

18-1133
No

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
FEB 25 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HENRY J. LANGER and
PATRICIA K. LANGER,

Petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Henry J. Langer and
Patricia K. Langer
7101 Antrim Court
Edina, MN 55439
(952) 941-6117

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Question(s) Presented For Review

Henry J. Langer and Patricia K. Langer (taxpayers) appealed the decision of the United States Tax Court which states “that the judgment of the tax court in this cause is affirmed in accordance with the opinion of this Court”.

1. Whether Respondent has proved by clear and convincing evidence that Henry J. Langer is liable for the fraud penalty for the years 2011, 2012, and 2013?
2. Whether Respondent has proved by clear and convincing evidence that Patricia K. Langer is liable for the fraud penalty for the years 2011, 2012, and 2013?

List of Parties

Randolph L. Hutter
Tax Division
Appellate Section
P.O. Box 504
Washington, D.C. 20044

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ORDERED AND DECIDED: That there are penalties due from petitioners for the taxable years 2011, 2012, and 2013, under the provisions of I.R.C. section 6663(a), in the amounts of \$27,446.25, \$20,539.50, and \$25,266.75, respectively.

APPENDIX B: (U.S. TAX Ct.).....	x
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Notice is hereby given that Henry Langer and Patricia Langer, petitioners in the above named case, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the decision of the United States Tax Court entered in the above-captioned proceeding on the 5th day of September, 2017.

APPENDIX C: (U.S. TAX Ct.).....	xi
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The United States Court of Appeals for the 8th Circuit and the parties are hereby notified that on

December 6, 2017 petitioners filed a Notice of Appeal from the decision of the Tax Court.

APPENDIX D: (U.S. Ct. of Appeals).....xiii

PER CURIAM: Henry and Patricia Langer appeal the tax court's decision, following a bench trial, upholding the Commissioner of Internal Revenue's determination that they were liable for fraud penalties for tax years 2011-2013.

APPENDIX E: (U.S. Ct. of Appeals).....xv

JUDGMENT: After consideration, it is hereby ordered and adjudged that the judgment of the tax court in this cause is affirmed in accordance with the opinion of this court.

APPENDIX F: (U.S. Ct. of Appeals).....xvii

ORDER denying the petition for the rehearing by the panel.

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CASES	PAGE NUMBER
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be granted to review the appeal below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix D to the petition.

JURISDICTION

The date on which the United States Court of Appeals decided our case was September 18, 2018.

A timely petition for rehearing by the panel was denied by the United States Court of Appeals on the following date: November 27, 2018, and the order denying rehearing by the panel appears at Appendix F.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

UNITED STATES TAX COURT
WASHINGTON DC 20217

HENRY LANGER & PATRICIA LANGER,

Petitioner(s),

v.

Docket No. 22719-15

COMMISSIONER OF INTERNAL REVENUE,

Respondent

DECISION

On May 30, 2017, the Court's Memorandum Findings of Fact and Opinion (**Henry Langer and Patricia Langer v. Commissioner**, T.C. Memo 2017-92) was filed. We stated at the end of the Opinion that a decision would be entered under Rule 155, Tax Court Rules of Practice and Procedure. On July 31, 2017, respondent filed his Computation for Entry of Decision. On July 31, 2017 the Court directed petitioners to file an objection or an alternative computation to respondent's computation by August 21, 2017. As of this date, no response has been received by or on behalf of petitioners.

Upon review of the record, we are satisfied that respondent's computation is consistent with our opinion. Accordingly, it is

ORDERED AND DECIDED that there are deficiencies in income tax due from petitioners for

the taxable years 2011, 2012, and 2013 in the amounts of \$36, 595.00, \$27,386.00, and \$33,689.00, respectively; and

That there are penalties due from petitioners for the taxable years 2011, 2012, and 2013, under the provisions of I.R.C. section 6663(a), in the amounts of \$27,446.25, \$20,539.50, and \$25,266.75, respectively.

**(Signed) Joseph W. Nega
Judge**

ENTERED: SEP 05 2017

UNITED STATES TAX COURT

Henry Langer and
Patricia Langer,

Petitioner(s)

Docket No. 22719-15

V.

Commissioner of Internal Revenue,
Respondent

NOTICE OF APPEAL

Notice is hereby given that Henry Langer and Patricia Langer, petitioners in the above named case, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the decision of the United States Tax Court entered in the above- captioned proceeding on the 5th day of September, 2017.

s/ Henry J. Langer

Henry J. Langer

7101 Antrim Court

Edina, MN 55439

s/ Patricia K. Langer

Patricia K. Langer

7101 Antrim Court

Edina, MN 554349

UNITED STATES TAX COURT

Washington, D.C. 20217

December 7, 2017

HENRY LANGER & PATRICIA LANGER

Petitioners

Docket No. 22719-15

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NOTICE OF FILING OF NOTICE OF APPEAL

The United States Court of Appeals for the 8th Circuit and the parties are hereby notified that on December 6, 2017 petitioners filed a Notice of Appeal from the decision of the Tax Court. A copy of that Notice of Appeal is herewith served upon you.

The parties are hereby notified that the papers constituting the record of the case in the United States Tax Court include any transcripts of proceedings. The record on appeal will be sent to the United States Court of Appeals on when we received the Court of Appeals docket number.

Counsel for the Commissioner of Internal Revenue are **GILBERT S. ROTHENBERG, CHIEF, APPELLATE SECTION, TAX DIVISION, UNITED STATES DEPARTMENT**

**OF JUSTICE. P. O. BOX 502, WASHINGTON, D.
C. 20044. UPON WHOM SERVICE OF
DOCUMENTS AND PAPERS IN
PROCEEDINGS IN THE COURT OF APPEALS
IS TO BE MADE, and William M. Paul, Acting
Chief Counsel, Internal Revenue Service.**

s/ Stephanie A. Servoss
(Signed) Stephanie A. Servoss
Clerk of the Court

Fee Paid: Yes XX No

SERVED DEC - 7 2017

United States Court of Appeals
for the Eighth Circuit

No. 17-3682

Henry J. Langer, Patricia K. Langer

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court

Submitted: September 13, 2018

Filed: September 18, 2018

[Unpublished]

Before KELLY, ERICKSON, and GRASZ, Circuit
Judges

PER CURIAM.

Henry and Patricia Langer appeal the tax court's¹ decision, following a bench trial, upholding the Commissioner of Internal Revenue's determination that they were liable for fraud penalties for tax years 2011-2013.

¹The Honorable Joseph W. Nega, United States Tax Court Judge.

**United States Court of Appeals
For The Eighth Circuit**

No. 17-3682

Henry J. Langer; Patricia K. Langer

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(022719-15)

JUDGMENT

Before KELLY, ERICKSON, and GRASZ, Circuit
Judges

This appeal from the United States Tax Court
was submitted on the record of the tax court and
briefs of the parties.

After consideration, it is hereby ordered and
adjudged that the judgment of the tax court in this

cause is affirmed in accordance with the opinion of this court.

September 18, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 17-3682

Henry J. Langer and Patricia K. Langer

Appellants

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(022719-15)

ORDER

The petition for rehearing by the panel is denied.

November 27, 2018

Order Entered in the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

STATEMENT OF THE CASE

1. On June 29, 2010, the Petitioners filed a complaint for the 2001 tax year with the Treasury Inspector General for Tax Administration (TIGTA).
2. The reaction by the Respondent to this complaint filed was to initiate action to “audit” 2011, 2012, and 2013 and in addition asserted the civil fraud penalty.
3. This case involved a redetermination of deficiencies and additions to tax under I.R.C. § 6663 of Petitioners Henry J. Langer and Patricia K. Langer for the taxable years 2011, 2012 and 2013.
4. Respondent bears the burden of proof on the issue of intentional evasion or fraudulent filing of tax returns and has failed to establish this element with any evidence, much less by clear and convincing evidence.
5. To sustain liability under I.R.C. § 6663, the burden is on Respondent to prove “fraud with the intent to evade tax” by clear and convincing evidence. I.R.C. § 7454(a); Mattingly v. U.S., 924 F.2d 785, 787 (8th Cir. 1991); Rechtzigel v. Commissioner, 703 F.2d 1063, 1064 n. 2 (8th Cir. 1983); Menefee v. United States, 77-1 U.S. Tax Cases (CCH) ¶ 9413, 1977 WL 1142, *8 (E.D.Mo. 1977).
6. Respondent carries the burden of proving by clear and convincing evidence that an understatement of tax on the return by Petitioner was done with fraudulent intent. Tax Court Rule 142.
7. Fraud is never presumed. Beaver v. Commissioner, 55 T.C. 85, 92 (1970).

8. Fraudulent intent must be proven to be present on each return for each of the years involved. Drieborg v. Commissioner, 225 F.2d 216 (6th Cir. 1955).
9. It is not enough that the Respondent make the court suspicious of Petitioners' actions; the Respondent must prove "the conscious purpose to defraud proscribed by the statute." U.S. v. Pechenik, 236 F.2d 844 (3rd Cir. 1956).
10. Such conscious purpose to defraud does not include negligence, carelessness, misunderstanding, or unintentional understatement of income. Id. See also Spies v. U.S., 317 U.S. 492 (1943) (holding that proof of fraud requires a showing of the willful commission of an act of misrepresentation or concealment, not merely the passive omission of a statutory duty).
11. Fraud must be determined separately for each year. Estate of Stein v. Commissioner, 25 T.C. 940, 959-963 (1956) aff'd sub nom. Levine v. Commissioner, 250 F.2d 798 (2nd Cir. 1958).
12. In order to prove fraud under 26 U.S.C. § 6663. Respondent must prove by clear and convincing evidence, that (1) an underpayment exists, (2) Petitioner acted with intent to evade taxes, (3) Petitioner knew that taxes were owed, and (4) Petitioner's conduct was intended to conceal, mislead, or otherwise prevent the collection of such taxes. Posnanski v. Commissioner, T.C. Memo 2001-26, (U.S. Tax Ct. 2001) (See also Parks v. Commissioner, 94 T.C. 654, 660-661, 1990 WL 48997 (1990)).
13. Since courts rarely encounter situations where intent to defraud can be proven with certainty, the

concept of “badges of fraud” has emerged to discern factors indicative of fraudulent intent. Spies v. U.S., 317 U.S. 492 (1943). These factors are: (1) substantial understating of income over a period of years, (2) deliberate maintenance of inadequate records, (3) giving implausible or inconsistent explanations of behavior, (4) concealment of income or assets, (5) failure to cooperate with tax authorities, (6) engaging in illegal activities, (7) dealing in cash, (8) providing incomplete or misleading information to petitioners’ tax preparer, ((9) lack of credibility of taxpayer’s testimony, (10) filing false returns, (11) failure to file tax returns, (12) engaging in a pattern of behavior which indicates an intent to mislead, (13) dishonesty in a business transaction. Bradford v. Commissioner, 796 F.2d 303, 307 (9th Cir. 1986).

14. No single factor is sufficient to establish fraud, and a combination of factors is only persuasive evidence of fraud. Petzold v. Commissioner, 922 T.C. 661, 699 (1989).

15. The existence of fraud must be determined from the entire record. DiLeo v. Commissioner, 96 T.C. 858, 874 (1991) aff’d. 959 F.2d 16 (2nd Cir. 1992).

16. Fraud is not proven when a court is left with only a suspicion of fraud, and even a strong suspicion is not sufficient to establish a taxpayer’s liability for the fraud penalty. Olinger v. Commissioner, 234 F.2d 823 (5th Cir. 1956), aff’d. in part and rev’d. in part on another ground. T.C. Memo. 1955-9 see also Green v. Commissioner, 66 T.C. 538, 550 (1976).

17. There is no fraud even if the record “reeks of suspicion.” Prekor v. Commissioner, T.C. Memo 1982 – 602 (U.S. Tax Ct. 1982).

18. The record contains no evidence that Petitioner, Patricia K. Langer, intended to evade tax.

19. Patricia K. Langer's diligence in maintaining and providing the records needed for preparing and filing her tax returns is persuasive evidence that she was attentive to her tax responsibilities.

20. Petitioner, Patricia K. Langer, did not commit any badges of fraud and Respondent failed to provide clear and convincing evidence that Patricia K. Langer had intent to fraudulently evade taxes.

21. Respondent has failed to present clear and convincing evidence that Petitioner, Henry J. Langer, had the requisite intent to evade taxes.

- a. Petitioner did not substantially understate his income.
- b. Petitioner did not deliberately maintain inaccurate records.
 - i. Evidence shows that Petitioner maintained extensive and accurate records of their income and expenses.
- c. Petitioner's explanation of his behavior was consistent and plausible.
- d. There was no concealment of income or assets.
 - i. **The income received from Herco LLC (\$4,533) and Western Land Services Inc. (\$5,310) was reported on Schedule C for the 2011 tax return.**
- e. Petitioner cooperated in the audit, providing records and meeting with the Revenue Agent.
- f. There was no illegal activity.

- g. Petitioner, Patricia K. Langer, received cash for piano teaching and the cash was noted in her records and reported.
 - i. 2011 \$6,739.00
 - ii. 2012 \$ 600.00
 - iii. 2013 \$1,020.02
- h. All information was available to Petitioner to prepare the returns.
- i. Petitioner testified without contradiction or impeachment.
- j. Petitioner timely filed their federal income tax returns.
- k. Petitioner made no attempt to mislead the agents.
- l. There is no dishonesty in any business transaction.

21. No badges of fraud are present in this case.

22. Respondent has not presented clear and convincing evidence that Petitioner, Henry J. Langer, had the requisite intent to fraudulently evade taxation.

23. Petitioner, Henry J. Langer, cooperated during the audit, provided the requested documentation, and met with the Revenue Agent numerous times.

24. Petitioner, Henry J. Langer, had no willful intent to evade taxes or commit fraud.

25. The record is replete with instances where the Revenue Agent supplanted her own judgment for what she considered to be a more "reasonable" amount of an expense that should be deducted.

26. The record also reflects complete "disallowance" of business expenses where the Revenue Agent did not accept the taxpayer's

categorization and explanation of the business purpose of items.

27. The Revenue Agent based her disallowances on her own opinion rather than on submitted receipts for expenses.

28. This case is very different from Quinn v. Commissioner, T.C. Memo 2012 – 178 (U.S. Tax Ct. 2013), in which the Court found a former IRS Tax Compliance Officer liable for the fraud penalty. There, then taxpayer altered and fabricated documents to support claimed deductions. Here the taxpayer provided all documents forming the basis for the claimed items.

Reasons For Granting The Petition

Respondent asserts that Petitioner, Henry J. Langer, deliberately maintained inaccurate records of his income. Evidence shows, however, that Petitioner, Henry J. Langer, maintained extensive and accurate records of his income and expenses.

Evidence shows that Petitioner, Henry J. Langer, provided records to the Revenue Agent.

Evidence also shows that Petitioner, Henry J. Langer, acted in good faith to file their income tax returns and to report their income and expenses on their income tax returns.

Respondent has not presented clear and convincing evidence that Petitioner, Henry J. Langer, had the requisite intent to fraudulently evade taxation.

Petitioner, Henry J. Langer, cooperated during the audit, provided the requested documentation, and met with the Revenue Agent numerous times.

Petitioner, Henry J. Langer, had no willful intent to evade taxes or commit fraud.

Petitioner, Patricia K. Langer, did not commit any badges of fraud and Respondent failed to provide clear and convincing evidence that Patricia K. Langer had intent to fraudulently evade taxes.

There was no evidence submitted by Respondent that shows that either Petitioner, Henry J. Langer, or Petitioner, Patricia K. Langer, knowingly committed fraud.

This case is similar to Erickson v. Commissioner, T.C. Memo 2016 – 107 (U.S. Tax Ct. 2016), in which this Court declined to hold the taxpayers liable for fraud where the taxpayer, a tax

return preparer, did not substantiate his claimed deductions but where no badges of fraud were proved by the Respondent.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Henry J Langer

Henry J. Langer

s/ Patricia K. Langer

Patricia K. Langer

Date: February 25, 2019