United States Tax Court

T.C. Memo. 2022-33

DANIEL METZ,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 16784-19. Filed April 7, 2022.

Daniel Metz, pro se.

Randall B. Childs and *A. Gary Begun*, for respondent.

MEMORANDUM OPINION

WEILER, *Judge*: This case arises from a statutory notice of deficiency issued to petitioner Daniel Metz for tax years 2000 through 2008 (years at issue). The Commissioner of Internal Revenue (respondent) determined deficiencies, additions to tax, and penalties for 2000 through 2008, as follows:

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[*2] Year	Deficiency	Additions to Tax/Penalties			
		§ 6663(a)[1]	§ 6651(a)(1)	§ 6651(a)(2)	§ 6654
2000	—	$95,113.50	—	—	—
2001	—	52,835.25	—	—	—
2002	—	90,986.25	—	—	—
2003	—	128,772.75	—	—	—
2004	—	154,884.75	—	—	—
2005	$306,095	377,032.50	$106,953.50	—	—
2006	106,749	227,409.75	51,667.75	—	—
2007	45,936	190,167.75	23,662.75	—	—
2008	139,624	—	31,396.73	$34,886	$1,797

In his Answer respondent also asserted an addition to tax under section 6651(f) for 2008.

The issues for decision are whether petitioner (1) received unreported income for 2005 through 2008; (2) is liable for civil fraud penalties under section 6663 for 2000 through 2007; (3) is liable for additions to tax under section 6651(a)(1) for 2005 through 2008; and (4) is liable for additions to tax under sections 6651(a)(2)and (f) and 6654 for 2008. For the reasons set forth below, we will sustain respondent's determinations, as adjusted in his Answer.

Background

The parties submitted this case for decision without trial under Rule 122. Relevant facts have been stipulated or otherwise included in the record. *See* Rule 122(a). Petitioner resided in Florida when he timely filed his Petition.

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code (Code), Title 26 U.S.C., in effect at all relevant times, all regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[*3] I. *Petitioner's Businesses*

During all times relevant to this case petitioner worked as a professional structural engineer who designed bridges and related road structures for the Florida Department of Transportation. In 1994 petitioner formed Metz & Associates, Inc. (Metz, Inc.), under Florida state law to start his own structural engineering business. Petitioner was the sole shareholder of the entity until 2007, when he dissolved Metz, Inc., and formed Metz & Associates, LLC (Metz, LLC), under Florida state law to continue his engineering business. Petitioner was the managing member of Metz, LLC, and held a 94% membership interest. Petitioner held signature authority over Metz, Inc.'s and Metz, LLC's business checking accounts. He was also an employee of both Metz, Inc., and Metz, LLC, and received a salary from each during the years at issue.

In addition to Metz, Inc., and Metz, LLC, petitioner created other entities. On December 29, 2003, petitioner created "The Office of the Administrator for ZJ Science and Education and His Successors, a Corporation Sole" (ZJ Science) under Nevada state law. Petitioner was the owner of ZJ Science. On December 2, 2016, petitioner registered Westbridge, Ltd., as a fictitious name with the Florida secretary of state's office. Petitioner opened bank accounts for these two entities and held signature authority over the accounts.

II. *Petitioner's Income Tax Filings for 2000 Through 2007*

Petitioner timely filed Forms 1120S, U.S. Income Tax Return for an S Corporation, for Metz, Inc., for 2000 through 2007 and Forms 1065, U.S. Return of Partnership Income, for Metz, LLC, for 2007 and 2008 with the Internal Revenue Service (IRS).

However, petitioner initially did not file Forms 1040, U.S. Individual Income Tax Return, to report any wage income he received from Metz, Inc., or Metz, LLC, during those years. For 2000 he initially sent a document titled "Statement for Tax Year 2000" to the IRS. Similarly, for 2001 he initially sent the IRS a document titled "Statement for Tax Year 2001."[2] Petitioner did not file Forms 1040 for 2000 through 2003 until April 13, 2009, after he was contacted by an

[2] On these documents petitioner acknowledged that he had filed Forms 1040 in the past but stated that he was not subject to any taxes under the Code and that he was not authorized or required to file Form 1040 because of the absence of an Office of Management and Budget (OMB) number.

[*4] IRS agent. Petitioner filed Form 1040 for 2004 on June 18, 2009, and he filed Forms 1040 for 2005 through 2007 on September 28, 2009. Because petitioner failed to file Form 1040 for 2008, respondent prepared a substitute for return (SFR) pursuant to section 6020(b) on his behalf.

III. *Petitioner's Fraudulent Tax Scheme*

With his tax returns for 2000 through 2007 petitioner submitted to the IRS false Forms 1099–OID, Original Issue Discount , as part of a fraudulent scheme to obtain withholding credits. These Forms 1099–OID were forged by a third party to appear as though they were legitimately issued by banks and financial institutions such as Bank of America and JPMorgan Chase Bank. Petitioner submitted these fraudulent Forms 1099–OID with his income tax returns to claim fraudulent refunds totaling $1,297,490 for 2000 through 2007.

IV. *Criminal Investigation and Conviction*

The Criminal Investigation Division of the IRS investigated petitioner's income tax returns and fraudulent Forms 1099–OID for 2005 through 2007. On August 8, 2012, a grand jury in the U.S. District Court for the Middle District of Florida indicted petitioner on three counts of filing false or fraudulent claims for 2005, 2006, and 2007 under 18 U.S.C. § 287 and one count of attempting to obstruct or interfere with the Internal Revenue Laws under section 7212. Petitioner pleaded not guilty, but he was ultimately convicted by a jury on all counts on July 18, 2013. On December 20, 2013, the District Court entered judgment against petitioner, and he was sentenced to 30 months in a federal penitentiary, followed by three years of supervised release. In addition the district court ordered petitioner to pay respondent restitution of $112,995.

V. *Failure to Cooperate with Tax Authorities*

Starting with his tax filing for 2000 and throughout the IRS's audit, petitioner continued to assert various arguments to prevent or delay the IRS from assessing or collecting his income tax liabilities. He submitted a "Statement for Tax Year 2000" and a "Statement for Tax Year 2001" in which he argued that he was not subject to any taxes under the Code and that he was not authorized or required to file Form 1040 because it did not have an OMB number. On February 6, 2002, he sent the IRS a document titled "Request for Status Determination," again setting forth the argument that he was not subject to the Code

[*5] and therefore had no tax obligations. On July 23, 2002, he sent the IRS a letter in response to a Notice CP–515[3] and argued that he was not subject to the Code and therefore had no tax obligations. On August 16, 2002, he sent another letter in response to the IRS's second Notice CP–515, again challenging respondent's authority and alleging violations of his due process rights. On December 29, 2003, he sent a document titled "Interrogatories Presented to the Internal Revenue Service Under 5 USC 556(d) the Administrative Procedures Act" to the IRS Office of Chief Counsel, demanding that the IRS provide answers to his questions about respondent's authority to assess and collect his tax liabilities. On March 1, 2005, he sent a document titled "Affidavit of Material Facts, Privacy Act Amendment Request, and Rebuttal of Erroneous IRS Individual Master File (IMF) of: Daniel Metz" to the IRS. The document included allegations of illegal conduct by IRS employees. On September 4, 2007, he filed a document titled, "Declaration of Legal Character of Natural Person" with the Clerk of the Circuit Court for Seminole County, Florida. In the document he stated that he "rejects the status of Fourteenth Amendment citizenship," and that he is a "native born American and common law freeman by birthright." On September 17, 2007, he sent a document titled "Complaint Against IRS Agents" to Paul D. Clement, Acting Attorney General, U.S. Department of Justice, arguing that he was a "sovereign American" and therefore was not subject to the Code.

In August 2009 the IRS issued summonses to petitioner to appear and provide copies of his bank statements so that the IRS could reconstruct his income. When petitioner did not comply with the summonses, the IRS issued third party summonses to banks to obtain copies of petitioner's bank statements. On October 13, 2009, petitioner filed a petition in the district court to quash the IRS summonses. After the district court denied petitioner's emergency restraining orders and preliminary injunctions to prevent the IRS from obtaining his bank statements, the court also dismissed the petition to quash the IRS's summonses.

Similarly, petitioner failed to comply with an Information Document Request sent by the IRS on November 17, 2010. Instead of sending the requested information, petitioner sent a letter to an IRS revenue agent on December 30, 2010, asking the agent to provide proof of identification and identify what authority the agent had to pursue

[3] The purpose of IRS Notice CP–515 is to remind a taxpayer that the IRS has no record that he or she has filed a tax return or returns.

[*6] claims against petitioner. On January 20, 2012, petitioner filed a complaint in the Eighteenth Judicial District Circuit Court for Seminole County, Florida, seeking an injunction to prevent the IRS from continuing its examination of his tax returns. The complaint was removed to the district court and was later dismissed. On October 15, 2017, petitioner sent a letter to IRS Acting Commissioner Linda E. Stiff challenging the constitutionality of the federal income tax.

VI. *Civil Audit for Underreported Income*

Respondent's examination of petitioner's tax filings for 2000 through 2007 shows underreporting of income for 2005 through 2007.

A. *Underreported Wage Income*

As an employee of Metz, Inc., and Metz, LLC, petitioner received wage income during the years at issue. He reported wage income from Metz, Inc., on his Forms 1040 for 2001 through 2005. He reported wage income of $37,520 on his 2005 Form 1040. However, he did not report any wage income from Metz, Inc., or Metz, LLC, on his 2006 and 2007 Forms 1040. Petitioner did not file any income tax return for 2008.

Respondent obtained bank statements and copies of the checks relating to Metz, Inc.'s and Metz, LLC's checking accounts and used the bank deposits method to determine petitioner's wage income. The analysis showed that petitioner wrote checks from Metz, Inc.'s bank account to himself for $410,709 in 2005, $234,910 in 2006, $73,436 in 2007, and $9,000 in 2008. The analysis also showed that Metz, Inc., and Metz, LLC, issued checks to petitioner every two weeks and most of the checks referenced pay periods in the memo sections. Similarly, petitioner wrote checks from Metz, LLC's bank account to himself for $27,098 in 2007 and $45,118 in 2008. Respondent determined that petitioner's underreported wage income for 2005 through 2008 equals the corresponding aforementioned amounts, less the reported wage of $37,520 for 2005. Petitioner has disputed the character of these transfers from Metz, Inc., and Metz, LLC, calling them distributions of capital, prior earnings and profits, draws, or dividends. We find respondent's characterization as wage income to be correct.

[*7] B. *Schedule E Income*

Respondent's bank deposits analysis for Metz, Inc., and Metz, LLC, also showed that petitioner underreported Metz, Inc.'s and Metz, LLC's income for 2000 through 2007.[4]

The bank deposits analysis for Metz, Inc., revealed total deposits of $1,538,081 for 2005, $828,459 for 2006, and $467,047 for 2007. However, on Forms 1120S petitioner reported gross receipts of only $900,846 for 2005, $647,212 for 2006, and $353,613 for 2007. Petitioner reported his share of taxable income from Metz, Inc., on his Schedules E, Supplemental Income and Loss, as $115,234 for 2005, a loss of $11,279 for 2006, and a loss of $86,626 for 2007. According to the bank deposits analysis, the correct amounts of petitioner's share of Metz, Inc.'s taxable income were $752,468 for 2005, $169,969 for 2006, and $26,808 for 2007. The IRS concluded that petitioner understated his share of the income from Metz, Inc., on his Schedules E by $637,234 for 2005, $181,248 for 2006, and $113,434 for 2007.

Similarly, the bank deposits analysis for Metz, LLC, revealed total deposits of $29,170 for 2007 and $199,342 for 2008. On Forms 1065 petitioner reported gross receipts for Metz, LLC, as $3,466 for 2007 and $28,706 for 2008. According to respondent's analysis, the correct amounts of petitioner's share of taxable income of Metz, LLC, were $32,616 for 2007 and $228,048 for 2008. Therefore, according to the analysis, petitioner also understated his share of income from Metz, LLC, on Schedules E by $27,420 for 2007 and $214,365 for 2008. Petitioner did not file Form 1040 for 2008, and therefore he did not report his distributive share of the income from Metz, LLC, for 2008.

C. *Schedule C Gross Receipts*

From examining ZJ Science's and Westbridge, Ltd.'s bank records the IRS concluded that petitioner deposited funds into checking accounts he held in the names of ZJ Science and Westbridge, Ltd., during 2005 through 2008. Petitioner's tax returns for 2005 through 2007 did not include Schedules C, Profit or Loss From Business. However, ZJ Science's bank statements showed yearly deposits of $56,500 for 2005, $33,549 for 2006, and $21,766 for 2007. The bank statements for Westbridge, Ltd.'s bank account reflected yearly deposits

[4] Petitioner held 100% ownership of Metz, Inc., and 94% of the membership interest of Metz, LLC, during all relevant times.

[*8] of $72,156 for 2006, $70,606 for 2007, and $29,275 for 2008. The IRS concluded that petitioner understated his Schedule C income by $56,500 for 2005, $105,705 for 2006, $92,372 for 2007, and $29,275 for 2008.

D. *Unreported Dividend Income*

Petitioner received dividend income of $299 from TD Waterhouse for 2008. Accordingly, TD Waterhouse issued Form 1099–DIV, Dividends and Distributions, to petitioner and filed a copy with respondent. Petitioner did not file an income tax return for 2008 that reflected the dividend income.

E. *Unreported Capital Gain Income*

Sometime before 2008 petitioner opened an investment account with Trapeze Asset Management, Inc. (TAM), in the name of Westbridge, Ltd., using his Social Security number. In 2008 TAM purchased and sold securities on petitioner's behalf and issued a Form 1099–B, Proceeds From Broker and Barter Exchange Transactions, reporting that petitioner had short-term capital gain of $103,440. Petitioner did not report any of the capital gain income or any basis in the securities sold by TAM during the 2008 tax year. Nor did he provide any documentation to establish cost or basis information. Instead, petitioner provided the IRS with a copy of a document titled "2008 Tax Report" which showed total sale proceeds of $258,981, total purchase amounts of $347,553, and a total realized loss of $88,572. The amounts in petitioner's 2008 Tax Report do not match the amounts TAM reported in Form 1099–B.

F. *Total Understatement*

On October 12, 2016, the IRS sent a letter to petitioner for 2005 through 2008 with a copy of Form 4549–A, Income Tax Examination Changes. The letter was signed by IRS Revenue Agent Stacy Gerardo and included Form 4549–A asserting deficiencies and additions to tax under section 6651(a)(1) for 2005 through 2008. On November 22, 2016, Supervisory Revenue Agent Daniel J. Itchue signed Workpaper 300, Civil Penalty Approval Form, approving the determination to assert additions to tax under section 6651(a)(1) against petitioner for the 2005 through 2008 tax years. On August 16, 2018, before the conclusion of the IRS audit, the acting group manager signed Workpaper 300, Civil Penalty Approval Form, approving the assertion of section 6663 civil fraud penalties against petitioner for 2000 through 2007. The initial

[*9] determination to assert the fraud penalties was made in Letters 950 (30-day letters) sent on August 17, 2018.

On June 11, 2019, the IRS issued petitioner a statutory notice of deficiency for 2000 through 2008. The IRS determined that petitioner had tax deficiencies of $306,095 for 2005, $106,749 for 2006, $45,936 for 2007, and $139,624 for 2008. Petitioner timely filed his Petition with this Court on September 11, 2019.[5]

Discussion

I. *Summary of Arguments by the Parties*

According to respondent, petitioner substantially understated his income and tax liabilities for 2005, 2006, 2007, and 2008.

Similarly, respondent states that petitioner failed to file his individual income tax returns for 2000 through 2007 until after the IRS contacted him, and he failed to file an individual income tax return for 2008. Respondent goes on to show how petitioner failed to cooperate with the IRS throughout its examination and consistently asserted frivolous legal arguments to avoid his federal tax liabilities and to obstruct the IRS's efforts to assess and collect his correct federal tax.

In his Opening Brief respondent argues that petitioner filed criminally false and fraudulent Forms 1099–OID to report erroneous withholding credits and to claim inflated refunds for 2000 through 2007 and that he attempted to conceal his income and assets by depositing funds into bank accounts he held in the names of ZJ Science and Westbridge, Ltd.

Respondent contends that petitioner's underpayments of tax for 2000 through 2004 are due to the erroneous withholding credits he claimed on the fraudulent Forms 1099–OID he filed with the IRS with the intent to evade tax. Respondent also contends that petitioner's underpayments of tax for 2005 through 2007 were due to the income tax deficiencies and the erroneous withholding credits in the fraudulent Forms 1099–OID, he filed with the IRS with the intent to evade tax.

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[5] Although the Petition was received after the 90th day from the date of the notice of deficiency, petitioner timely filed his Petition by mailing it U.S. certified mail to the Court on September 6, 2019, which is evidenced by the postmark date in the record. *See* I.R.C. § 7502.

[*10] Finally, respondent contends that petitioner failed to make estimated tax payments for 2000 through 2008.

On the basis of the foregoing arguments respondent contends that petitioner fraudulently understated his income and tax liabilities on his 2005 through 2007 income tax returns with the intent to evade tax. Accordingly, respondent contends that petitioner is liable for civil fraud penalties under section 6663(a) for 2000 through 2007 and the addition to tax under section 6651(f) because he fraudulently—and with the intent to evade tax—failed to file an individual income tax return for 2008.[6] Respondent also contends that petitioner is liable for additions to tax under section 6651(a)(1) for failing to timely file for 2005 through 2008, and the addition to tax under section 6651(a)(2) for failing to pay tax for 2008. Respondent also contends that petitioner is liable for an addition to tax under section 6654 for failing to make estimated tax payments for 2008.

In his Opening Brief petitioner argues that respondent has neglected to consider factual evidence and that he is "not a class of person who has incurred a federal income tax liability since he has not knowingly engaged in federally taxable activities." He also argues that his substantive due process rights have been violated. Finally, he contends that the bank deposits method the IRS used is arbitrary and erroneous and that the IRS has failed to give him credit for tax payments he voluntarily made in 2000 and for his restitution payments as ordered by the district court.

II. *Underreported Income*

A. *Burden of Production and Proof*

The Commissioner's deficiency determination ordinarily is entitled to a presumption of correctness. *See Bone v. Commissioner*, 324 F.3d 1289, 1293 (11th Cir. 2003), *aff'g* T.C. Memo. 2001-43. However, when a case involves unreported income, the U.S. Court of Appeals for the Eleventh Circuit, to which an appeal in this case would lie absent a stipulation to the contrary, *see* I.R.C. § 7482(b)(1)(A), (2), held that the Commissioner's determination of unreported income is entitled to a presumption of correctness only if the determination is supported by a minimal evidentiary foundation linking the taxpayer to an income-

[6] In the alternative respondent contends that petitioner is liable for the addition to tax under section 6651(a)(1) for failing to file a tax return for 2008.

[*11] producing activity, *see Blohm v. Commissioner*, 994 F.2d 1542, 1549 (11th Cir. 1993), *aff'g* T.C. Memo. 1991-636. After the Commissioner produces evidence linking the taxpayer to an income-producing activity, the presumption of correctness applies and the burden of production then shifts to the taxpayer to rebut that presumption by establishing that the Commissioner's determination is arbitrary or erroneous. *Id.*; *see also United States v. Janis*, 428 U.S. 433, 441–42 (1976).

Under section 7491(a)(1), "[i]f, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue." *See Higbee v. Commissioner*, 116 T.C. 438, 442 (2001). Petitioner has not introduced credible evidence sufficient to shift the burden of proof to respondent under section 7491(a) as to any relevant issue in dispute.

B. *Bank Deposits Method*

Gross income includes "all income from whatever source derived." I.R.C. § 61(a). A taxpayer must maintain books and records establishing the amount of his or her gross income. I.R.C. § 6001. Should a taxpayer fail to cooperate in the audit of his tax returns, wide latitude is afforded the Commissioner with respect to the method he may use to reconstruct that taxpayer's income. *Giddio v. Commissioner*, 54 T.C. 1530 (1970). The Commissioner may use any reasonable method which reflects the taxpayer's income, including the bank deposits method. *Cupp v. Commissioner*, 65 T.C. 68, 82 (1975), *aff'd without published opinion*, 559 F.2d 1207 (3d Cir. 1977). The Commissioner's reconstruction of income "need only be reasonable in light of all surrounding facts and circumstances." *Petzoldt v. Commissioner*, 92 T.C. 661, 687 (1989).

The bank deposits method is a permissible method of reconstructing income. *See Clayton v. Commissioner*, 102 T.C. 632, 645 (1994); *see also Langille v. Commissioner*, T.C. Memo. 2010-49, *aff'd*, 447 F. App'x 130 (11th Cir. 2011). Bank deposits constitute prima facie evidence of income. *See Tokarski v. Commissioner*, 87 T.C. 74, 77 (1986). The Commissioner need not show the likely source of a deposit treated as income, but he "must take into account any nontaxable source or deductible expense of which [he] has knowledge" in reconstructing income using the bank deposits method. *Clayton*, 102 T.C. at 645–46. However, the Commissioner need not follow any "leads" suggesting that

[*12] a taxpayer has deductible expenses. *See DiLeo v. Commissioner*, 96 T.C. 858, 872 (1991), *aff'd*, 959 F.2d 16 (2d Cir. 1992).

After the Commissioner reconstructs a taxpayer's income and determines a deficiency, the taxpayer bears the burden of proving that the Commissioner's use of the bank deposits method is unfair or inaccurate. *Clayton,* 102 T.C. at 645; *DiLeo*, 96 T.C. at 882–83. The taxpayer must prove that the reconstruction is in error and may do so, in whole or in part, by proving that a deposit is not taxable. *DiLeo*, 96 T.C. at 882–83.

III. *Analysis*

In his Opening Brief petitioner argues that respondent's bank deposits analysis was arbitrary and erroneous because it "ignored significant offsetting expenditure." Petitioner was engaged in income-producing activities through Metz, Inc., and Metz, LLC, during the years at issue. However, he filed fraudulent tax returns for 2005 through 2007 and did not file a tax return for 2008. Furthermore, he refused to cooperate in the ascertainment of his income and continued to assert frivolous arguments in various communications to the IRS. Under the circumstances, we find that it was reasonable for respondent to use the bank deposits method to reconstruct petitioner's wage, Schedule E, and Schedule C income.[7]

To satisfy his burden of production respondent introduced extensive banking records obtained from third-party institutions. Respondent obtained bank statements and copies of the checks from Metz, Inc.'s and Metz, LLC's bank accounts for 2005 through 2008 and examined all inflow transactions with respect to these accounts. Respondent determined the differences between the gross receipts as indicated on the statements and the gross receipts petitioner reported. We find that respondent has satisfied the threshold burden as relates to his determination of petitioner's income.

Petitioner contends that respondent's analysis is arbitrary and erroneous because he did not give credit for deductible business expenses. Because respondent met the burden of production, petitioner bore the burden of showing that the analysis was inaccurate, e.g., by

[7] In his briefs petitioner challenges only the reasonableness of the bank deposits analysis the IRS used to reconstruct his wage, Schedule E, and Schedule C income but does not challenge the reasonableness of other reconstructed income, including capital gain and dividend income.

[*13] identifying additional nontaxable items that respondent failed to exclude. *See Clayton*, 102 T.C. at 645; *DiLeo*, 96 T.C. at 872; *Chico v. Commissioner*, T.C. Memo. 2019-123, at *19, *aff'd without published opinion*, No. 20-71017, 2021 WL 4705484 (9th Cir. Oct. 8, 2021). However, at no point during the examination did petitioner supply any evidence to substantiate his claimed deductions. Petitioner has provided the names of payees and later added information and explanations of the expenses in his requested findings. With limited information provided by petitioner, however, respondent would not have had actual knowledge as to whether these expenses are deductible. We too are not persuaded that any of petitioner's now claimed deductions are allowable. Therefore, we find that petitioner has not carried his burden of proving that respondent's determinations of unreported income are "arbitrary or erroneous." *See Erickson v. Commissioner*, 937 F.2d 1548, 1554–55 (10th Cir. 1991), *aff'g* T.C. Memo. 1989-552.

Petitioner also contends that he has made the restitution payment ordered by the district court and the amount of restitution should have reduced or eliminated his determined deficiencies. First, petitioner has provided no evidence to show that he has remitted any payments pursuant to the district court's order. Since petitioner bears the burden of proof and has failed to enter evidence into the record, the Court infers that such evidence either does not exist or would fail to establish petitioner's contention. *See Blum v. Commissioner*, 59 T.C. 436, 440–41 (1972).

Even if we were to assume that petitioner paid restitution, respondent is unable to reduce his deficiencies and additions to tax, before assessment, by amounts of restitution previously ordered by the district court and remitted by petitioner.[8] In this case the district court

[8] A federal district court may order restitution to the victim of a criminal offense. 18 U.S.C. § 3663(a) . Although restitution in a tax case is based upon an estimate of civil tax liability, it is not determinative of a civil tax liability. *See Morse v. Commissioner*, 419 F.3d 829, 833–35 (8th Cir. 2005), *aff'g* T.C. Memo. 2003-332, 86 T.C.M. (CCH) 673; *Hickman v. Commissioner*, 183 F.3d 535, 537–38 (6th Cir. 1999), *aff'g* T.C. Memo. 1997-566. The restitution statute specifically contemplates that a civil claim may be brought after the criminal prosecution by providing that the amount paid under a restitution order "shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in . . . any Federal civil proceeding." 18 U.S.C. § 3664(j)(2). Furthermore, any amount paid to the IRS as restitution for taxes owed must be deducted from any civil judgment the IRS obtains to collect the same tax deficiency. *See United States v. Tucker*, 217 F.3d 960, 962 (8th Cir. 2000); *United States v. Helmsley*, 941 F.2d 71, 102 (2d Cir. 1991). It follows that

[*14] entered judgment against petitioner on December 20, 2013. Respondent made the assessment after the restitution order became final, then calculated additions to tax based on the deficiencies so determined. Therefore, the restitution payments petitioner made, if any, will not affect respondent's calculations of his income tax deficiency in this case. *See Schwartz v. Commissioner*, T.C. Memo. 2016-144, at *12, *aff'd in unpublished order*, No. 16-2502, 2017 WL 5125662 (6th Cir. Sept. 5, 2017).

In addition petitioner argues that he made a payment of $23,437 for his 2000 tax year and that this payment should offset tax liabilities from 2000 through 2008. Form 1040 for 2000 shows that $23,437 was withheld as federal income tax. However, estimated taxes and amounts withheld from wages do not affect the amount of a taxpayer's deficiency, as defined by section 6211(a). I.R.C. § 6211(b)(1).

Petitioner also asserts the common tax-protester arguments that he is not subject to the Code and that the Code is unconstitutional in some respect. This Court and other courts have universally rejected similar arguments, and we see no need to further address them here. *See Crain v. Commissioner*, 737 F.2d 1417 (5th Cir. 1984).

Accordingly, we will sustain the deficiencies respondent determined for 2005 through 2008.

IV. *Additions to Tax and Penalties*

A. *Section 6663(a) Fraud Penalties for 2000 Through 2007*

Respondent determined that petitioner is liable for section 6663 fraud penalties for 2000 through 2007. Section 6663(a) provides that "[i]f any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud." The Commissioner has the burden of proving fraud by clear and convincing evidence. I.R.C. § 7454(a); Rule 142(b). To do so, the Commissioner must prove for each relevant year that (1) an underpayment of tax exists and (2) the underpayment was due to fraud. *Sadler v. Commissioner*, 113 T.C. 99, 102 (1999); *Katz v. Commissioner*, 90 T.C. 1130, 1143 (1988). Treasury Regulation § 1.6664-2(c)(1)

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until a civil judgment is entered, the IRS is unable to reduce a taxpayer's liability by restitution paid.

[*15] interprets the definition of "underpayment" found in section 6664 to include a taxpayer's overstated credits for withholding. *See Feller v. Commissioner*, 135 T.C. 497, 503 (2010); Treas. Reg. § 1.6664-2(g) (example 3).

When the allegations of fraud are intertwined with reconstructed unreported income, as they are here, the Commissioner can satisfy the former burden by either proving a likely source of the unreported income or (where the taxpayer alleges a nontaxable source) disproving the nontaxable source so alleged. *Parks v. Commissioner*, 94 T.C. 654, 661 (1990). The Commissioner can satisfy the latter burden if he shows that the taxpayer intended to conceal, mislead, or otherwise evade the collection of taxes known or believed to be owing. *Katz*, 90 T.C. at 1143 (and cases cited thereat). If the Commissioner establishes that any portion of the underpayment is attributable to fraud, the entire underpayment shall be treated as attributable to fraud and subject to a 75% penalty unless the taxpayer establishes by a preponderance of the evidence that some part of the underpayment is not attributable to fraud. I.R.C. § 6663(b).

B. *Supervisory Approval*

The Commissioner's burden of production includes producing evidence that the IRS complied with the procedural requirements of section 6751(b)(1). *See Graev v. Commissioner*, 149 T.C. 485, 492–93 (2017), *supplementing and overruling in part* 147 T.C. 460 (2016). Section 6751(b)(1) requires the initial determination of certain penalties to be "personally approved (in writing) by the immediate supervisor of the individual making such determination." *See Graev*, 149 T.C. at 492–93; *see also Clay v. Commissioner*, 152 T.C. 223, 248 (2019), *aff'd*, 990 F.3d 1296 (11th Cir. 2021). So we have concluded that the revenue agent must obtain written supervisory approval for penalties before the first formal communication to the taxpayer of penalties. *Clay*, 152 T.C. at 249.

1. *Section 6751(b) Compliance*

Since IRS Revenue Agent Gerardo's immediate supervisor approved the determination to assert the penalties before the date the 30-day letters were sent to petitioner, and petitioner makes no claim that the "initial determination" was before that date; we find that written supervisory approval of section 6663 civil fraud penalties was given before the first formal communication of those penalties to

[*16] petitioner and that respondent complied with the procedural requirements of section 6751(b).[9] Accordingly, respondent has satisfied his burden of production with regard to the supervisory approval requirement of section 6751(b), and petitioner does not contend otherwise.

2. *Section 6663(a) Analysis*

We now address whether petitioner is liable for section 6663(a) fraud penalties for 2000 through 2007. As discussed above, respondent has proven that petitioner underpaid his tax liabilities for 2005, 2006, and 2007. We must now determine whether respondent has proven by clear and convincing evidence that any portions of the underpayments for 2000 through 2007 are attributable to fraud.

Fraud is intentional wrongdoing designed to evade tax believed to be owing. *Neely v. Commissioner*, 116 T.C. 79, 86 (2001). The existence of fraud is a question of fact to be resolved upon consideration of the entire record. *Estate of Pittard v. Commissioner*, 69 T.C. 391, 400 (1977). Fraud is not to be presumed or based upon mere suspicion. *Petzoldt*, 92 T.C. at 699–700. But because direct proof of a taxpayer's intent is rarely available, fraudulent intent may be established by circumstantial evidence. *Id.* at 699.

Circumstances that may indicate fraudulent intent, often called "badges of fraud," include but are not limited to: (1) understating income, (2) keeping inadequate records, (3) giving implausible or inconsistent explanations of behavior, (4) concealing income or assets, (5) failing to cooperate with tax authorities, (6) engaging in illegal activities, (7) supplying incomplete or misleading information to a tax return preparer, (8) providing testimony that lacks credibility, (9) filing false documents (including false tax returns), (10) failing to file tax returns, and (11) dealing in cash. *See Schiff v. United States*, 919 F.2d 830, 833 (2d Cir. 1990); *Bradford v. Commissioner*, 796 F.2d 303, 307–08 (9th Cir. 1986), *aff'g* T.C. Memo. 1984-601; *Parks*, 94 T.C. at 664–65; *Recklitis v. Commissioner*, 91 T.C. 874, 910 (1988); *Morse*, 86 T.C.M. (CCH) at 675. No single factor is dispositive, but the existence of several factors "is persuasive circumstantial evidence of fraud." *See Vanover v. Commissioner*, T.C. Memo. 2012-79, 103 T.C.M. (CCH) 1418, 1420.

[9] The 30-day letters were stipulated exhibits that neither petitioner nor respondent reserved an objection to.

[*17] A conviction under section 7212 for attempting to obstruct and impede the due administration of the internal revenue laws is also indicative of fraud. *Belanger v. Commissioner*, T.C. Memo. 2020-130, at 34–35.

Petitioner did not file Forms 1040 for 2000 through 2007 until 2009, after he was contacted by an IRS agent during an examination, even though he had filed returns in previous years. Petitioner has offered no reasonable cause for the late filing of his 2000 through 2007 returns. Petitioner never filed a tax return for 2008. We find that these facts establish a pattern of fraudulent conduct and support a finding of fraudulent intent. *See Omozee v. Commissioner*, T.C. Memo. 2013-89, at *11; *Vogt v. Commissioner*, T.C. Memo. 2007-209, *aff'd*, 336 F. App'x 758 (9th Cir. 2009).

The record before us also establishes that petitioner continuously refused to cooperate with respondent during the examination and in doing so asserted several common tax-protester arguments. Instead of filing valid tax returns petitioner submitted "Statements" for 2000 and 2001, arguing that he was not subject to the Code and that he could not file Form 1040 because of the absence of an OMB number on the Form 1040. Petitioner continued to send various forms of communications asserting the same frivolous and groundless legal arguments and accusations of illegal conduct by respondent.

Moreover, petitioner's failure to cooperate with respondent and produce requested bank statements led respondent to eventually issue summonses to petitioner in August 2009. When petitioner failed to comply with the summonses, respondent then issued third-party summonses to petitioner's banks to obtain the necessary information. In response petitioner filed a petition to quash in the district court, arguing that respondent lacked authority to issue summonses and that the summonses violate petitioner's constitutional right to due process.

Finally, the most significant indicia of fraud are that petitioner demonstrated the intent to mislead, conceal, or obstruct the assessment of his federal income tax liabilities by filing false Forms 1099–OID and false income tax returns for 2000 through 2007. The record shows that petitioner hired a third party to forge fraudulent Forms 1099–OID to claim tax withholding credits. Consequently, petitioner was found guilty of three counts of filing false or fraudulent claims for 2005, 2006, and 2007 and one count of attempting to obstruct or interfere with section 7212(a). Petitioner consistently understated his income for 2000

[*18] through 2007, kept inadequate records, and engaged in illegal activities resulting in the guilty verdict. Although no tax deficiencies are due for 2000 through 2004, petitioner's overstatement of withholdings results in underpayments for 2000 through 2007, including the earlier years. *See Rice v. Commissioner,* T.C. Memo. 1999-65, 77 T.C.M. (CCH) 1488, 1489–90; Treas. Reg. § 1.6664-2(c)(1).

We find that the filing of delinquent returns, coupled with a demonstrated pattern of understating income, efforts to conceal income, and failure to make estimated tax payments, shows petitioner's fraudulent intent. Respondent has proven by clear and convincing evidence that for 2000 through 2007, petitioner had underpayments of tax due to fraudulent intent. Petitioner has not shown that any specific portion of any underpayment of tax was not attributable to fraud. *See* I.R.C. § 6663(b). Consequently, we hold that for 2000 through 2007 petitioner is liable for section 6663(a) fraud penalties as determined by respondent.

C. *Section 6651(a)(1) Additions to Tax for 2005 Through 2007*

Section 6651(a)(1) imposes an addition to tax if the taxpayer fails to file an income tax return by the required due date, including any extension of time for filing. Under section 7491(c) the Commissioner bears the burden of production with respect to the liability of the taxpayer for additions to tax. *See Higbee*, 116 T.C. at 446–47. If the Commissioner meets the burden, the taxpayer has the burden of proving that failure to timely file was due to reasonable cause and not willful neglect. *See* I.R.C. § 6651(a)(1); *Higbee*, 116 T.C. at 447.

Petitioner stipulated that he untimely filed his 2005 through 2007 federal tax returns and does not contend that he has reasonable cause for his late filings. Respondent has met the burden of production, and accordingly we find petitioner is liable for the additions to tax pursuant to section 6651(a)(1) as determined by respondent.

D. *Section 6651(f) Fraudulent Failure to File Addition to Tax or Section 6651(a)(1) Failure to Timely File Addition to Tax for 2008*

Respondent asserted in his answer an addition to tax under section 6651(f) for fraudulent failure to file and determined in the notice of deficiency an addition to tax under section 6651(a)(1) for 2008. Section 6651(a)(1) imposes an addition to tax for failure to file a return on the date prescribed (determined with regard to any extension of time for

[*19] filing) unless the taxpayer can establish that such failure is due to reasonable cause and not due to willful neglect. Under section 6651(f), if any failure to file any return is fraudulent, the penalty imposed under section 6651(a)(1) is increased to 15% percent (rather than 5%) for each month the return is delinquent, up to a total of 75% (rather than 25%). We consider the same elements as when considering the imposition of the addition to tax for fraud under section 6663 in applying section 6651(f) to determine whether the taxpayer's failure to file his tax returns was fraudulent. *See Clayton*, 102 T.C. at 653. The Commissioner bears the burden of demonstrating fraud by clear and convincing evidence. *See* I.R.C. § 7454(a); Rule 142(b).

For 2000 through 2007 petitioner wears many badges of fraud described in the previous section. For 2008 he failed to file his return, and we find that he wears many of the same badges of fraud as for the earlier years. Considering these facts, in conjunction with his failure to make estimated tax payments for 2008, which we discuss below, we find that it is appropriate for respondent to assert the fraudulent failure to file addition to tax under section 6651(f) for 2008. *See Clayton*, 102 T.C. at 653 (applying the same badges of fraud that existed in earlier years to a subsequent tax period to find the taxpayer liable for the addition to tax under section 6651(f)). Consequently, we hold that for 2008 petitioner is liable for the addition to tax pursuant to section 6651(f) to be determined in the Rule 155 computations.

E. *Section 6651(a)(2) Failure to Timely Pay Addition to Tax for 2008*

Respondent determined that petitioner is liable for an addition to tax under section 6651(a)(2) for 2008. Section 6651(a)(2) provides for an addition to tax when a taxpayer fails to timely pay the tax shown on a return. To meet his burden of production under section 7491(c) with respect to the section 6651(a)(2) addition to tax, respondent must provide evidence of a tax return. *See Wheeler v. Commissioner*, 127 T.C. 200, 208–10 (2006), *aff'd*, 521 F.3d 1289 (10th Cir. 2008). An SFR that meets the requirements of section 6020(b) is treated as the "return" filed by the taxpayer for this purpose. *See* I.R.C. § 6651(g)(2).

This addition to tax will not apply if the taxpayer shows that the failure to pay was "due to reasonable cause and not due to willful neglect." I.R.C. § 6651(a)(2). "The determination of whether the taxpayer had reasonable cause pursuant to section 6651(a)(2) is similar to the analysis of reasonable cause pursuant to section 6651(a)(1) except that

[*20] undue financial hardship may be a defense to the failure to pay . . . ." *Hardin v. Commissioner*, T.C. Memo. 2012-162, 103 T.C.M. (CCH) 1861, 1863; *see* Treas. Reg. § 301.6651-1(c)(1). "To establish undue hardship, the taxpayer must show that making the tax payment on time would have required 'the risk of a substantial financial loss.'" *Hardin*, 103 T.C.M. (CCH) at 1863 (quoting *Merriam v. Commissioner*, T.C. Memo. 1995-432, 70 T.C.M. (CCH) 627, 636, *supplemented by* T.C. Memo. 2005-17, *aff'd without published opinion*, 107 F.3d 877 (9th Cir. 1997)).

Because petitioner never filed an income tax return for 2008 respondent prepared an SFR pursuant to section 6020(b) and sent it to petitioner in a letter dated August 17, 2018. The SFR for 2008 is treated as the "return" filed by petitioner. *See* I.R.C. § 6651(g)(2). The SFR showed a tax due and yet petitioner has made no payments. Therefore, we hold that petitioner is liable for the section 6651(a)(2) addition to tax for 2008 as determined by respondent.

F. *Section 6654 Failure to Pay Estimated Tax Addition to Tax for 2008*

Respondent determined an addition to tax under section 6654 for 2008. Section 6654(a) and (b) provides for an addition to tax in the event of an underpayment of a required installment of individual estimated tax. Each required installment of estimated tax is equal to 25% of the "required annual payment," which, in turn, is equal to the lesser of (1) "90 percent of the tax shown on the return for the taxable year (or, if no return is filed, 90 percent of the tax for such year)" or (2) if the individual filed a return for the immediately preceding year, 100% of the tax shown on that return. I.R.C. § 6654(d)(1)(A) and (B). Except in very limited circumstances not applicable herein, *see* I.R.C. § 6654(e)(3), section 6654 provides no exception for reasonable cause or lack of willful neglect.

We have determined that petitioner had a tax liability for 2008, a year for which he filed no return. Petitioner therefore had a "required annual payment," and the record also establishes that the "lesser of" requirement was met as well, taking into account the filed return for the immediately preceding year. Respondent has shown that petitioner paid no estimated tax for 2008, and he has thus satisfied his burden of production. *See Wheeler*, 127 T.C. at 212. Therefore, we hold that petitioner is liable for the section 6654 addition to tax for 2008 as determined by respondent.

[*21] We conclude that petitioner's failure to pay, like his failure to file, was not due to reasonable cause.

Accordingly, respondent's penalties and additions to tax against petitioner are sustained.

We have considered all of the arguments that the parties made and to the extent they are not addressed herein, we find the arguments to be moot, irrelevant, or without merit.

To reflect the foregoing,

Decision will be entered under Rule 155.