

UNITED STATES TAX COURT

JOHN CHARLES FREDRICK GILLE,

Petitioner,

v.

Docket No. 7568-06S

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE GRANTED AND TO IMPOSE A PENALTY UNDER
I.R.C. § 6673**

RESPONDENT MOVES, pursuant to the provisions of Tax Court Rule 40, that this case be dismissed for failure to state a claim upon which relief can be granted, and that the Court find in its order that there are due from petitioner, deficiencies in income tax for the years and in the amount set forth in the notice of deficiency dated January 17, 2006, upon which notice this case is based.

RESPONDENT FURTHER MOVES that the court impose a penalty, in an appropriate amount, pursuant to I.R.C. § 6673, based upon the fact that petitioner has instituted these proceedings primarily for the purpose of delay and/or his position in the present case is frivolous or groundless.

IN SUPPORT THEREOF, respondent respectfully states:

1. On April 24, 2006, petitioner filed a petition with this court alleging a disagreement with the notice of deficiency. In the petition, he argued that no payments had

been made to or received by him "in the course of a 'trade or business' as defined by applicable laws."

2. On May 19, 2006, petitioner filed an amended petition in which he disagreed with respondent's determination that he is liable for deficiencies of \$1,530 and \$1,010 for tax years 2002 and 2003, respectively.

3. In the amended petition, petitioner alleged that no payments for the years at issue were "made to me or received by me in the course of a 'trade or business' as that term is defined by relevant laws."

4. In the notice of deficiency, respondent determined that during the taxable years 2002 and 2003, petitioner earned gross receipts and incurred expenses, which he improperly reported on the returns of a trust, which he claimed was an entity that he could use to operate his sign surveying business.

5. As detailed in Pages 10-11 of the notice of deficiency, petitioner filed form 1041 for the trust and attached to it Schedule C, on which he listed gross receipts and claimed deductions for automobile expenses, travel, meals and entertainment, insurance, and the adjustment to income for self-employment tax. Thus, petitioner does not dispute that he engaged in a trade or business for 2002 and 2003; rather, he is attempting to attribute the income and expenses to the trust.

6. Treas. Reg. § 301.7701-4 states that an arrangement will be treated as a trust if the purpose of the arrangement is to vest in trustees responsibility for beneficiaries who cannot share in the discharge of that responsibility, and are thus not associates in a joint enterprise for the conduct of business for profit. The regulation further states that "business trusts" created by the beneficiaries as a device to carry on a profit making business that would otherwise be classified as a business entity, such as a corporation or partnership, are not considered trusts under the I.R.C.

7. Courts also hold that "business trusts" are not valid trusts for income tax purposes. In Dahlstrom v. Commissioner, T.C. Memo 1991-264, the court explained:

Section 61(a) provides that gross income includes all income from whatever source derived, including compensation for services, fees, commissions, or gains derived from dealings in property. Fundamental to this principle is that income is taxable to the person who earns it. Lucas v. Earl, 281 U.S. 111 (1930). A taxpayer has a right to minimize his taxes or avoid them totally by any means which the law permits. Gregory v. Helvering, 293 U.S. 465, 469 (1935). However, where entities are created which have no real economic effect and which affect no cognizable economic relationships, the substance of a transaction involving those entities will control over its form. Zmuda v. Commissioner, 731 F.2d 1417, 1421 (9th Cir. 1984), affg. 79 T.C. 714 (1982); Markosian v. Commissioner, 73 T.C. 1235, 1241 (1980).

8. The Service disregarded the trust for income tax purposes and properly attributed the gross receipts and any substantiated expenses to petitioner, resulting in deficiencies due from petitioner of \$1,530 and \$1,010 for tax years 2002 and 2003, respectively, as detailed in the notice of deficiency.

9. In the amended petition, petitioner also alleged that in neither year did he have sufficient income to require him to file a tax return. However, when combining the income reported on Mr. Gille's individual returns with his business income (less expenses) reported on the trust's return, income that he claims is "not in the course of a trade or business," the resulting sum is sufficient for petitioner to incur income and self-employment tax liability for tax year 2002, and self-employment tax liability for tax year 2003, as reflected in the chart on page 6 of the notice of deficiency.

10. Tax Court Rule 34(b) provides in pertinent part that the petition in a deficiency action shall contain "[c]lear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency or liability. . . . Any issue not raised in the assignment of errors shall be deemed to be conceded."

11. Petitioner makes no factual claims of error in the petition but argues only law and legal conclusions therein.

12. No justiciable error has been alleged in the petition with respect to the Commissioner's determination set forth in the notice of deficiency, and no facts in support of any such error are apparent therein. The absence in the petition of specific justiciable allegations of error and of supporting facts permit the court to grant respondent's motion. Tax Court Rule 123(b). White v. Commissioner, T.C. Memo. 1981-609; Klein v. Commissioner, 45 T.C. 308 (1965); Goldsmith v. Commissioner, 31 T.C. 56 (1958).

13. The documents filed as the petition and amended petition do not comply with the rules of the court as to the form and content of a petition and fail to state a claim upon which relief can be granted.

14. Petitioner brought this action as a protest to paying income taxes. Such an action falls within the conduct proscribed by I.R.C. § 6673.

15. Respondent spoke with petitioner concerning this motion, and petitioner objects to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

DONALD L. KORB
Chief Counsel
Internal Revenue Service

Date: June 9, 2006

By: <signature>
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