tax Court Rules of Practice and Procedure, governs the petition. Paragraph (b)(5) of that Rule states in pertinent that a petition in a deficiency case shall contain "Clear and concise lettered statements of the facts on which petitioner bases the assignments of error". Petitioner has failed in that requirement.

We will ask petitioner to file an objection to respondent's oral motion under Fed. R. Evid. 408 and also to respond to respondent's concerns as to the relevance of Ms. Driver's testimony and to our concern under Greenberg's Express. He shall identify in particular the adjustments on the Form 4549-A attached to respondent's notice of deficiency as to which he believes Ms. Driver has knowledge. He shall specify the facts that petitioner relies on to show error in each of those adjustments. He shall identify what knowledge Ms. Driver possesses of each of those facts. He shall identify how she obtained knowledge of each such fact.

It is therefore,

ORDERED that petitioner shall, by the close of business on Thursday, April 12, 2018, file a response to this Order addressing respondent's oral motion to exclude the testimony of Ms. Driver.

**(Signed) James S. Halpern
Judge**

Dated: Washington, D.C.
April 10, 2018