Case No. ________________

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES PETRUNAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S APPLICATION TO 7TH CIRCUIT JUSTICE ELENA KAGAN FOR RELEASE ON BAIL PENDING THE DISPOSITION OF HIS MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO TITLE 28 UNITED STATES CODE SECTION 2255

Seventh Circuit Case No.: 18-1873

District Court No.: 1:17-cv-04396
The Hon. William T. Lawrence
United States District Court Judge

Charles Petrunak, pro se
611 N. Capitol Avenue
Indianapolis, IN 46204

Comes Now the Petitioner, Charles Petrunak, pro se, and pursuant to the applicable rules of the Court allowing application for bail on habeas corpus to a Circuit Justice hereby moves the Court to release him on his own recognizance pending disposition, by the United States District Court for the Northern District of Indiana, of his now pending Motion to Vacate, Set Aside or Correct Sentence pursuant to Title 28 U.S.C. §2255.

Background

Beginning in the mid-1990s, the Petitioner was a state and federally licensed pyrotechnician who operated Abyss Special FX, Inc., and who had preformed countless indoor and outdoor fireworks displays in Indiana and Ohio. Abyss's client list included elected officials, the producers of Disney on Ice, local governments and private individuals, and all of Abyss' performances went off without a hitch, at least on the Petitioner's part.

As a part of his regulatory compliance efforts in 1998, the Petitioner met with Inspector Manuel Vicario of the Bureau of Alcohol, Tobacco and Firearms (hereinafter "ATF"), who inspected and approved the Petitioner's storage magazine.

On September 1, 2001, the Petitioner was scheduled to perform a show in Parma, Ohio, at the request of William Mason - the duly elected Cuyahoga County Prosecuting Attorney from 2000 until 2012 - for the benefit of the American Civil Liberties Union.

Petitioner collected from distributors all of the explosive fireworks necessary to perform the show, and transported it safely, and in a manner consistent with the law, to Parma on August 31, 2001.

Upon arrival, Petitioner learned that Mr. Mason had been unable to secure the funding necessary to pay for Abyss' intended display, effectively canceling the production at the 11th hour, and leaving the Petitioner both nearly illiquid and with a truck load of explosives which he could neither return nor lawfully dispose of.

In an untenable fiscal and legal position, the Petitioner reached out to a representative of the State of Ohio Fire Marshal's office - Dave Schroeder - who was unavailable (scheduled out of the office until September 11, 2011) and, despite an extended attempt to do so, Petitioner failed to receive any guidance from any other Fire Marshal staffer he was able to reach on the phone.

Unable to find guidance or help from the State of Ohio, Petitioner Petrunak then reached out to the ATF and spoke with Inspector Jill Krofta (See Attachment 'A' Declaration of Charles Petrunak, and Attachment 'B', handwritten notes compiled by Jill Krofta[1]).

Mrs. Krofta, was unable to offer any suggestions and, as her notes - obtained by the Petitioner - indicate, she somewhat glibly determined that the problem the Petitioner had with excess explosive fireworks which he had no means to store, and no means to dispose of, were not the government's problem,

1 All attachment references are to attachments to the §2255 motion pending below, which pleading is being filed contemporaneously with this motion as the Petitioner's Appendix.

and were certainly not a concern for the ATF. (Attachment 'B')

On September 11, 2001, foreign terrorists pilots seized control of four commercial jetliners, flying them one each into the twin towers of the World Trade Center, the Pentagon and the Pennsylvania landscape. These attacks, now referred to as the 9/11 attacks, shook the nation, and the world, and drove the United States Government into several sound, and several knee-jerk, responses.

As a part of the knee-jerk response to the 9/11 attacks, the ATF, like many governmental agencies, cast about for work that would reassure the public by making it look like the ATF was "doing something". To this end, Inspectors Krofta and Vicario elected to conduct what they later alleged was a "mandatory inspection" of Abyss' (Trial Record, 36-37).

Inspector Krofta found at Abyss' facility exactly what it was that she knew, from her earlier conversations with the Petitioner, she would find, explosive fireworks that the Petitioner was not at the time authorized to store.

Krofta filed an internal (within the ATF) "violation report" charging Petitioner charging the Petitioner with various violations of federal regulation, the most serious of which - the only truly meaningful charge - being the improper storage of explosive fireworks. (See, T.R. at 38, and Attachment 'C', Administrative Law Judge's Determinations)

The Petitioner challenged these violations during a hearing before an ATF administrative law judge conducted in June of 2003 (T.R. 39-40, 258-260).

Both Krofta and Vicario testified during that hearing. (T.R. 276) Both Krofta and Vicario were present for each other's testimony. (Attachment 'A')

Krofta, whose testimony was heavily relied on by the ALJ in his findings, testified that she had never met the Petitioner prior to the post-9/11 inspection of his facility, and disavowed any prior knowledge of the Petitioner's storage issues. (Attachment 'C')

Openly stating that a fellow ATF employee - Agent Krofta - would not attempt to deceive him, but that the Petitioner would - the ALJ found each of the violations against the Petitioner and, in a blistering order stripped the Petitioner of his license. (Attachment 'C', T.R. 258)

Lacking a license, Petitioner was no longer able to lawfully operate Abyss and it ultimately went out of business. (T.R. 258)

The shuttering of Abyss' operations caused the Petitioner significant personal and corporate financial losses, losses whose first proximate cause was the sudden "mandatory" inspection and the subsequent selective amnesia suffered by Inspectors Krofta and Vicario. (T.R. 260, 267)

The Petitioner, unable to afford an accountant or tax lawyer's assistance, and uncertain as to the proper method of calculating his personal and business taxes in light of the type and manner of his losses, reached out to the Internal Revenue Service in April in 2006.

Between April 2006 and April 2009, the Petitioner wrote more than a dozen letters to the IRS, and spoke with its representatives by phone no less than 30 times, seeking counsel and guidance in addressing his losses properly in his tax filings. (T.R. 198-199, 263-265).

Ultimately, Petitioner Petrunak was referred to IRS Publication 535 in one of the IRS's latter letters. (T.R. 165, 263)(The salient parts of which publication are attached hereto as Attachment 'D').

Being lay-at-law, the Petitioner determined - possibly correctly - that he was required to deduct his loss - which he determined to be approximately $500,000 - of business from his taxes, and to attribute that loss to it's first proximate cause, the blatant perjury of Inspectors Krofta and Vicario. He did so by preparing and delivering to them IRS Form 1099, which forms apportioned the $500,000 equally between the inspectors (T.R. 263, 269 and 274), and by which be believed he was assigning his personal and business losses in accordance with law. (T.R. 275-276)

In the early part of 2009, the Petitioner then attached the two 1099s to an IRS Form 1096, executed the 1096, and sent them to the IRS. (T.R. 181)

Petitioner Petrunak then prepared and executed an IRS Form 1120-S, the corporate tax return for Abyss Special FX, and transmitted it to the IRS, claiming a deduction for the aforesaid $500,000 (T.R. 128 and 187) which was then passed through to this personal tax return, which he filed using an IRS Form 1040, executing it and transmitting it to the IRS.

By 2010, the IRS noticed the discrepancy between Jill Krofta's filed tax return and the loss caused income reported by Abyss, and instituted an audit of her tax filings. (T.R. 45).

Attorneys for the ATF intervened and the matter was resolved in her favor. (T.R. 48 - 50).

An IRS investigation of Petitioner Petrunak ensued (T.R. 83), in which he openly participated, cooperating by submitting to interviews, completing questionnaires, producing his inexhaustible supply of correspondence with the agency, and providing countless other documents. (T.R. 83, 87, 167-169 and 289)

During an interview with the IRS, the Petitioner was told outright that he was being attacked in retaliation for his filings, "You fuck with us [federal employees, such as the agent and Krofta/Vicario] and we fuck with you." (Attachment 'A')

On May 14, 2014, the Petitioner was indicted by a federal grand jury in this district for three counts of making and subscribing false and fraudulent IRS forms in violation of Title 26 U.S.C. xx7206(1) (Docket Entry 1), one count each for the IRS Forms 1096, 1120-S and 1040 forms mentioned above.

The Petitioner made his initial appearance before the District Court on May 20, 2014, and was released on his own recognizance. (D.E. 14).

There was one material pre-trial motion filed by the parties: A Motion in Limine by the government, seeking to exclude corporate minutes Petitioner presented in reciprocal discovery. (D.E. 36) The District Court granted this motion. (D.E. 40)

Petitioner proceeded to jury trial on December 14, 2015, approximately 204 days after his initial appearance before the lower Court

As a part of trial preparation, the Petitioner informed defense counsel McShane of inspectors Krofta and Vicario's earlier perjury. (Attachment 'A')

Only a limited number of witnesses testified during the Petitioner's trial. Five, to be precise: Krofta, Vicario, IRS Agents Hall and Roney, and the Petitioner himself.

The trial theory presented by the government was simple: The Petitioner is a raging - yet diabolical - maniac who cannot let go of the losses he undertook at the hands of Krofta and Vicario and who plotted to benefit financially by making retaliatory IRS filings, apparently for the purpose of causing the Krofta and Vicario distress.

Mrs. Krofta testified that she first encountered the Petitioner at the time of her late September 2001 "mandatory" inspection of Abyss' facility.

Petitioner asked counsel to raise the question of Krofta's documented perjury, and to present her handwritten letter as a means to impeachment. (Attachment 'A') Counsel refused because doing so could "ruin her career". Id.

Krofta also testified about her ordeal with the IRS and indicated that it was resolved without injury.

Vicario offered essentially the same misleading testimony (given that he had first met the Petitioner in 1998, not 2001, and that the inspection was not, after all, mandated by Washington), minus, of course, the part about being audited, since he was not.

IRS Agent Roney testified extensively, identifying the Petitioner, discussing the information contained in the Petitioner's tax records and generally offering legal opinions about tax procedure without the expert witness status needed to properly do so.

The Petitioner offered testimony regarding his filing rationale and the earlier perjury of Krofta and Vicarrio.

Closing arguments ensured, during which the government again painted the Petitioner as a revenge seeking lunatic who, it argued, understood the law perfectly well, and was motivated only out of revenge and pecuniary interest. (T.R. 347-360, 376-382)

On December 15, 2015, the jury returned guilty verdicts on all three counts. (T.R. 383-384)

The District Court continued the Petitioner on bond and ordered the preparation of a presentence investigation report (T.R. 386).

Petitioner appeared for sentencing on the 23rd of September 2016 and the Court imposed a period of 24 months incarceration, to be followed by 1 year of supervised release. (D.E. 81, Judgment in a Criminal Case, entered into the docket on September 30, 2016, pages 2 and 8, respectively)

The Court also ordered restitution be paid to the government in the amount of $2,512.00 the amount of money Agent Roney testified the Petitioner received as a refund. Id.

The Petitioner entered a timely notice of appeal on October 7, 2016, and appealed raising two issues: 1. Whether the District Court should have granted the government's Motion In Limine? and, 2. When the District Court erred in its calculation of tax loss?

On May 4, 2017, this Court denied the Petitioner's appeal on both grounds in Case No. 16-3631.

Petitioner's Motion to Vacate, Set Aside or Correct Sentence was filed in a timely fashion in November of 2017.

Petitioner was enlarged by the District Court on his own recognizance for the duration of the prosecution of the case against him, and after being sentenced to a term of imprisonment, was allowed by the Court to self-surrender to the custody of the United States Department of Justice, Federal Bureau of Prisons' minimum security satellite prison camp located in Ashland, Kentucky, where he routinely moves freely among FCI/SPC Ashland facilities, fence free, on foot, roaming miles a day, effectively unsupervised in his movements, such is the trust of the Department of Justice that Petitioner is not a flight risk or threat to the community.

On December 18, 2017, the Petitioner filed a motion for release on bond pending the disposition of his §2255 motion.

On December 21, 2017, the District Court, in a boilerplate cut & paste order, summarily denied Petitioner's request for release.

The District Court's denial alleges that the Petitioner failed to raise a substantial issue, and that his bond motion provides no exceptional circumstance warranting release on bail at this time. It specifically notes that Petitioner has under a year remaining to serve on his sentence, but then proceeds to dismiss this time period as not being brief enough to merit release under the precedent set out below.

The Petitioner then filed a motion with the United States Court of Appeals For The 7th Circuit, seeking enlargement on bail pursuant to Fed.R.App.P. 23, beginning what can best be called a comedy of errors.

Petitioner mailed his motion to the Court of Appeals, which was received on the 23rd of January, 2018 (Appendix II, Attachment 'A').

The appellate court apparently transmitted a copy to the district court, which promptly sent the Petitioner a letter on the 23rd chastising him for not filing a not-required for motions practice docketing statement (Appendix II, Attachment 'B').

The same day, the district court notified the Petitioner, again by letter, that his "notice of appeal" had been filed (Petitioner had file no such notice) and the record of the case was to be transmitted to the 7th Circuit (Appendix II, Attachment 'C').

On the 23rd of January the 7th Circuit sent the Petitioner a separate demand for the non-required docketing statement, as well as informing him that he hadn't paid the appropriate appellate filing fee in the district court (a fill-in-the-blank informa pauperis motion was included for the Petitioner's convenience) (Appendix II, Attachment 'D').

On January 25th, the 7th Circuit ordered the Petitioner to dispense with briefing practice and only file a motion for bond under Rule 23 no later than February 7, 2018 (which, it should be pointed out, is what he had filed at all in the first place...the only thing he had done in the 7th Circuit so far)(Appendix II, Attachment 'E').

On January 26th, the 7th Circuit entered an order vacating its order of the 25th as being clearly erroneous (Appendix II, Attachment 'F') and then entered a separate order affirming the district court's denial of Petitioner's bond motion because, it felt, Petitioner had not met the precedential prerequisites (Appendix

II, Attachment 'G'). In the clear rush to find ways to deny the Petitioner's request, the appellate court apparently missed the fact that the action before it was an original application for admittance to bail to the Circuit under Rule 23, not an appeal, per se.

Petitioner now makes application to Justice Kagan in her capacity as Circuit Justice.

Release Standards for Bond on §2255 Motions

Requests for release on habeas bond are generally governed by the provisions of Rule 23(b) of the Federal Rules of Appellate Procedure and the equitable standard enunciated in *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985). Rule 23(b) provides:

> "(b) Detention or Release Pending Review of Decision Not to Release. While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court or a judge or justice of either court, may order that the prisoner be:
>
> (1) detained in the custody from which release is sought;
>
> (2) detained in other appropriate custody; or
>
> (3) released on personal recognizance, with or without surety.

"Federal district judges have the inherent power to admit applicants to bail pending the decision of their cases, but [that power is] a power to be exercised very sparingly." *Cherek*, 767 F.2d at 337.

In *Cherek*, Judge Posner explained the basis for the limited use of this power, finding that a Petitioner whose conviction has been affirmed on appeal is unlikely to have been convicted unjustly; hence the case for bail pending resolution of his post-conviction proceeding is even weaker than the case for bail pending appeal. *Id*. Further, the statute governing bail pending direct appeal from a federal conviction, 18 U.S.C. §3143(b), provides a more favorable standard than that to which a petitioner seeking post conviction release on bail is entitled to. *Id* at 338. Thus, if a petitioner cannot bring himself within the terms of §3143(b), he is not entitled to release pending appeal of his post conviction motion. *Swanson v. Untited States*, 2011 U.S. Dist. LEXIS 101517, 1:08-CV-1180-SEB-DKL (S.D.IN. Sept. 8, 2011).

Title 18 U.S.C. §3143(b)(1) provides, in pertinent part:

> "[T]he judicial officer shall order a person who has been found guilty of an offense and sentenced to a term of imprisonment ... detained, unless the judicial officer finds -
>
> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released ...
>
> (B) that the appeal is not taken for purposes of delay and raises a substantial question of law or fact likely to result in
>
> (i) reversal,
>
> (ii) an order for new trial,
>
> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term of imprisonment less than the total time already served plus the expected duration of the appeal process."

In addition to meeting these requirements, as mandated by *Cherek*, a person seeking enlargement on bail pending the Court's determination of the merits of his §2255 motion must establish the existence of a "some special circumstance making [the motion for bail] exceptional and deserving of special treatment in the interest of justice." *Swanson, supra*, 2011 U.S. Dist. LEXIS 101517, quoting *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990), further quoting *Aronson v. May*, 85 S.Ct. 3, 5, 13 L.Ed.2d 6 (1964)(Douglas, J. in chambers)).

Petitioner will address these requirements in turn.

Flight Risk and Threat to the Community

In the instant case, Petitioner Petrunak was enlarged on bail pending trial pursuant to title 18 U.S.C. §3141.

After being found guilty by the jury, Petitioner was continued on bail pending sentencing pursuant to 18 U.S.C. §3143(a) and further allowed to self-surrender to the prison camp he was subsequently designated to.

In order to be permitted to remain in the community pending sentencing and for self-surrender, the District Court, pursuant to §3141(a) was required to make findings identical to those appearing in §3143(b)(1). That is to say that the Court was required to find by clear and convincing evidence that the Petitioner was neither a flight risk nor a threat to the community.

That determination, without anything intervening to disturb it, has become the law of the case.

Though Petitioner requires no further evidence to establish these two requirements of §3143(b)(1), he would note that he performed the reporting requirements established by the Court and the Bureau of Prisons flawlessly.

Petitioner has further been assigned to a Federal Prison Camp (satellite camp, associated with the Federal Correctional Institution located in Ashland, Kentucky), which assignment effectively represents a determination by the Department of Justice that Petitioner is neither a flight risk nor a threat to the community. In fact, the Petitioner daily treks a cumulative mile or more on foot around the facility's unsecured grounds, walking to the FCI Ashland administration building, among other places, unaccompanied and unsupervised.

Petitioner submits that he has established by clear and convincing evidence that he is not a flight risk, and that he poses no threat to the community.

Substantial Question Likely to Result in Petitioner's Release

The Petitioner has presented three questions which, taken individually or together, present "substantial questions" as required by §3143(b)(1). He challenges the failure of counsel to move to have his indictment dismissed after the Speedy Trial Act was violated, he challenges the failure of counsel to properly challenge the government's case against him, and he challenges the government's failure to present exculpatory evidence in its possession, thereby violating the Supreme Court's mandate in *Brady v. Maryland* and the requirements of the *Jencks Act*.

Petitioner incorporates his §2255 issues herein by reference and submits that they all present substantial questions. The District Court's order denying Petitioner release states that the issues are not substantial, but fails to identify any flaw or reason that they are not. Judge Lawrence simply dismisses them in a sweeping statement saying, "[Petitioner] has not shown a substantial probability of success on the merits of his claims." *Order Denying Release,* December 21, 2017, D.E. 5.

The 7th Circuit defines a "substantial question" as a "close" question, one that could "very well be decided either way". See *United States v. Eaken,* 995 F.2d 740, 741 (1993); *United States v. Greenberg*, 773 F.2d 340, 341 (7th Cir. 1985); See also, *United States v. Lane,* 281 F.3d 638, 639 (7th Cir. 2002)(Rovner, J. dissenting).

A court finding a "substantial question" is *not* making a determination on the merits of a Petitioner's case, *United States v. Hattermann,* 853 F.2d 555, 557 (7th Cir. 1988), and the court is not required to predict the outcome of the merits determination, or even to believe in the issue at all, for that matter. *Hattermann* at fn 6. This seems to conflict with the District Court's position that the Petitioner must prove that he is likely to *prevail* in order to secure release on bond.

Petitioner has presented substantial questions which, if resolved in his favor, would result in his immediate release, either on pretrial status or through outright dismissal of the indictment charging him. This is what precedent requires of him. This is important not only because it means he meets the third requirement of §3143(b)(1), but also because it implicates the last requirement for granting bail to him as a §2255 movant: the existence of an exceptional circumstance meriting release.

Exceptional Circumstances

As noted above, in order for the Court to enlarge the Petitioner on bail at this time, it must find that some "exceptional circumstance" exists to require his release as being in the interests of justice. *Aronson, supra,* 85 S.Ct. at 5.

There is substantial precedent supporting the contention that an exceptional circumstance exists where the time required to adjudicate the questions presented is expected to exceed the time remaining on a Petitioner's sentence, as the case in the instant matter.

Petitioner Petrunak has a statutory good conduct release date of July 31, 2018[2]. Given the District Court's busy docket[3], the time needed to properly adjudicate complex challenges such as the Petitioner raises in his §2255 motion, the need for an evidentiary hearing, the fact that Petitioner now has proof positive of additionally and illegally withheld *Brady* and *Jencks Act* material[4] and so will soon be transmitting a discovery request for document inspection, it is unlikely, bordering on impossible, that this case will be disposed of prior to the completion of Petitioner's term of incarceration.

That a "denial of bail could leave a petitioner without remedy" given how

2 See the attached Bureau of Prisons Sentence Computation sheet for Charles Petrunak. Exhibit "A" to this pleading.

3 Please see the attached Exhibit "B", a review of 20 recent §2255 motions before Judge Lawrence, noting the time needed to dispose of each.

4 Item 'B' in Petitioner's Appendix to the Memorandum in Support for his §2255 motion is a handwritten record of a conversation between Petitioner and ATF Investigator Jill Krofta, a holographic record in Krofta's own handwriting and presented to the Defense as a part of discovery. Petitioner now understands that this single disclosed page to be just the first page of that handwritten record and that a second page, and possibly a third, which have been excluded from disclosure, would have provided support for both the Petitioner's trial defense *and*his earlier ATF administrative hearing case.

circumstance under the habeas bail standard. See, e.g. *Marino v. Vasquez,* 812 F.2d 499, 509 (9th Cir. 1987)(bail pending appeal on habeas case where appeal process can exhaust time remaining on petitioner's sentence, leaving him without any meaningful recourse)(*also, Hilton v. Braunskill,* 481 U.S. 770, 777-78 (1987)(the less time remaining on a prisoner's sentence, the greater his interest in his release pending further adjudication).

In denying the Petitioner release, the District Court asserted that the under 1 year that Petitioner has left to serve on his sentence somehow doesn't meet this exceptional circumstance. This seems disingenuous given the amount of time §2255 motions typically take to resolve.

A review of the most recent §2255 motions before Judge Lawrence, Petitioner's judge, gives lie to any reasonable likelihood that Petitioner will see his case resolved prior to the end of his sentence.

Attached to this pleading as Exhibit "B" is a list of the twenty (20) most recent habeas corpus cases Petitioner was able to identify as being resolved by Judge Lawrence. The average time to resolution for Judge Lawrence is 15.52 months, with the shortest time (7 months) greatly exceeding the less than 4 months Petitioner has remaining to serve.

Petitioner submits that, at this point, with so few weeks left to complete his sentence, he has a significant interest in release pending the §2255 motion's disposition and that interest, coupled with his meeting all of the requirements of 18 U.S.C. §3143(b)(1), establishes a solid foundation for enlarging him on his own recognizance at this time, and requests that the Court do so.

The Petitioner would call three final matters to the Court's attention.

First, in the District Court's denial of Petitioner's bond motion, Judge Lawrence relied heavily on *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992), explaining that under the rational in that case, "[a]lthough Mr. Petrunak is scheduled to be released within the next year, the Court does not view this as sufficiently soon enough to warrant his release pending the resolution of his habeas petition."

Petitioner submits that the District Court's reliance on *Landano* is misplaced. Petitioner is a federal defendant convicted of filing improper tax forms with the IRS and serving a very brief sentence.

Landano, on the other hand, was convicted in 1977 in New Jersey state court on a charge of *felony murder of a police officer during the course of the robbery* of a check-cashing establishment and Mr. Landano received what is effectively a life sentence for this extremely violent offense. The two defendants could not be more distinct from each other.

Additionally, the 3rd Circuit's main reason for denying Landano bail was a matter if comity. Landano was asking the federal court to grant him release on bail while his habeas petition was still pending in the state judicial system. The 3rd Circuit explained that

> "When the State has not completed its review of the petitioner's claims, it is inappropriate for a federal court to reach the merits of petitioner's case in ruling on a motion for bail.
>
> The Supreme Court has emphasized that even in cases where a clear violation of the petitioner's rights was found, "considerations of federal-state comity would still inhere, and it would be unseemly in our dual system of government for the federal courts to upset a state-

> court conviction without affording the state courts the opportunity to correct a constitutional violation." Duckworth v. Serrano, 454 U.S. 1, 4, 102 S.Ct. 18, 20, 70 L.Ed.2d 1 (1981) (per curiam); see also Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir.) (as a matter of comity, exhaustion "`should be strictly adhered to because it expresses respect for our dual judicial system'" (quoting Landano, 897 F.2d at 668)), cert. denied, ___ U.S. ___, 112 S.Ct. 2283, 119 L.Ed.2d 208 (1992). As we noted in Lucas, "We doubt that it is appropriate to grant bail prior to ruling on a state habeas petition solely on the ground that there is a high likelihood of success on the merits...." 790 F.2d at 367. *Landano*, 970 2d at 1241-42."

While the District Court's reliance on *Landano* to deny Petitioner's request may have been misplaced, Petitioner submits that this Court may find guidance in its pages to grant Petitioner release.

The *Landano* court's consideration included and specifically relied upon *Boyer v. City of Orlando,* 402 F.2d 966 (5th Cir.1968), a case that illustrates the situation where bail has been awarded because the sentence was so short that if bail were denied and the habeas petition were eventually granted, the defendant would already have served the sentence. In that case, the Fifth Circuit directed the district court to release Boyer, who had been sentenced to 120 days in prison, on bail while he exhausted his constitutional claim. The court stated that it was obliged to take extraordinary action to make Boyer's exhaustion in the courts truly effective, or his sentence would long have been served. *Landano, supra,* 970 F.2d at 1240-41.

The last point the Petitioner would make about the District Court's decision denying him release at this time is that there is, apparently, something missing, that perhaps in the holiday rush a significant cut & paste error was made.

On page 2 of 3 of the denial, the Judge Lawrence cites a continuing reference, "*Rado*, 699 F. Supp. at 26", without ever having provided an initial primary, reference to *Rado*.

Petitioner *thinks* that this is a cut and paste error, the court taking advantage of a boilerplate denial stored somewhere in its vast database of earlier decisions[5].

The other possibility, that there is some missing detail and precedent, inadvertently excised from the final order, that the District Court had intended be included, is not beyond the realm of possibility.

Either way, the District Court's order is somewhat incomplete and, the Petitioner submits, as he has clearly met each of the criteria for enlargement on bail[6], the decision denying it by the 7th Circuit should be overruled, the Petitioner enlarged on bail by this Honorable Court.

In the alternate, Petitioner prays that the Court will remand with instructions to the Court of Appeals to provide a more detailed explanation, delineating the reasons for denial, so that they may be more completely vetted by this Court.

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5 An idea that finds support in the lack of specificity the denial has, offering no explanation as to why Petitioner's grounds for relief provide an insufficient basis for his release, simply making a broad statement that they don't, an unfortunate deficiency existing in the appellate panel's denial as well.

6 An unfortunate emerging exceptional circumstance which did not exist in its present form at the time of the initial filings in the district and appeals courts, but which the Petitioner hopes the Court will exercise its discretion to consider is the impending death of Petitioner's father, Matthew Petrunak who is expected to expire at any time now (see the letter from Dr. Tamara Hoffman, DO, who is responsible for the Petitioner's father's end of life care, last page of Appendix II) Petitioner submits that this additional circumstance,by itself, or taken together with the others presented herein, constitutes compelling rationale for Petitioner's enlargement at this time.

Conclusion

Wherefore, Petitioner prays that, for the foregoing reasons, the Court will enlarge him on bail pending the outcome of his §2255 motion, or that it will, in the alternate, order the District Court to convene a prompt hearing to further consider the question of bail.

Respectfully submitted,

Charles Petrunak, pro se
611 N. Capitol Avenue
Indianapolis, IN 46204

Certificate of Service

I, Charles Petrunak, do hereby certify that a true copy of the foregoing motion for release was served this 5th day of April 2018, upon the attorney for the government by prepaid First Class United States Mail.

Charles Petrunak

Case No. ________________

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES PETRUNAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S APPENDIX

LOWER COURT ORIGINAL MATERIAL

Seventh Circuit Case No.: 18-1873

District Court No.: 1:17-cv-04396
The Hon. William T. Lawrence
United States District Court Judge

Charles Petrunak, pro se
611 N. Capitol Avenue
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No.: 1:14-CR-94-WLT-TAB-1

CHARLES V. PETRUNAK,

Defendant.

The Hon. William T. Lawrence
United States District Court Judge

______________________________/

DEFENDANT'S FIRST APPENDIX OF DOCUMENTS

Defendant Charles V. Petrunak herewith submits his Appendix of Documents to his contemporaneously filed *Motion to Vacate, Set Aside or Correct Sentence.*

Respectfully submitted,

Charles V. Petrunak, pro se
FPC Ashland #12343-028
Post Office Box 6000
Ashland, KY 41105

APPENDIX ATTACHMENT 'A'

SWORN DECLARATION OF CHARLES V. PETRUNAK

SWORN DECLARATION OF CHARLES V. PETRUNAK
November, 1, 2017

I, Charles V. Petrunak, under the penalty of perjury and consistent with the provisions of Title 28 United States Code Section 1746, do hereby make the following true declaration:

1. I am the criminal defendant in United States v. Petrunak, Case No.: 1:14-CR-94-WLT-TAB-1
2. I have read through the factual statements presented throughout the attached 2255 motion; and,
3. That each of the aforementioned statements is true and accurate to the best of my knowledge and recollection and,
4. In addition to these statements, I would note the following:

   (a) That during my initial interview with the Internal Revenue Service, Agent Robertson made the clear and unambiguous statement, "You fuck with us, we fuck with you.";

   (b) The interview during which Agent Robertson said this was videotaped;

   (c) No copy of this video tape was presented to me as a part of the discovery in my criminal case; and,

   (d) No copy of any email or federal investigator official notes regarding the details of, or the progression of, my case was ever presented to me as part of the discovery in my criminal case, with the exception of Inspector Krofta's handwritten notes which are attached as a part of my §2255 pleadings.

5. During my criminal trial I testified:

   (a) about the circumstances leading up to the storage of fireworks at my place of business;

   (b) about my reasoning regarding the presentation of 1099's to the parties directly responsible for the loss of my fireworks licenses and business; and,

   (c) regarding the interviews I had with government officials involved in this criminal case.

6. I had unambiguously instructed my trial attorney to impeach Inspector Krofta regarding her perjury at my 2003 Administrative hearing before the ATF, and he declined to do so because of the potential negative impact on her career.

Date: November 1, 2017

Charles V. Petrunak
Declarant

APPENDIX ATTACHMENT 'B'

ATF INSPECTOR JILL KROFTA'S HANDWRITTEN NOTES

August 31 2001

Till I called him Back. See me! 3/31

Jerry -

Charles Petrunak (has expl. permit w/us) Jerry

Abyss Special FX

330-273-1221

pager 216-623-9415

This individual called + is mad because of the State Moratorium on storage of explosives in Ohio. Its costing his business because everytime he schedules a show and it gets cancelled he has to pay $650 for the explosives to be taken back to his supplier in Michigan. He thinks the fireworks in Parma this weekend will be cancelled + this is the second show that is costing him.

He called Dept of Commerce and they told him to call us.

He said we are discriminating. I told him we cannot enforce State laws.

He was complaining about Sayl, Prism + Rivera - how they have a monopoly. Prism + Rivera created companies fictitious out-of-State?

I told him I would call him Tuesday if no one called him back.

I mentioned to him - why doesn't he ~~add~~ charge ~~money~~ more to cover himself in case of cancellatio

I told him the only thing he could do is pursue it in court + he insisted we are restricting th

APPENDIX ATTACHMENT 'C'

2003 ATF ADMINISTRATIVE LAW JUDGE'S FINDINGS

FILE NO. CC:DT-70460

UNITED STATES OF AMERICA
Before the
DEPARTMENT OF JUSTICE
BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES
Washington, D.C.

In the Matter of ABYSS SPECIAL FX, INC.	: : : : :	INITIAL DECISION August 25, 2003

APPEARANCES: Brenda Hutson for the Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives

Daniel Walker for Abyss Special FX, Inc.

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

Background

The Office of Personnel Management designated me to hear this proceeding pursuant to a request from the Bureau of Alcohol, Tobacco, Firearms, and Explosives. ("A.T.F.").[1] I held a hearing in Cleveland, Ohio, on June 16 and 17, 2003. The A.T.F. presented testimony from five witnesses and introduced twenty-six exhibits. Abyss Special FX, Inc. ("Abyss") presented testimony from Charles V. Petrunak and introduced four exhibits.[2] The parties filed consecutive briefs. I received the final brief on August 22, 2003.

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[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, enacted November 25, 2002, includes the Safe Explosives Act ("SEA") at Title XI, Subtitle C. The statute transferred the regulatory responsibilities of the Department of the Treasury's Bureau of Alcohol, Tobacco, and Firearms to the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives. 6 U.S.C. § 531. The SEA amended the federal explosives laws in 18 U.S.C. Chapter 40. On January 24, 2003, the regulations in 27 C.F.R. 55 were transferred from Chapter 1 to Chapter 2 of Title 27 and redesignated as part 555. Implementation of the Safe Explosives Act, 68 Fed. Reg. 13768 (Mar. 20, 2003) (codified at 27 C.F.R. pt. 555)

[2] "(Tr.__.)" refers to the transcript of the hearing on the date specified. I will refer to the A.T.F.'s exhibits and Abyss's exhibits as "(A.T.F. Ex.__.)" and "(Abyss Ex.__.)," respectively.

Issue

A.T.F. is authorized to revoke a license or permit based on a finding that the holder is not likely to comply with laws or regulations, or is otherwise not eligible to continue operations authorized under the license. 27 C.F.R. § 555.74. The issue is whether A.T.F. showed by a preponderance of the evidence that Abyss is not likely to comply with the explosives laws and/or regulations and thus A.T.F. acted lawfully when it revoked Abyss's License Number 4-BL-19-3B-12513, and Permit Number 4-OH-103-33-3B-12683. See 27 C.F.R. §§ 71.81, 555.74.

Findings of Fact and Conclusions of Law

Federal, state, and local governments regulate explosives.[3] Under federal law explosive materials are "explosives, blasting agents, and detonators." 18 U.S.C. § 841(c); see also 27 C.F.R. § 555.11. Federal regulations define fireworks as "[a]ny composition or device designed to produce a visible or an audible effect by combustion, deflagration, or detonation, and which meets the definition of 'consumer fireworks' or 'display fireworks' as defined by this section." 27 C.F.R § 555.11. Display fireworks are defined as:

> Large fireworks designed primarily to produce visible or audible effects by combustion, deflagration, or detonation. This term includes, but is not limited to, salutes containing more than 2 grains (130 mg) of explosives materials, aerial shells containing more than 40 grams of pyrotechnic compositions, and other display pieces which exceed the limits of explosive materials for classification as 'consumer fireworks.'

27 C.F.R § 555.11. Fireworks are considered to be explosives under federal law. (June 16, 2003, Tr. 44.) A federal license or permit is required to purchase Type 1.3(G) fireworks, a powerful and dangerous type of fireworks that are considered hazardous.[4] (June 16, 2003, Tr. 42-43; June 17, 2003, Tr. 80, 114.)

Consumer fireworks are "[a]ny small firework device designed to produce visible effects by combustion and which must comply with the construction chemical

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[3] Federal law "affects all persons who import, manufacture, deal in, purchase, use, store or possess explosive materials. It also affects those who ship, transport, or receive explosive materials in interstate or foreign commerce." Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Federal Explosives Law and Regulations, 54 (2000). I took official notice of this publication. (June 17, 2003, Tr. 163.)

[4] Type 1.3(G) fireworks are sometimes called display fireworks. In Ohio, an exhibitor must have a permit issued for a firework exhibition before he can possess and use Type 1.3(G) fireworks. (A.T.F. Ex. II.)

composition, and labeling regulations of the U.S. Consumer Product Safety Commission." 27 C.F.R § 555.11. A federal license is not required to purchase 1.4(G) fireworks, referred to as consumer fireworks, which are less dangerous than the more powerful Type 1.3(G) fireworks. (June 16, 2003, Tr. 42-43.)

Compliance with the federal explosive laws and regulations does not exempt a person from compliance with explosive laws and regulations promulgated by states and local jurisdictions.[5] 18 U.S.C. § 848. The State of Ohio regulates fifty-two licensed fireworks wholesalers and manufacturers, 528 firework exhibitors, like Abyss, who put on firework displays, 1,322 assistants, and approximately twenty-seven out-of-state shippers. (June 17, 2003, Tr. 75; A.T.F. Ex. II.) The Ohio legislature has not permitted grants of new permits to store fireworks since at least 1997. (June 16, 2003, Tr. 159-60.) "The only permanent storage that is allowed is limited to manufacturers and wholesalers," and no new licenses can be issued until December 1, 2006. (June 17, 2003, Tr. 135; A.T.F. Ex. J at 4.) The State Fire Marshall has to make a recommendation to the legislature in 2005. (June 17, 2003, Tr. 83.) As of June 17, 2003, Ohio had fifty-two licensed storage locations for fireworks, all were manufacturers and wholesalers licensed to store Type 1.3(G) explosives. (June 17, 2003, Tr. 82-84.)

In 2001, Mr. Petrunak held two firework licenses from the State of Ohio.[6] (June 17, 2003, Tr. 79-80.) The first, Exhibitor of Fireworks and Pyrotechnic License number 56-18-0051, expiration date August 13, 2002, allowed Mr. Petrunak to conduct public firework exhibitions using Type 1.3(G) fireworks. (June 17, 2003, Tr. 46; A.T.F. Ex. S at 1; Abyss Ex. 10.) The second license was for pyrotechnics that allowed Mr. Petrunak to use fireworks indoors as special effects in a performance or show.[7] (June 17, 2003, Tr. 53, 79-80.) Mr. Petrunak is also licensed in several other states. (June 17, 2003, Tr. 145-46, 152; Abyss Ex. 4 at 10.)

The following federal license and permit are at issue here.[8] Abyss received Permit 4-BL-103-19-3B-12513, Type 19–Manufacturer of Theatrical Flash Powder, on October 14, 1997, with an expiration date of February 1, 2003. (A.T.F. Ex. J at 16.) On

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[5] Under the present regulatory scheme that exists in the United States, the states authorize the storage of explosives, and federal and state governments regulate the conditions of authorized storage. (June 16, 2003, Tr. 68-70, 117; June 17, 2003, Tr. 14-15.)

[6] Mr. Petrunak testified that he held three licenses from the State of Ohio. (June 17, 2003, Tr. 152.)

[7] The copies of two state licenses that Mr. Petrunak submitted as part of his application to the City of Parma, Ohio, bear the seal of the State of Texas. (Abyss Ex. 4 at 10.)

[8] The A.T.F. put into evidence copies of Abyss's applications for Type 19 license 4-BL-12391 that expired on November 1, 1998, and Type 34 permit 4-OH-12588 that expired on January 1, 1999. (June 17, 2003, Tr. 150-51; A.T.F. Exs. A, B, G, I, and J at 2, 16)

January 12, 1999, A.T.F. issued Abyss License 4-OH-103-33-3B-12683, Type 33–User of High Explosives. (June 16, 2003, Tr. 45-46; A.T.F. Ex. J at 16.)

Abyss has been in business since 1997 doing "displays involving pyrotechnics, fireworks, special effects, movie special effects, bubbles, balloons, confetti . . . as a service to the entertainment industry." (June 16, 2003, Tr. 160; June 17, 2003, Tr. 144.) Charles V. Petrunak, Abyss's president and sole owner, incorporated Abyss in the State of Ohio, in February 1998, and in the State of Indiana, in October 2002. (July 17, 2002, Tr. 144.) Mr. Petrunak graduated from Baldwin-Wallace College and earned a master's degree in music from Kent State University. He is a private piano instructor and church organist. (July 17, 2003, Tr. 142.)

Mr. Petrunak has admitted that Abyss did not have a license from the State of Ohio to store pyrotechnics or Type 1.3(G) fireworks. (June 16, 2003, Tr. 108; June 17, 2003, Tr. 217-18.) Mr. Petrunak called the A.T.F. Cleveland's office on August 31, 2001, and complained that the State of Ohio would not give him a storage permit and requested that A.T.F. make the State of Ohio grant him a permit. (A.T.F. Ex. J at 35.) Mr. Petrunak told Inspector Jill Krofta that he expected the City of Parma, Ohio, to cancel a scheduled firework display that weekend on September 1, 2001, and he complained that he had to pay $650 to return the fireworks every time a show was cancelled, and this was the second cancellation. (June 16, 2003, Tr. 50, 54; June 17, 2003, Tr. 258; A.T.F. Ex. J at 35.) Inspector Krofta told Mr. Petrunak that A.T.F. could not grant his request, and to return the fireworks to his supplier, and she told her supervisor about the call. (June 16, 2003, Tr. 164, 202; A.T.F. Ex. J at 35.) A.T.F. Area Supervisor Jerome Cajka returned Mr. Petrunak's call and reiterated that he could not force the state to grant him a permit to store explosives. (June 16, 2003, Tr. 277-78; A.T.F. Ex. J at 35.)

I reject Mr. Petrunak's claim that he told Inspector Krofta that he was going to store Type 1.3(G) explosives. Inspector Krofta and Area Supervisor Cajka assumed that Mr. Petrunak would comply with the regulations and either find storage for the explosives that he had purchased for the canceled firework display on September 1, 2001, or return them to the supplier. (June 16, 2003, Tr. 165, 168, 201, 299; June 17, 2003, Tr. 258-59.)

On October 16, 2001, Inspector Krofta visited Abyss's office as part of an inspection program initiated after September 11, 2001, and observed a forty-five foot semitrailer parked in front of Abyss's office at 1669 West 130th Street, Hinckley, Ohio.[9] (June 16, 2003, Tr. 57-58, 65-66; A.T.F. Exs. J at 4, Q.) Abyss occupied a center unit among six units on one side of Building Four in an area characterized as light industrial area where there are five or six parallel rows of one-story rectangular buildings.

[9] No one was at the Abyss office when Inspector Krofta first visited on October 16, 2001. She left her card and Mr. Petrunak called her later in the day. (June 16, 2003, Tr. 65-66.)

(June 17, 2003, Tr. 22; A.T.F. Ex. J at 8, 37.) Each building had ten to twelve or more industrial type business tenants, such as a lawn care company, a painting company, an excavation company, etc.[10] (June 16, 2003, Tr. 94, 97; June 17, 2003, Tr. 24.)

In response to a telephone inquiry later on the same day, Mr. Petrunka told Inspector Krofta that he had about 800 pounds of fireworks stored in that semitrailer.[11] Inspector Krofta immediately informed her supervisor, and within hours Inspector Krofta, Inspector Manuel Vicario, Special Agent Kevin McGrath, and Sherri Reddish Payne ("Reddish"), Assistant Deputy State Fire Marshall, gathered at the site.[12] (June 16, 2003, Tr. 86-92.)

The inspection on October 16, 2001, found a forty-five by ninety-six foot semitrailer located ten to thirty feet in front of Abyss's office in Building Four.[13] (A.T.F. Exs. Q, FF at 1, 2.) Building Four was about 200 feet behind Building Three.[14] In addition to Abyss, Building Four housed about eleven other businesses. (June 16, 2003, Tr. 94, 228-29; June 17, 2003, Tr. 20, 23, 160-62; A.T.F. Ex. J at 37.) On October 16, 2001, traffic was observed coming and going from the surrounding businesses and vehicles were seen entering and leaving the immediate area. (June 16, 2003, Tr. 229.) Building Five had a gymnastic studio for children that held classes daily.[15] (June 16, 2003, Tr. 94-95; June 17, 2003, Tr. 24-25.) Persons came to Abyss's office to take music lessons from Mr. Petrunak. Residential homes are located outside the light industrial area, but within one thousand feet of the semitrailer. (June 17, 2003,

[10] Mr. Petrunak agreed that there were from two to six businesses in each building. However, it appears that there are twelve units total, six rental units back to back in each building. (June 17, 2003, Tr. 196; A.T.F. Ex. J at 37.)

[11] A semitrailer is "a freight trailer that when attached is supported at its forward end by the fifth wheel device of the truck tractor." Merriam-Webster's Collegiate Dictionary, 1062 (10th ed. 2001). Mr. Petrunak received the twenty-four year old semitrailer on June 22, 2001. Under a lease-purchase agreement, the total cost was $1,800. (A.T.F. Ex. J at 14.)

[12] Special Agent McGrath was included because special agents in the law enforcement side of A.T.F. are authorized to confiscate explosives, but inspectors in the regulatory or industry operations side of A.T.F. lack this authority. (June 16, 2003, Tr. 88-89, 162, 281-82.)

[13] The ten to thirty feet determination is based on testimony from Assistant Deputy State Fire Marshall Reddish who estimated that the semitrailer was ten feet from the front of Building Four, while the State Fire Marshall's Notice of Proposed Revocation and Mr. Petrunak described the "ungrounded semi-truck trailer" as located approximately thirty feet away from Abyss's office. (June 17, 2003, Tr. 20-21, 161; Abyss Ex. 10 at 6.)

[14] I find the distance between Building Three and Building Four to be 200 feet. This is the average of the 172 feet measured by A.T.F. and the 230 feet measured by Mr. Petrunak and the building owner. (June 17, 2003, Tr. 161-62; A.T.F. Ex. J at 37.)

[15] The owner of Northeast Elite Ohio Gym estimated that during the school year about 300 children attended classes at the site each day. (June 16, 2003, Tr. 95-96.)

Tr. 22-23, 35.) Neither the surrounding business owners, nor the Hinckley Fire Department knew that the semitrailer held explosives. (June 16, 2003, Tr. 231, 238-39; A.T.F. Ex. J at 17.)

The semitrailer contained thirty-two or thirty-three boxes of Type 1.3(G) fireworks weighing approximately 575 pounds.[16] (June 16, 2003, Tr. 124-25, 127, 231; A.T.F. Exs. J at 7, 39, M, X at 6, BB; Abyss Ex. 10 at 6.) Mr. Petrunak claims to have picked up these fireworks on August 20, 2001, to use in a fireworks show in Parma, Ohio, scheduled for September 1, 2001. That show was canceled. (June 16, 2003, Tr. 107-08, 169-70, 188; June 17, 2003, Tr. 47-49, 147; A.T.F. Ex. J at 7, 33, and 40.)

Mr. Petrunak could not find the relevant paperwork and he had to request the supplier, Wolverine Fireworks Display Inc., Kawkawlin, Michigan, ("Wolverine"), to fax copies of the invoice and bills of lading. (June 17, 2003, Tr. 12-13; A.T.F. Ex. J at 10.) Wolverine furnished an invoice that shows Mr. Petrunak purchased the fireworks on August 15, 2001, and a bill of lading dated August 20, 2001. (A.T.F. Ex. J at 31-33.) The "magazine summary," a sheet posted on the inside of the semitrailer, showed that on October 16, 2001, the contents included "3 Charcoal 12 shells" that were leftover from a show on August 18, 2001, in Fairview Park, Ohio.[17] (June 16, 2003, Tr. 111-12; A.T.F. Ex. L.)

The semitrailer did not have any markings or placards indicating that it held explosives. (June 16, 2003, Tr. 238.) At the insistence of A.T.F. and the Assistant Deputy State Fire Marshall, Mr. Petrunak removed the explosives from the semitrailer and returned them to Wolverine on October 16, 2001.[18] (June 16, 2003, Tr. 145-47; June 17, 2003, Tr. 35-36; A.T.F. Ex. J at 9.)

On October 19, 2001, Inspector Krofta delivered a "Report of Violations" found during the inspection on October 16, 2001, to Mr. Petrunak. (June 16, 2003, Tr. 156; June 17, 2003, Tr. 173; A.T.F. Ex. J at 18-22.)

On December 4, 2001, Area Supervisor Cajka forwarded to legal counsel and the Director of Industry Operations the "Regulatory Enforcement Inspection Report," prepared by Inspector Krofta and Inspector Vicario, which stated as follows:

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[16] The inventory conducted jointly by state and federal authorities found thirty-two boxes of fireworks. Mr. Petrunak maintains that there were thirty-three boxes in the semitrailer. (June 16, 2003, Tr. 123-26; A.T.F. Ex. M.)

[17] A magazine is "[a]ny building or structure, other than an explosives manufacturing building, used for storage of explosive materials." 27 C.F.R. § 555.11. Abyss had two Type III magazines in connection with its Type 19 license. It had no approved storage in connection with its Type 33 permit. (A.T.F. Ex. J at 25.)

[18] Mr. Petrunak could not find a licensed storage site willing to accept the fireworks. (June 16, 2003, Tr. 90.)

Recommendation is made to revoke both the user of high explosives permit (4-OH-12683) and the manufacturer of theatrical flash powder license (4-BL-12513) due to the violations found.

The type 34 permit (4-OH-12588) expired 1/01/1999 and should be changed to inactive in the licensing database. Also, in the licensing database the type 33 permit (4-OH-12683) should be changed to no storage and the type 19 license (4-BL-12391) should be changed to inactive since this expired 11/01/1998.

Revocation

(A.T.F. Ex. J at 2.)

On March 8, 2002, Norris L. Alford, A.T.F. Director of Industry Operations ("Director") sent a Notice of Contemplated Denial or Revocation of License or Permit ("Proposed Revocation") to Abyss and Mr. Petrunak. (Abyss Ex. 6.) On July 10, 2002, at Mr. Petrunak's request, Mr. Alford, and four A.T.F. employees met with Mr. Petrunak and his legal counsel. (A.T.F. Ex. R.) The purpose of the meeting was to allow Abyss to respond to the Proposed Revocation. (June 16, 2003, Tr. 154-56, 177-78.) At the conclusion of the meeting, Mr. Alford informed Mr. Petrunak that A.T.F. would proceed to revoke Abyss's license and permit based on the nature of the violations and Mr. Petrunak's response. (June 16, 2003, Tr. 157.)

In June 2002, the State of Ohio and Mr. Petrunak settled a state action that would have revoked State License number 56-18-0051, based on the improper storage of fireworks. (June 17, 2003, Tr. 96, 109-12; A.T.F. Ex. AA.) Mr. Petrunak (1) admitted to improperly storing fireworks on or about September 2, 2001, through October 16, 2001; (2) agreed to take an in-service exhibitor training course; (3) agreed to move the, primary place of business of the holder of Exhibitor license No. 56-18-0051 out of the State of Ohio by October 31, 2002; and (4) agreed to pay a $1,000 fine to the Treasurer of the State of Ohio. (June 17, 2003, Tr. 109-12; A.T.F. Ex. AA.) The settlement allows Mr. Petrunak to do business in the State of Ohio, but his business cannot be located in the state. (June 17, 2003, Tr. 215-16.)

On September 10, 2002, Director Alford issued to Charles E. Petrunak, Abyss Special FX, Inc., a Notice of Revocation ("Notice") revoking high explosives permit 4-OH-103-33-3B-12683, and manufacturer of theatrical flash powder license 4-BL-19-3B-12513. (A.T.F. Ex. D at 1, 8.) The Notice reflects the Director's opinion that Abyss is not likely to comply with the laws or regulations and/or is otherwise not eligible to continue operations authorized under its license or permit. (A.T.F. Ex. D at 2.) The Director relied on what he characterized as willful and extremely serious violations. (Notice at 2-6.) In a letter dated September 20, 2002, Mr. Petrunak objected to the Notice and requested a hearing. (A.T.F. Ex. E.)

A.T.F. has the burden of proof, and preponderance of the evidence is the applicable standard of proof. 27 C.F.R. § 71.81; Steadman v. SEC, 450 U.S. 91 (1981). I will examine each of the factors that the Director relied on in revoking Abyss's license and permit to determine whether A.T.F. acted lawfully pursuant to 27 C.F.R. § 555.74. My findings are based on the record and my observation of the witnesses' demeanor. I have considered all proposed findings, conclusions, and arguments raised by the parties and accept those consistent with this decision.

1. Failure to maintain required records of explosives materials in violation of 18 U.S.C. § 842(f) and 27 C.F.R. § 555.107.

The Federal explosive laws make it unlawful for "any license or permittee willfully to . . . purchase, distribute, or receive explosive materials without making such records as the Attorney General may by regulation require . . . ." 18 U.S.C. § 842(f). Pursuant to that grant of authority, A.T.F. has issued a general requirement that each licensee and permittee shall keep records of explosive materials as required by Subpart G of part 555. 27 C.F.R § 555.107. Subpart G specifies that each licensee and permittee shall keep records pertaining to explosive materials in permanent form (i.e. commercial invoices, record books), and that each shall maintain all records of sale or other disposition. 27 C.F.R § 555.121. In addition, the rules require that a permittee shall keep a separate record of the date of acquisition, manufacturer's name and marks of identification, quantity, and description. 27 C.F.R § 555.125.

On October 16, 2001, Mr. Petrunak could not locate any pertinent information requested by A.T.F. inspectors about the fireworks he received from Wolverine on August 20, 2001, which he represented to be the fireworks contained in the semitrailer. (A.T.F. Ex. J at 10.) To obtain a description of the materials for A.T.F. and the Assistant Deputy State Fire Marshal, Mr. Petrunak had to request that Wolverine fax him copies of the invoices and bills of lading.

I find that Mr. Petrunak willfully violated 18 U.S.C. § 842(f) and 27 C.F.R. § 555.107 because he is an experienced, knowledgeable fireworks exhibitor who deliberately chose to disregard a basic regulation. In this decision, willful is defined as acting with purposeful disregard or plain indifference to known legal obligations. Cucchiara v. Secretary of Treasury, 652 F.2d 28, 30 (9th Cir. 1981); see also Stein's Inc. v. Blumenthal, 649 F.2d 463, 468 (7th Cir. 1980); Lewin v. Blumenthal, 590 F.2d 268, 269 (8th Cir. 1979).

2. Failure to properly store 575 pounds of fireworks according to the requirements of state law in violation of 18 U.S.C. § 848 and 27 C.F.R. § 555.62.

Mr. Petrunak knew that the State of Ohio required a state permit to store explosives and that he did not have one. Mr. Petrunak has worked in the fireworks industry since 1995. He engaged in a running dialogue with the administrator for Explosives and Pyrotechnics, Ohio State Fire Marshall's Office, on the issue of storing fireworks in Ohio for at least five years. In addition, Mr. Petrunak discussed regulatory issues including storage with A.T.F. inspectors as part of his application inspections.[19] (June 16, 2003, Tr. 32-33, 191; June 17, 2003, Tr. 78-79, 81-82, 108, 143, 219; A.T.F. Exs. G, I, J at 27, U, W, and Y; Abyss Ex. 4 at 11-12.)

There is no doubt that Mr. Petrunak knew it was illegal under state law for him to store approximately 575 pounds of Type 1.3(G) fireworks in a semitrailer outside the Abyss office in Hinckley, Ohio, from, at a minimum, August 20, 2001, to October 16, 2001. (June 17, 2003, Tr. 253.) A.T.F. stressed that Mr. Petrunak's federal license did not authorize storage without a state permit; however, Mr. Petrunak made no such claim. 18 U.S.C. § 848; 27 C.F.R. § 555.62. I find that Mr. Petrunak's actions were a willful violation of 18 U.S.C. § 848 and 27 C.F.R. § 555.62.

<u>3. Mr. Petrunak's unauthorized storage failed to meet table of distance requirements for storing fireworks in violation of 18 U.S.C. § 842(j) and 27 C.F.R. §§ 555.206(b), .224.</u>

The federal explosives laws make it unlawful for any person to store any explosive material in a manner not in conformity with regulations promulgated by the Attorney General. 18 U.S.C § 842(j). Federal regulations require that display fireworks up to a weight of one thousand pounds be stored at least 150 feet from an inhabited building. 27 C.F.R. §§ 555.206(b), .224.

Mr. Petrunak was responsible for storing approximately 575 pounds of Type 1.3(G) fireworks for almost two months in violation of state and federal regulations because he did not have the necessary storage permit from the State of Ohio. However, even if Mr. Petrunak had a state permit, the storage would still have violated federal regulations because the semitrailer that Mr. Petrunak was using as a magazine was (1) a maximum of thirty feet from a building inhabited by several other businesses, Building

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[19] In an application for a Type 19 license dated September 5, 1997, Mr. Petrunak stated that he "will purchase the explosives the day of the display or have them shipped directly to the site." (A.T.F. Ex. A.) On October 10, 1997, Mr. Petrunak signed a "No Storage Facility" letter acknowledging that because Abyss did not list any storage facility on the application for a Type 19 license/permit, Abyss was not authorized to store explosives.[19] (A.T.F. Ex. H.) A.T.F. considers a "No Storage Facility" letter to be an acknowledgement by a licensee or permittee who lacks storage that explosives or fireworks not used on the day of purchase have to be returned that day to the distributor. (June 16, 2003, Tr. 79-81.) A.T.F. refers to this as the 24-hour rule. (June 16, 2003, Tr. 106.) In an application for a Type 34 permit dated October 24, 1997, Mr. Petrunak stated that "all materials used the same day." (A.T.F. Ex. B.) In connection with this application, Mr. Petrunak told a A.T.F. inspector on December 15, 1997, that he only had a day box and not storage, and that a "local supplier can store on his behalf (Coyote-Rainbow Fireworks)." (A.T.F. Ex. I at 5.) A day box is a type of storage magazine that can be used to store theatrical flash powder. (June 16, 2003, Tr. 79-82.)

Four, and (2) the forty-five foot semitrailer was within 150 fifty feet of another inhabited building, Building Three.[20]

The rebuttal testimony of Inspector Krofta refutes Mr. Petrunak's claims that the stored fireworks materials weighed approximately 300 pounds because A.T.F. did not subtract the weight of the cardboard inserts. (June 17, 2003, Tr. 163-66.) I accept Inspector Krofta's explanation that the weight of approximately 575 pounds was calculated after subtracting industry-accepted percentages for cardboard, tubes, etc. (June 17, 2003, Tr. 255-56.)

I reject Mr. Petrunak's claim that A.T.F. used the wrong "Table of Distances." (June 17, 2003, Tr. 163-67.) I accept the testimony of Area Supervisor Cajak that the applicable distances are those shown at 27 C.F.R. § 555.224 Table of Distances for the storage of display fireworks (except bulk salutes), which puts the applicable distance as 150 fifty feet. I reject the distances that Mr. Petrunak advocates because they apply between fireworks process buildings and other specified areas, and Abyss was not a fireworks processor. 27 C.F.R. § 555.223.

For the reasons stated, I find that Mr. Petrunak willfully violated 18 U.S.C. § 842(j) and 27 C.F.R. §§ 555.206(b), .224

<u>4. Mr. Petrunak did not maintain the daily summary of magazine transactions showing the dates fireworks were placed in the magazine properly in violation of 18 U.S.C. § 842(f) and 27 C.F.R. § 555.127.</u>

A.T.F. regulations require licensed importers, licensed manufacturers, licensed dealers, and permittees to keep detailed records and reports of explosive materials, and that these categories of persons enter a record of daily summary transactions at each magazine of an approved storage facility. 27 C.F.R. §§ 555.122, .123, .124, .125, .127.

Mr. Petrunak did not have available for the A.T.F. inspectors on October 16, 2001, an accurate daily summary of magazine transactions for the explosives in the semitrailer that he was using for unauthorized storage. (June 16, 2003, Tr. 108-09, 127; A.T.F. Ex. J at 9-10.) There was a sheet in the semitrailer that had a list of fireworks and some notations, but this sheet did not comply with the regulations because it did not show the date materials were acquired and put into storage, the name of the manufacturer, and the firework type. In addition, it did not provide an accurate running total of what was presently in storage. (A.T.F. Ex. L.)

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[20] The total distance between the two buildings was 200 feet. The trailer was at most thirty feet from Building Four so that at a minimum its forty-five foot length extended to 125 feet from Building Three.

I find that as the holder of a federal permit Mr. Petrunak willfully violated 18 U.S.C. § 842(f) and 27 C.F.R. §§ 555.125, and .127. Mr. Petrunak violated the record keeping requirements even though his storage was not authorized because persons acting in an unauthorized manner should not be allowed greater latitude than persons acting pursuant to State authority. The other regulations cited by A.T.F. are inapplicable because Mr. Petrunak does not come within the definition of a licensed importer, licensed manufacturer, or licensed dealer. 27 C.F.R. § 555.11.

<u>5. Failure to maintain a record of receipt and disposition of fireworks for purchase made on August 20, 2001, from Wolverine in violation of 18 U.S.C. § 842(f) and 27 C.F.R. § 555.121(c).</u>

A.T.F. requires that each licensee and permittee maintain records as to the receipt and disposition of all explosive materials. 27 C.F.R. § 555.121(c). As noted previously, Mr. Petrunak claimed that the explosives in the semitrailer were only the explosives he purchased from Wolverine on August 20, 2001, but he did not have, or could not find, any documentation supporting his claim. (A.T.F. Exs. J at 9-10, S at 2)

I find that Mr. Petrunak's failure to have records that substantiated his acquisition and disposition of the explosives stored in the semitrailer was a willful violation of 18 U.S.C. § 842(f) and 27 C.F.R. § 555.121. I make no ruling as to a violation of 18 U.S.C. § 842(g) because ATF has not shown that Mr. Petrunak made any false entries in the records he was required to keep.

<u>6. Failure to meet magazine construction requirements, to have tumbler padlocks, and to have the padlocks protected with no less than one-quarter inch steel hoods in violation of 18 U.S.C. § 842(j) and 27 C.F.R. § 555.210.</u>

Pursuant to statutory authority, A.T.F. has promulgated detailed regulations for outdoor magazines to ensure that the explosives stored within are safe and secure. 18 U.S.C. § 842(j) and 27 C.F.R. § 555.210. For a Type Four magazine, which is the type at issue here, the regulations require, among other things, that: (1) the magazine be constructed of masonry, metal-covered wood, fabricated metal or a combination of these three materials; (2) if the magazine has no continuous foundation, the space under the building is to be enclosed with a fire-resistant material; and (3) if padlocks are used to secure the magazine, there must be two padlocks or one padlock used in combination with a mortise lock. (June 16, 2003, Tr. 118-19; 27 C.F.R. § 555.210(a)(2), (a)(4).) In addition, the padlocks must have "at least five tumblers and case-hardened shackle" of at least three-eights inch diameter and be protected by a one-quarter inch steel hood constructed to prevent sawing or lever action on the locks. 27 C.F.R. § 555.210(a)(4).

Mr. Petrunak willfully violated 18 U.S.C. § 842(j) and 27 C.F.R. § 555.210. The semitrailer that Mr. Petrunak parked outside Abyss's office on October 16, 2001, violated 18 U.S.C. § 842(j) and 27 C.F.R. § 555.210(a)(2), (a)(4) because (1) it was not constructed of fire resistant materials but had a floor made of wood and walls constructed of wood and metal; (2) the space from the wood floor to the ground under the magazine was not enclosed by a fire resistant skirt; and (3) the magazine was locked with a single, very basic type of padlock. (June 16, 2003, Tr. 41-42, 245, 251-52; June 17, 2003, Tr. 16, 32-33; A.T.F. Ex. J at 11-13.)

<u>7. Failure to properly store fireworks in a magazine in violation of 18 U.S.C. § 842(j) and 27 C.F.R. § 555.214.</u>

A.T.F. regulations require that within a magazine: (1) explosives not be placed directly against an interior wall and should be placed to allow ventilation. Some nonsparking material can be used to prevent contact of the explosives with the wall; (2) explosives are to be stored so that markings on containers are visible. Storage should be in a manner to permit easy counting and checking on inspection; and (3) containers of explosives must be closed while stored. 27 C.F.R. § 555.214(a), (b), (c).

Mr. Petrunak willfully violated 18 U.S.C. § 842(j) and 27 C.F.R. § 555.214(a), (b), and (c) because on October 16, 2001, he stored explosives in cartons placed directly against the walls of a semitrailer, which were partially metal. The markings on the outside of some cartons that described the contents were not easily visible, and some of the cartons were opened. One cartoon was marked incorrectly as containing Type 1.4(G) fireworks when it contained Type 1.3(G). (June 16, 2003, Tr. 120-21, 252; A.T.F. Exs. J at 13-14, FF at 4, 5, 10, GG at 8.)

<u>8. Failure to notify A.T.F. before acquiring a magazine in violation of 18 U.S.C. § 842(j) and 27 C.F.R. § 555.63(d).</u>

A.T.F. regulations require that persons notify the A.T.F. regional director if after they receive a license or permit, they intend to construct or acquire a magazine. 27 C.F.R. § 555.63(d).

Mr. Petrunak in all his communication with the A.T.F. consistently represented that he did not have any permanent storage. (June 16, 2003, Tr. 67-68.) For example, in his applications dated September 5, 1996, and October 24, 1997, he stated that he had no permanent storage and he would use all materials the same day. (A.T.F. Exs. A, B.) Mr. Petrunak discussed storage with the A.T.F. inspector who interviewed him in connection with his applications. (June 17, 2003, Tr. 219.) Following that discussion, the inspector noted on the "Explosives Application Inspection Workplan" that Abyss had no overnight storage (A.T.F. Exs. G at 6-7, I at 5.) In his capacity as president of Abyss, Mr. Petrunak confirmed in a one-page letter dated October 10, 1997, that he had no authority to store explosive materials, and that if he should decide to obtain/lease a storage facility he must notify A.T.F. (A.T.F. Ex. H.) Mr. Petrunak knew that he was to notify A.T.F. if he acquired storage from the state. (June 17, 2003, Tr. 219-20.)

I find that Mr. Petrunak willfully violated 18 U.S.C. § 842(j) and 27 C.F.R. § 555.63(d). Mr. Petrunak's explanation, that he did not notify A.T.F. that he had acquired storage because he rented the semitrailer to store mortar racks, is implausible.[21] (June 17, 2003, Tr. 221.) The A.T.F. inspection on October 16, 2001, is conclusive that Mr. Petrunak was using a semitrailer to store 575 pounds of Type 1.3(G) explosives along with mortar racks and other related materials.

9. Failure to keep the magazine floor clean, dry, free of paper, and to have fireworks properly stored in violation of 18 U.S.C. § 842(j) and 27 C.F.R. § 555.215.

Pursuant to statutory authority, A.T.F. regulations require magazines "to be kept clean, dry, and free of grit, paper, empty packages and containers, and rubbish." 27 C.F.R. § 555.215.

I find that Mr. Petrunak willfully violated 18 U.S.C. § 842(j) and 27 C.F.R. § 555.215. The semitrailer contained explosives and non-explosive mortars or plastic pipes that hold fireworks, wooden mortar racks, and dollies with metal wheels, stored in no apparent order. At one corner of the semitrailer near the roof there was a leak that allowed water to enter. (June 16, 2003, Tr. 119, 121, 253-54; June 17, 2003, Tr. 31-32; A.T.F. Exs. FF at 8, 19, GG at 5-12, 15.) Mr. Petrunak did not address evidence that (1) the magazine was not kept clean, dry and free of paper; (2) the magazine had broken shell paper on the floor; (3) used and unused fireworks were stored in the same containers; and (4) water was entering the magazine. (A.T.F. Ex. J at 15.)

Summary

A.T.F. has shown by a preponderance of the evidence that Abyss and Mr. Petrunak are not likely to comply with the explosives laws and regulations. This conclusion has several bases. The overwhelming evidence is that Mr. Petrunak stored explosives in willful violation of many A.T.F. regulations. Mr. Petrunak does not accept responsibility for these violations, rather he has chosen to blame others and to lie about material facts.

Mr. Petrunak claims that the semitrailer was opened more than once on October 16, 2001, and that A.T.F. and state authorities rearranged the contents so that the photographs in evidence do not accurately show the contents of the semitrailer when it was opened. (June 17, 2003, Tr. 179-82; Licensee's Post Hearing Reply Brief at 8-9.)

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[21] Mr. Petrunak has nothing to support his claim that he housed the explosives he purchased from Wolverine on August 20, 2001, in a Ryder truck until August 30, 2001. I reject his claim that during this ten-day period the explosives were regulated by the Federal Department of Transportation and not by either the A.T.F. or the State of Ohio. (June 17, 2003, Tr. 222, 225.)

The evidence in the record does not support Mr. Petrunak's claims. (June 16, 2003, Tr. 256-57.) Inspector Krofta, Inspector Vicario, and Assistant Deputy State Fire Marshall Reddish gave consistent testimony that Mr. Petrunak was the only one with a key to the semitrailer and that he opened it in their presence and then the photographs were taken. (June 16, 2003, Tr. 265; June 17, 2003, Tr. 14, 256-57, 269-71.) Inspector Vicario acknowledged moving boxes but only to see what the semitrailer held. (June 16, 2003, Tr. 265.) Inspector Vicario's statement is supported by the testimony of Assistant Deputy State Fire Marshall Reddish who testified that some of the boxes were turned sideways so that mortars had to be moved to see the markings on the boxes. (June 17, 2003, Tr. 17.)

According to Mr. Petrunak, A.T.F. and the State of Ohio are to blame for the fact that he stored explosives without authority because he told the regulators on August 31, September 4, and September 11, 2001, that he had a storage problem and that he did not have the resources to return the fireworks to his supplier. (June 17, 2003, Tr. 153-55, 249-50.) This audacious claim has no basis in law or in fact. Inspector Krofta and Area Supervisor Cajka heard Mr. Petrunak complain about the state's moratorium on storage and the cost of making returns to his supplier but had no indication that he would violate the law. (June 16, 2003, Tr. 164-65, 277-78.) David Schroeder, Administrator for Explosives and Pyrotechnics for the Ohio State Fire Marshall, does not recall conversations with Mr. Petrunak on those dates. (June 17, 2003, Tr. 129.) Inspector Krofta's notes prepared on August 31, 2001, at the time of the conversation are the best evidence on this point and they do not support Mr. Petrunak's claim. (A.T.F. Ex. J at 35.) The evidence is that the regulators knew Mr. Petrunak was upset that the State of Ohio refused to grant storage permits, but they did not know, or have reason to know, until October 16, 2001, that he was violating the storage regulations.

Despite his education, knowledge, and experience with explosives, Mr. Petrunak did not appear to comprehend the serious danger his actions created to public safety. (June 16, 2003, Tr. 145, 246-48; A.T.F. Ex. J at 16.) According to Assistant Deputy State Fire Marshall Reddish, the contents of the semitrailer had to be removed immediately:

> [b]ecause we had several hundred pounds of explosive fireworks sitting in an area where there were individuals going in and out of businesses, passenger vehicles and delivery trucks going up and down the road that led back to this industrial area. We have residential homes over in the area. And if there would have been, unfortunately, some type of an explosion, the lives that would have been affected, whether it be injury or the most extreme, loss of life, and with the amount, meaning poundages, of fireworks that were in that trailer, it would have been a catastrophic event because of the fact the trailer would have been shrapnel, just going through everything. Not just buildings, people. And I'm talking great distances.

(June 17, 2003, Tr. 42-43.)

Mr. Petrunak, on the other hand, wanted to delay removing the fireworks until it was more convenient for him to do so since he had a piano lesson scheduled at the Abyss office the evening of October 16, 2001, that he did not want to cancel.[22] (June 16, 2003, Tr. 145, 246-48.)

Area Supervisor Cajka, an experienced A.T.F. regulator, provided credible and compelling testimony as to the serious nature of Mr. Petrunak's actions. Prior to October 16, 2001, Mr. Cajka had not encountered an illegal explosives storage situation in ten years and he had not been involved in revocation for at least the last two years. For the first time in his career, he required confirmation from the supplier that the fireworks had been returned. (June 16, 2003, Tr. 284.) I give weight to Area Supervisor Cajka's position that he would have recommended revocation even if Inspector Krofta had not done so based on the serious threat that Mr. Petrunak's illegal storage posed to the public. (June 16, 2003, Tr. 285-86.)

For all the reasons stated, I find that A.T.F. acted lawfully in revoking License Number 4-BL-19-3B-12513, and Permit Number 4-OH-103-33-3B-12683, pursuant to 27 C.F.R. § 555.74, because the preponderance of the evidence establishes that Abyss and Mr. Petrunak are not likely to comply with the explosives laws and/or regulations.

Brenda P. Murray
Chief Administrative Law Judge

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[22] I cannot find any support for Mr. Petrunak's claim that he denied giving piano lessons at Abyss's office. (June 17, 2003, Tr. 141-254.) He did not cite to the record. (Licensee's Post Hearing Brief at 7.)

APPENDIX ATTACHMENT 'D'

IRS PUBLICATION 535 - Excerpts

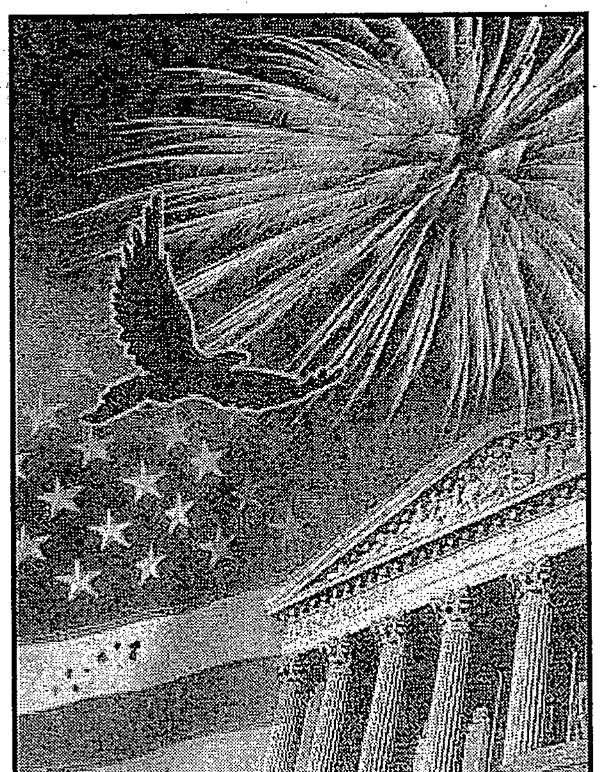
Department of the Treasury
Internal Revenue Service

Publication 535
Cat. No. 15065Z

Business Expenses

For use in preparing

2016 Returns



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Jan 19, 2017

Contents

Introduction

This publication discusses common business expenses and explains what is and is not deductible. The general rules for deducting business expenses are discussed in the opening chapter. The chapters that follow cover specific expenses and list other publications and forms you may need.

Note. Section references within this publication are to the Internal Revenue Code and regulation references are to the Income Tax Regulations under the Code.

Comments and suggestions. We welcome your comments about this publication and your suggestions for future editions.

You can send us comments from *IRS.gov/formspubs*. Click on "More Information" and then on "Give us feedback."

Or you can write to:

Internal Revenue Service
Tax Forms and Publications
1111 Constitution Ave. NW, IR-6526
Washington, DC 20224

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Although we cannot respond individually to each comment received, we do appreciate your feedback and will consider your comments as we revise our tax products.

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Tax questions. If you have a tax question, check the information available on IRS.gov or call 1-800-829-4933. We cannot answer tax questions sent to the above address.

Future Developments

For the latest information about developments related to Pub. 535, such as legislation enacted after it was published, go to *IRS.gov/pub535*.

What's New for 2016

The following items highlight some changes in the tax law for 2016.

Advance payments of the Health Coverage Tax Credit (HCTC). Beginning in 2016, an individual who qualifies for the HCTC can enroll in a program in which the IRS makes monthly advance payments of the HCTC directly to health plan administrators for qualified health insurance coverage. For more information, see chapter 6.

Payroll tax credit election for research expenditures for qualified small businesses. Qualified small businesses may elect to apply a certain amount of the research tax credit against the employer portion of social security taxes. For more information, see chapter 7.

Standard mileage rate. Beginning in 2016, the standard mileage rate for the cost of operating your car, van, pickup, or panel truck for each mile of business use is 54 cents per mile. For more information, see chapter 11.

What's New for 2017

The following item highlights a change in the tax law for 2017.

Standard mileage rate. Beginning in 2017, the standard mileage rate for the cost of operating your car, van, pickup, or panel truck for each mile of business use is 53.5 cents per mile.

Reminders

The following reminders and other items may help you file your tax return.

IRS *e-file* (Electronic Filing)

You can file your tax returns electronically using an IRS *e-file* option. The benefits of IRS *e-file* include faster refunds, increased accuracy, and acknowledgment of IRS receipt of your return. You can use one of the following IRS *e-file* options.

- Use an authorized IRS *e-file* provider.
- Use a personal computer.
- Visit a Volunteer Income Tax Assistance (VITA) or Tax Counseling for the Elderly (TCE) site.

For details on these fast filing methods, see your income tax package.

Form 1099-MISC. File Form 1099-MISC, Miscellaneous Income, for each person to whom you have paid during the year in the course of your trade or business at least $600 in rents, services (including parts and materials), prizes and awards, other income payments, medical and health care payments, and crop insurance proceeds. See the Instructions for Form 1099-MISC for more information and additional reporting requirements.

Photographs of missing children. The Internal Revenue Service is a proud partner with the *National Center for Missing & Exploited Children® (NCMEC)*. Photographs of missing children selected by the Center may appear in this publication on pages that would otherwise be blank. You can help bring these children home by looking at the photographs and calling 1-800-THE-LOST (1-800-843-5678) (24 hours a day, 7 days a week) if you recognize a child.

Preventing slavery and human trafficking. Human trafficking is a form of modern-day slavery, and involves the use of force, fraud, or coercion to exploit human beings for some type of labor or commercial sex purpose. The United States is a source, transit, and destination country for men, women, and children, both U.S. citizens and foreign nationals, who are subjected to the injustices of slavery and human trafficking, including forced labor, debt bondage, involuntary servitude, "mail-order" marriages, and sex trafficking. Trafficking in persons can occur in both lawful and illicit industries or markets, including in hotel services, hospitality, agriculture, manufacturing, janitorial services, construction, health and elder care, domestic service, brothels, massage parlors, and street prostitution, among others.

The *President's Interagency Task Force to Monitor and Combat Trafficking in Persons (PITF)* brings together federal departments and agencies to ensure a whole-of-government approach that addresses all aspects of human trafficking. Online resources for recognizing and reporting trafficking activities, and assisting victims include the Department of Homeland Security (DHS) Blue Campaign at *DHS.gov/blue-campaign*, the Department of State Office to Monitor and Combat Trafficking in Persons at *State.gov/j/tip*, and the National Human Trafficking Resource Center (NHTRC) at *humantraffickinghotline.org*. DHS is responsible for investigating human trafficking, arresting traffickers, and protecting victims. DHS also provides *immigration relief* to non-U.S. citizen victims of human trafficking. DHS uses a *victim-centered approach* to combating human trafficking, which places equal value on identifying and stabilizing victims and on investigating and prosecuting traffickers. Victims are crucial to investigations and prosecutions; each case and every conviction changes lives. DHS understands how difficult it can be for victims to come forward and work with law enforcement due to their trauma. DHS is committed to helping victims feel stable, safe, and secure.

To report suspected human trafficking, call the DHS domestic 24-hour toll-free number at 1-866-DHS-2-ICE (1-866-347-2423) or 1-802-872-6199 (non-toll-free international). For help from the NHTRC, call the National Human Trafficking Hotline toll free at 1-888-373-7888 or text HELP or INFO to BeFree (233733).

1.

Deducting Business Expenses

Introduction

This chapter covers the general rules for deducting business expenses. Business expenses are the costs of carrying on a trade or business, and they are usually deductible if the business is operated to make a profit.

Topics

This chapter discusses:

- What you can deduct
- How much you can deduct
- When you can deduct
- Not-for-profit activities

Useful Items

You may want to see:

Publication

- ❑ **334** Tax Guide for Small Business
- ❑ **463** Travel, Entertainment, Gift, and Car Expenses
- ❑ **525** Taxable and Nontaxable Income
- ❑ **529** Miscellaneous Deductions
- ❑ **536** Net Operating Losses (NOLs) for Individuals, Estates, and Trusts
- ❑ **538** Accounting Periods and Methods
- ❑ **542** Corporations
- ❑ **547** Casualties, Disasters, and Thefts
- ❑ **583** Starting a Business and Keeping Records
- ❑ **587** Business Use of Your Home
- ❑ **925** Passive Activity and At-Risk Rules

❑ **936** Home Mortgage Interest Deduction

❑ **946** How To Depreciate Property

Form (and Instructions)

❑ **Schedule A (Form 1040)** Itemized Deductions

❑ **5213** Election To Postpone Determination as To Whether the Presumption Applies That an Activity Is Engaged in for Profit

See chapter 12 for information about getting publications and forms.

What Can I Deduct?

To be deductible, a business expense must be both ordinary and necessary. An ordinary expense is one that is common and accepted in your industry. A necessary expense is one that is helpful and appropriate for your trade or business. An expense does not have to be indispensable to be considered necessary.

Even though an expense may be ordinary and necessary, you may not be allowed to deduct the expense in the year you paid or incurred it. In some cases, you may not be allowed to deduct the expense at all. Therefore, it is important to distinguish usual business expenses from expenses that include the following.

- The expenses used to figure cost of goods sold.
- Capital expenses.
- Personal expenses.

Cost of Goods Sold

If your business manufactures products or purchases them for resale, you generally must value inventory at the beginning and end of each tax year to determine your cost of goods sold. Some of your business expenses may be included in figuring cost of goods sold. Cost of goods sold is deducted from your gross receipts to figure your gross profit for the year. If you include an expense in the cost of goods sold, you cannot deduct it again as a business expense.

The following are types of expenses that go into figuring cost of goods sold.

- The cost of products or raw materials, including freight.
- Storage.
- Direct labor (including contributions to pension or annuity plans) for workers who produce the products.
- Factory overhead.

Under the uniform capitalization rules, you must capitalize the direct costs and part of the indirect costs for certain production or resale activities. Indirect costs include rent, interest, taxes, storage, purchasing, processing, repackaging, handling, and administrative costs.

This rule does not apply to personal property you acquire for resale if your average annual gross receipts (or those of your predecessor) for the preceding 3 tax years are not more than $10 million.

For more information, see the following sources.

- Cost of goods sold—chapter 6 of Pub. 334.
- Inventories—Pub. 538.
- Uniform capitalization rules—Pub. 538 and section 263A and the related regulations.

Capital Expenses

You must capitalize, rather than deduct, some costs. These costs are a part of your investment in your business and are called "capital expenses." Capital expenses are considered assets in your business. In general, you capitalize three types of costs.

- Business start-up costs (See Tip below).
- Business assets.
- Improvements.

TIP *You can elect to deduct or amortize certain business start-up costs. See chapters 7 and 8.*

Cost recovery. Although you generally cannot take a current deduction for a capital expense, you may be able to recover the amount you spend through depreciation, amortization, or depletion. These recovery methods allow you to deduct part of your cost each year. In this way, you are able to recover your capital expense. See *Amortization* (chapter 8) and *Depletion* (chapter 9) in this publication. A taxpayer can elect to deduct a portion of the costs of certain depreciable property as a section 179 deduction. A greater portion of these costs can be deducted if the property is qualified disaster assistance property. See Pub. 946 for details.

Going Into Business

The costs of getting started in business, before you actually begin business operations, are capital expenses. These costs may include expenses for advertising, travel, or wages for training employees.

If you go into business. When you go into business, treat all costs you had to get your business started as capital expenses.

Usually, you recover costs for a particular asset through depreciation. Generally, you cannot recover other costs until you sell the business or otherwise go out of business. However, you can choose to amortize certain costs for setting up your business. See *Starting a Business* in chapter 8 for more information on business start-up costs.

If your attempt to go into business is unsuccessful. If you are an individual and your attempt to go into business is not successful, the expenses you had in trying to establish yourself in business fall into two categories.

1. The costs you had before making a decision to acquire or begin a specific business. These costs are personal and nondeductible. They include any costs incurred during a general search for, or preliminary investigation of, a business or investment possibility.
2. The costs you had in your attempt to acquire or begin a specific business. These costs are capital expenses and you can deduct them as a capital loss.

If you are a corporation and your attempt to go into a new trade or business is not successful, you may be able to deduct all investigatory costs as a loss.

The costs of any assets acquired during your unsuccessful attempt to go into business are a part of your basis in the assets. You cannot take a deduction for these costs. You will recover the costs of these assets when you dispose of them.

Business Assets

There are many different kinds of business assets, for example, land, buildings, machinery, furniture, trucks, patents, and franchise rights. You must fully capitalize the cost of these assets, including freight and installation charges.

Certain property you produce for use in your trade or business must be capitalized under the uniform capitalization rules. See Regulations section 1.263A-2 for information on these rules.

Improvements

Improvements are generally major expenditures. Some examples are new electric wiring, a new roof, a new floor, new plumbing, bricking up windows to strengthen a wall, and lighting improvements.

Generally, you must capitalize the costs of making improvements to a business asset if the improvements result in a betterment to the unit of property, restore the unit of property, or adapt the unit of property to a new or different use.

However, you can currently deduct repairs that keep your property in a normal efficient operating condition as a business expense. Treat as repairs amounts paid to replace parts of a machine that only keep it in a normal operating condition.

Restoration plan. Capitalize the cost of reconditioning, improving, or altering your property as part of a general restoration plan to make it suitable for your business. This applies even if some of the work would by itself be classified as repairs.

Capital Versus Deductible Expenses

To help you distinguish between capital and deductible expenses, different examples are given below.

Motor vehicles. You usually capitalize the cost of a motor vehicle you use in your business. You can recover its cost through annual deductions for depreciation.

There are dollar limits on the depreciation you can claim each year on passenger automobiles used in your business. See Pub. 463 for more information.

Generally, repairs you make to your business vehicle are currently deductible. However, amounts you pay to recondition and overhaul a business vehicle are capital expenses and are recovered through depreciation.

Roads and driveways. The cost of building a private road on your business property and the cost of replacing a gravel driveway with a concrete one are capital expenses you may be able to depreciate. The cost of maintaining a private road on your business property is a deductible expense.

Tools. Unless the uniform capitalization rules apply, amounts spent for tools used in your business are deductible expenses if the tools have a life expectancy of less than 1 year or their cost is minor.

Machinery parts. Unless the uniform capitalization rules apply, the cost of replacing short-lived parts of a machine to keep it in good working condition, but not add to its life, is a deductible expense.

Heating equipment. The cost of changing from one heating system to another is a capital expense.

Personal Versus Business Expenses

Generally, you cannot deduct personal, living, or family expenses. However, if you have an expense for something that is used partly for business and partly for personal purposes, divide the total cost between the business and personal parts. You can deduct the business part.

For example, if you borrow money and use 70% of it for business and the other 30% for a family vacation, you generally can deduct 70% of the interest as a business expense. The remaining 30% is personal interest and generally is not deductible. See chapter 4 for information on deducting interest and the allocation rules.

Business use of your home. If you use part of your home for business, you may be able to deduct expenses for the business use of your home. These expenses may include mortgage interest, insurance, utilities, repairs, and depreciation.

To qualify to claim expenses for the business use of your home, you must meet both of the following tests.

1. The business part of your home must be used exclusively and regularly for your trade or business.
2. The business part of your home must be:
   a. Your principal place of business; or
   b. A place where you meet or deal with patients, clients, or customers in the normal course of your trade or business; or
   c. A separate structure (not attached to your home) used in connection with your trade or business.

You generally do not have to meet the exclusive use test for the part of your home that you regularly use either for the storage of inventory or product samples, or as a daycare facility.

Your home office qualifies as your principal place of business if you meet the following requirements.

- You use the office exclusively and regularly for administrative or management activities of your trade or business.
- You have no other fixed location where you conduct substantial administrative or management activities of your trade or business.

If you have more than one business location, determine your principal place of business based on the following factors.

- The relative importance of the activities performed at each location.
- If the relative importance factor does not determine your principal place of business, consider the time spent at each location.

Optional safe harbor method. Individual taxpayers can use the optional safe harbor method to determine the amount of deductible expenses attributable to certain business use of a residence during the tax year. This method is an alternative to the calculation, allocation, and substantiation of actual expenses.

The deduction under the optional method is limited to $1,500 per year based on $5 a square foot for up to 300 square feet. Under this method, you claim your allowable mortgage interest, real estate taxes, and casualty losses on the home as itemized deductions on Schedule A (Form 1040). You are not required to allocate these deductions between personal and business use, as is required under the regular method. If you use the optional method, you cannot depreciate the portion of your home used in a trade or business.

Business expenses unrelated to the home, such as advertising, supplies, and wages paid to employees, are still fully deductible. All of the requirements discussed earlier under Business use of your home still apply.

For more information on the deduction for business use of your home, including the optional safe harbor method, see Pub. 587.

CAUTION *If you were entitled to deduct depreciation on the part of your home used for business, you cannot exclude the part of the gain from the sale of your home that equals any depreciation you deducted (or could have deducted) for periods after May 6, 1997.*

Business use of your car. If you use your car exclusively in your business, you can deduct car expenses. If you use your car for both business and personal purposes, you must divide your expenses based on actual mileage. Generally, commuting expenses between your home and your business location, within the area of your tax home, are not deductible.

You can deduct actual car expenses, which include depreciation (or lease payments), gas and oil, tires, repairs, tune-ups, insurance, and registration fees. Or, instead of figuring the business part of these actual expenses, you may be able to use the standard mileage rate to figure your deduction. Beginning in 2016, the standard mileage rate is 54 cents per mile.

If you are self-employed, you can also deduct the business part of interest on your car loan, state and local personal property tax on the car, parking fees, and tolls, whether or not you claim the standard mileage rate.

For more information on car expenses and the rules for using the standard mileage rate, see Pub. 463.

How Much Can I Deduct?

Generally, you can deduct the full amount of a business expense if it meets the criteria of ordinary and necessary and it is not a capital expense.

Recovery of amount deducted (tax benefit rule). If you recover part of an expense in the same tax year in which you would have claimed a deduction, reduce your current year expense by the amount of the recovery. If you have a recovery in a later year, include the recovered amount in income in that year. However, if part of the deduction for the expense did not reduce your tax, you do not have to include that part of the recovered amount in income.

For more information on recoveries and the tax benefit rule, see Pub. 525.

Payments in kind. If you provide services to pay a business expense, the amount you can deduct is limited to your out-of-pocket costs. You cannot deduct the cost of your own labor.

Similarly, if you pay a business expense in goods or other property, you can deduct only what the property costs you. If these costs are included in the cost of goods sold, do not deduct them again as a business expense.

Limits on losses. If your deductions for an investment or business activity are more than the income it brings in, you have a loss. There may be limits on how much of the loss you can deduct.

Not-for-profit limits. If you carry on your business activity without the intention of making a profit, you cannot use a loss from it to offset other income. For more information, see Not-for-Profit Activities, later.

At-risk limits. Generally, a deductible loss from a trade or business or other income-producing activity is limited to the investment you have "at risk" in the activity. You are at risk in any activity for the following.

1. The money and adjusted basis of property you contribute to the activity.
2. Amounts you borrow for use in the activity if:
   a. You are personally liable for repayment, or
   b. You pledge property (other than property used in the activity) as security for the loan.

For more information, see Pub. 925.

Passive activities. Generally, you are in a passive activity if you have a trade or business activity in which you do not materially participate, or a rental activity. In general, deductions for losses from passive activities only offset income from passive activities. You cannot use any excess deductions to offset other income. In addition, passive activity credits can only offset the tax on net passive income. Any excess loss or credits are carried over to later years. Suspended passive losses are fully deductible in the year you completely dispose of the activity. For more information, see Pub. 925.

Net operating loss (NOL). If your deductions are more than your income for the year, you may have an NOL. You can use an NOL to lower your taxes in other years. See Pub. 536 for more information.

See Pub. 542 for information about NOLs of corporations.

When Can I Deduct an Expense?

When you can deduct an expense depends on your accounting method. An accounting method is a set of rules used to determine when and how income and expenses are reported. The two basic methods are the cash method and the accrual method. Whichever method you choose must clearly reflect income.

For more information on accounting methods, see Pub. 538.

Cash method. Under the cash method of accounting, you generally deduct business expenses in the tax year you pay them.

Accrual method. Under an accrual method of accounting, you generally deduct business expenses when both of the following apply.

1. The all-events test has been met. The test is met when:
   a. All events have occurred that fix the fact of liability, and
   b. The liability can be determined with reasonable accuracy.
2. Economic performance has occurred.

Economic performance. You generally cannot deduct or capitalize a business expense until economic performance occurs. If your expense is for property or services provided to you, or for your use of property, economic performance occurs as the property or services are provided, or the property is used. If your expense is for property or services you provide to others, economic performance occurs as you provide the property or services.

Example. Your tax year is the calendar year. In December 2016, the Field Plumbing Company did some repair work at your place of business and sent you a bill for $600. You paid it by check in January 2017. If you use the accrual method of accounting, deduct the $600 on your tax return for 2016 because all events have occurred to "fix" the fact of liability (in this case, the work was completed), the liability can be determined, and economic performance occurred in that year.

If you use the cash method of accounting, deduct the expense on your 2017 tax return.

Prepayment. You generally cannot deduct expenses in advance, even if you pay them in advance. This rule applies to both the cash and accrual methods. It applies to prepaid interest, prepaid insurance premiums, and any other expense paid far enough in advance to, in effect, create an asset with a useful life extending substantially beyond the end of the current tax year.

Example. In 2016, you sign a 10-year lease and immediately pay your rent for the first 3 years. Even though you paid the rent for 2016, 2017, and 2018, you can only deduct the rent for 2016 on your 2016 tax return. You can deduct the rent for 2017 and 2018 on your tax returns for those years.

Contested liability. Under the cash method, you can deduct a contested liability only in the year you pay the liability. Under the accrual method, you can deduct contested liabilities such as taxes (except foreign or U.S. possession income, war profits, and excess profits taxes) either in the tax year you pay the liability (or transfer money or other property to satisfy the obligation) or in the tax year you settle the contest. However, to take the deduction in the year of payment or transfer, you must meet certain conditions. See Regulations section 1.461-2.

Related person. Under an accrual method of accounting, you generally deduct expenses when you incur them, even if you have not yet paid them. However, if you and the person you owe are related and that person uses the cash method of accounting, you must pay the expense before you can deduct it. Your deduction is allowed when the amount is includible in income by the related cash method payee. For more information, see *Related Persons* in Pub. 538.

Not-for-Profit Activities

If you do not carry on your business or investment activity to make a profit, you cannot use a loss from the activity to offset other income. Activities you do as a hobby, or mainly for sport or recreation, are often not entered into for profit.

The limit on not-for-profit losses applies to individuals, partnerships, estates, trusts, and S corporations. It does not apply to corporations other than S corporations.

In determining whether you are carrying on an activity for profit, several factors are taken into account. No one factor alone is decisive. Among the factors to consider are whether:

- You carry on the activity in a businesslike manner,
- The time and effort you put into the activity indicate you intend to make it profitable,
- You depend on the income for your livelihood,
- Your losses are due to circumstances beyond your control (or are normal in the start-up phase of your type of business),
- You change your methods of operation in an attempt to improve profitability,
- You (or your advisors) have the knowledge needed to carry on the activity as a successful business,
- You were successful in making a profit in similar activities in the past,
- The activity makes a profit in some years, and
- You can expect to make a future profit from the appreciation of the assets used in the activity.

Presumption of profit. An activity is presumed carried on for profit if it produced a profit in at least 3 of the last 5 tax years, including the current year. Activities that consist primarily of breeding, training, showing, or racing horses are presumed carried on for profit if they produced a profit in at least 2 of the last 7 tax years, including the current year. The activity must be substantially the same for each year within this period. You have a profit when the gross income from an activity exceeds the deductions.

If a taxpayer dies before the end of the 5-year (or 7-year) period, the "test" period ends on the date of the taxpayer's death.

If your business or investment activity passes this 3- (or 2-) years-of-profit test, the IRS will presume it is carried on for profit. This means the limits discussed here will not apply. You can take all your business deductions from the activity, even for the years that you have a loss. You can rely on this presumption unless the IRS later shows it to be invalid.

Using the presumption later. If you are starting an activity and do not have 3 (or 2) years showing a profit, you can elect to have the presumption made after you have the 5 (or 7) years of experience allowed by the test.

You can elect to do this by filing Form 5213. Filing this form postpones any determination that your activity is not carried on for profit until 5 (or 7) years have passed since you started the activity.

The benefit gained by making this election is that the IRS will not immediately question whether your activity is engaged in for profit. Accordingly, it will not restrict your deductions. Rather, you will gain time to earn a profit in the required number of years. If you show 3 (or 2) years of profit at the end of this period, your deductions are not limited under these rules. If you do not have 3 (or 2) years of profit, the limit can be applied retroactively to any year with a loss in the 5-year (or 7-year) period.

Filing Form 5213 automatically extends the period of limitations on any year in the 5-year (or 7-year) period to 2 years after the due date of the tax return for the last year of the period. The period is extended only for deductions of the activity and any related deductions that might be affected.

TIP *You must file Form 5213 within 3 years after the due date of your tax return (determined without extensions) for the year in which you first carried on the activity, or, if earlier, within 60 days after receiving written notice from the IRS proposing to disallow deductions attributable to the activity.*

Bonuses and advanced royalties. Bonuses and advanced royalties are payments a lessee makes before production to a lessor for the grant of rights in a lease or for minerals, gas, or oil to be extracted from leased property. If you are the lessor, your income from bonuses and advanced royalties received is subject to an allowance for depletion, as explained in the next two paragraphs.

Figuring cost depletion. To figure cost depletion on a bonus, multiply your adjusted basis in the property by a fraction, the numerator of which is the bonus and the denominator of which is the total bonus and royalties expected to be received. To figure cost depletion on advanced royalties, use the calculation explained earlier under Cost Depletion, treating the number of units for which the advanced royalty is received as the number of units sold.

Figuring percentage depletion. In the case of mines, wells, and other natural deposits other than gas, oil, or geothermal property, you may use the percentage rates discussed earlier under Mines and Geothermal Deposits. Any bonus or advanced royalty payments are generally part of the gross income from the property to which the rates are applied in making the calculation. However, for oil, gas, or geothermal property, gross income does not include lease bonuses, advanced royalties, or other amounts payable without regard to production from the property.

Ending the lease. If you receive a bonus on a lease that ends or is abandoned before you derive any income from mineral extraction, include in income the depletion deduction you took. Do this for the year the lease ends or is abandoned. Also increase your adjusted basis in the property to restore the depletion deduction you previously subtracted.

For advanced royalties, include in income the depletion claimed on minerals for which the advanced royalties were paid if the minerals were not produced before the lease ended. Include this amount in income for the year the lease ends. Increase your adjusted basis in the property by the amount you include in income.

Delay rentals. These are payments for deferring development of the property. Since delay rentals are ordinary rent, they are ordinary income that is not subject to depletion. These rentals can be avoided by either abandoning the lease, beginning development operations, or obtaining production.

Timber

You can figure timber depletion only by the cost method. Percentage depletion does not apply to timber. Base your depletion on your cost or other basis in the timber. Your cost does not include the cost of land or any amounts recoverable through depreciation.

Depletion takes place when you cut standing timber. You can figure your depletion deduction when the quantity of cut timber is first accurately measured in the process of exploitation.

Figuring cost depletion. To figure your cost depletion allowance, you multiply the number of timber units cut by your depletion unit.

Timber units. When you acquire timber property, you must make an estimate of the quantity of marketable timber that exists on the property. You measure the timber using board feet, log scale, cords, or other units. If you later determine that you have more or less units of timber, you must adjust the original estimate.

The term "timber property" means your economic interest in standing timber in each tract or block representing a separate timber account.

Depletion unit. You figure your depletion unit each year by taking the following steps.

1. Determine your cost or adjusted basis of the timber on hand at the beginning of the year. Adjusted basis is defined under Cost Depletion in the discussion on *Mineral Property*, earlier.
2. Add to the amount determined in (1) the cost of any timber units acquired during the year and any additions to capital.
3. Figure the number of timber units to take into account by adding the number of timber units acquired during the year to the number of timber units on hand in the account at the beginning of the year and then adding (or subtracting) any correction to the estimate of the number of timber units remaining in the account.
4. Divide the result of (2) by the result of (3). This is your depletion unit.

Example. You bought a timber tract for $160,000 and the land was worth as much as the timber. Your basis for the timber is $80,000. Based on an estimated one million board feet (1,000 MBF) of standing timber, you figure your depletion unit to be $80 per MBF ($80,000 ÷ 1,000). If you cut 500 MBF of timber, your depletion allowance would be $40,000 (500 MBF × $80).

When to claim depletion. Claim your depletion allowance as a deduction in the year of sale or other disposition of the products cut from the timber, unless you choose to treat the cutting of timber as a sale or exchange (explained below). Include allowable depletion for timber products not sold during the tax year the timber is cut as a cost item in the closing inventory of timber products for the year. The inventory is your basis for determining gain or loss in the tax year you sell the timber products.

Example. The facts are the same as in the previous example except that you sold only half of the timber products in the cutting year. You would deduct $20,000 of the $40,000 depletion that year. You would add the remaining $20,000 depletion to your closing inventory of timber products.

Electing to treat the cutting of timber as a sale or exchange. You can elect, under certain circumstances, to treat the cutting of timber held for more than 1 year as a sale or exchange. You must make the election on your income tax return for the tax year to which it applies. If you make this election, subtract the adjusted basis for depletion from the FMV of the timber on the first day of the tax year in which you cut it to figure the gain or loss on the cutting. You generally report the gain as long-term capital gain. The FMV then becomes your basis for figuring your ordinary gain or loss on the sale or other disposition of the products cut from the timber. For more information, see *Timber* in chapter 2 of Pub. 544.

You may revoke an election to treat the cutting of timber as a sale or exchange without the IRS's consent. The prior election (and revocation) is disregarded for purposes of making a subsequent election. See Form T (Timber) for more information.

Form T (Timber). Complete and attach Form T (Timber) to your income tax return if you claim a deduction for timber depletion, choose to treat the cutting of timber as a sale or exchange, or make an outright sale of timber.

10. Business Bad Debts

Introduction

You have a bad debt if you cannot collect money owed to you. A bad debt is either a business bad debt or a nonbusiness bad debt. This chapter discusses only business bad debts.

Generally, a business bad debt is one that comes from operating your trade or business. You can deduct business bad debts on Schedule C (Form 1040) or your applicable business income tax return.

All other bad debts are nonbusiness bad debts and are deductible only as short-term capital losses. For more information on nonbusiness bad debts, see Pub. 550.

Topics
This chapter discusses:

- Definition of business bad debt
- When a debt becomes worthless
- How to claim a business bad debt
- Recovery of a bad debt

Useful Items
You may want to see:

Publication

- ❑ **525** Taxable and Nontaxable Income
- ❑ **536** Net Operating Losses (NOLs) for Individuals, Estates, and Trusts
- ❑ **544** Sales and Other Dispositions of Assets

- ☐ **550** Investment Income and Expenses
- ☐ **556** Examination of Returns, Appeal Rights, and Claims for Refund

Form (and Instructions)

- ☐ **Schedule C (Form 1040)** Profit or Loss From Business
- ☐ **1040X** Amended U.S. Individual Income Tax Return
- ☐ **1045** Application for Tentative Refund
- ☐ **1065** U.S. Return of Partnership Income
- ☐ **1065X** Amended Return or Administrative Adjustment Request (AAR)
- ☐ **1120S** U.S. Income Tax Return for an S Corporation
- ☐ **1120X** Amended U.S. Corporation Income Tax Return
- ☐ **1139** Corporation Application for Tentative Refund
- ☐ **3115** Application for Change in Accounting Method

See chapter 12 for information about getting publications and forms.

Definition of Business Bad Debt

A business bad debt is a loss from the worthlessness of a debt that was either:

- Created or acquired in your trade or business, or
- Closely related to your trade or business when it became partly or totally worthless.

A debt is closely related to your trade or business if your primary motive for incurring the debt is business related. Bad debts of a corporation (other than an S corporation) are always business bad debts.

Credit sales. Business bad debts are mainly the result of credit sales to customers. Goods that have been sold, but not yet paid for, and services that have been performed, but not yet paid for, are recorded in your books as either accounts receivable or notes receivable. After a reasonable period of time, if you have tried to collect the amount due, but are unable to do so, the uncollectible part becomes a business bad debt.

Accounts or notes receivable valued at FMV when received are deductible only at that value, even though the FMV may be less than the face value. If you purchased an account receivable for less than its face value, and the receivable subsequently becomes worthless, the most you are allowed to deduct is the amount you paid to acquire it.

CAUTION *You can claim a business bad debt deduction only if the amount owed to you was previously included in gross income. This applies to amounts owed to you from all sources of taxable income, including sales, services, rents, and interest.*

Accrual method. If you use an accrual method of accounting, you generally report income as you earn it. You can only claim a bad debt deduction for an uncollectible receivable if you have previously included the uncollectible amount in income.

If you qualify, you can use the nonaccrual-experience method of accounting discussed later. Under this method, you don't have to accrue income that, based on your experience, you don't expect to collect.

Cash method. If you use the cash method of accounting, you generally report income when you receive payment. You can't claim a bad debt deduction for amounts owed to you because you never included those amounts in income. For example, a cash basis architect can't claim a bad debt deduction if a client fails to pay the bill because the architect's fee was never included in income.

Debts from a former business. If you sell your business but retain its receivables, these debts are business debts because they arose out of your trade or business. If any of these receivables subsequently become worthless, the loss is still a business bad debt.

Debt acquired from a decedent. The character of a loss from debts of a business acquired from a decedent is determined in the same way as debts acquired on the purchase of a business. The executor of the decedent's estate treats any loss from the debts as a business bad debt if the debts were closely related to the decedent's trade or business when they became worthless. Otherwise, a loss from these debts becomes a nonbusiness bad debt for the decedent's estate.

Liquidation. If you liquidate your business and some of the accounts receivable that you retain become worthless, they're treated as business bad debts.

Types of Business Bad Debts

Business bad debts may result from the following.

Loans to clients and suppliers. If you loan money to a client, supplier, employee, or distributor for a business reason and you're unable to collect the loan after attempting to do so, you have a business bad debt.

Debts owed by political parties. If a political party (or other organization that accepts contributions or spends money to influence elections) owes you money and the debt becomes worthless, you can claim a bad debt deduction only if all of the following requirements are met.

1. You use an accrual method of accounting.
2. The debt arose from the sale of goods or services in the ordinary course of your trade or business.
3. More than 30% of your receivables accrued in the year of the sale were from sales to political parties.
4. You made substantial and continuing efforts to collect on the debt.

Loan or capital contribution. You cannot claim a bad debt deduction for a loan you made to a corporation if, based on the facts and circumstances, the loan is actually a contribution to capital.

Debts of an insolvent partner. If your business partnership breaks up and one of your former partners becomes insolvent, you may have to pay more than your pro rata share of the partnership's debts. If you pay any part of the insolvent partner's share of the debts, you can claim a bad debt deduction for the amount you paid that is attributable to the insolvent partner's share.

Business loan guarantee. If you guarantee a debt that subsequently becomes worthless, the debt can qualify as a business bad debt if all the following requirements are met.

- You made the guarantee in the course of your trade or business.
- You have a legal duty to pay the debt.
- You made the guarantee before the debt became worthless. You meet this requirement if you reasonably expected you wouldn't have to pay the debt without full reimbursement from the borrower.
- You received reasonable consideration for making the guarantee. You meet this requirement if you made the guarantee according to normal business practice or for a good faith business purpose.

Example. Jane Zayne owns the Zayne Dress Company. She guaranteed payment of a $20,000 note for Elegant Fashions, a dress outlet. Elegant Fashions is one of Zayne's largest clients. Elegant Fashions later defaulted on the loan. As a result, Ms. Zayne paid the remaining balance of the loan in full to the bank.

She can claim a business bad debt deduction only for the amount she paid, since her guarantee was made in the course of her trade or business for a good faith business purpose. She was motivated by the desire to retain one of her better clients and keep a sales outlet.

Deductible in the year paid. If you make a payment on a loan you guaranteed, you can deduct it in the year paid, unless you have rights against the borrower.

Rights against a borrower. When you make payment on a loan you guaranteed, you may have the right to take the place of the lender. The debt is then owed to you. If you have this right, or some other right to demand payment from the borrower, you can't claim a bad debt deduction until these rights become partly or totally worthless.

Joint debtor. If two or more debtors jointly owe you money, your inability to collect from one does not enable you to deduct a proportionate amount as a bad debt.

Sale of mortgaged property. If mortgaged or pledged property is sold for less than the debt, the unpaid, uncollectible balance of the debt is a bad debt.

When a Debt Becomes Worthless

A debt becomes worthless when there is no longer any chance the amount owed will be paid. This may occur when the debt is due or prior to that date.

To demonstrate worthlessness, you must only show that you have taken reasonable steps to collect the debt but were unable to do so. It isn't necessary to go to court if you can show that a judgment from the court would be uncollectible. Bankruptcy of your debtor is generally good evidence of the worthlessness of at least a part of an unsecured and unpreferred debt.

Property received for debt. If you receive property in partial settlement of a debt, reduce the debt by the property's FMV, which becomes the property's basis. You can deduct the remaining debt as a bad debt if and when it becomes worthless.

If you later sell the property for more than its basis, any gain on the sale is due to the appreciation of the property. It is not a recovery of a bad debt. For information on the sale of an asset, see Pub. 544.

How To Claim a Business Bad Debt

There are two methods to claim a business bad debt.

- The specific charge-off method.
- The nonaccrual-experience method.

Generally, you must use the specific charge-off method. However, you may use the nonaccrual-experience method if you meet the requirements discussed later under Nonaccrual-Experience Method.

Specific Charge-Off Method

If you use the specific charge-off method, you can deduct specific business bad debts that become either partly or totally worthless during the tax year. However, with respect to partly worthless bad debts, your deduction is limited to the amount you charged off on your books during the year.

Partly worthless debts. You can deduct specific bad debts that become partly uncollectible during the tax year. Your tax deduction is limited to the amount you charge off on your books during the year. You do not have to charge off and deduct your partly worthless debts annually. You can delay the charge off until a later year. However, you can't deduct any part of a debt after the year it becomes totally worthless.

Significantly modified debt. An exception to the charge-off rule exists for debt which has been significantly modified and on which the holder recognized gain. For more information, see Regulations section 1.166-3(a)(3).

Deduction disallowed. Generally, you can claim a partial bad debt deduction only in the year you make the charge-off on your books. If, under audit, the IRS does not allow your deduction and the debt becomes partly worthless in a later tax year, you can deduct the amount you charged off in that year plus the disallowed amount charged off in the earlier year. The charge-off in the earlier year, unless reversed on your books, fulfills the charge-off requirement for the later year.

Totally worthless debts. If a debt becomes totally worthless in the current tax year, you can deduct the entire amount minus any amount deducted in an earlier tax year when the debt was only partly worthless.

You do not have to make an actual charge-off on your books to claim a bad debt deduction for a totally worthless debt. However, you may want to do so. If you do not and the IRS later rules the debt is only partly worthless, you will not be allowed a deduction for the debt in that tax year because a deduction of a partly worthless bad debt is limited to the amount actually charged off. See *Partly worthless debts,* earlier.

Filing a claim for refund. If you didn't deduct a bad debt on your original return for the year it became worthless, you can file a claim for a credit or refund. If the bad debt was totally worthless, you must file the claim by the later of the following dates.

- 7 years from the date your original return was due (not including extensions).
- 2 years from the date you paid the tax.

If the claim is for a partly worthless bad debt, you must file the claim by the later of the following dates.

- 3 years from the date you filed your original return.
- 2 years from the date you paid the tax.

You may have longer to file the claim if you were unable to manage your financial affairs due to a physical or mental impairment. Such an impairment requires proof of existence.

For details and more information about filing a claim, see Pub. 556. Use one of the following forms to file a claim. For more information, see the instructions for the applicable form.

Table 10-1. **Forms Used To File a Claim**

IF you filed as a...	THEN file...
Sole proprietor or farmer	Form 1040X
Corporation	Form 1120X
S corporation	Form 1120S and check box H(4)
Partnership	Form 1065X if filing on paper or Form 1065 and check box G(5) if filing electronically

Nonaccrual-Experience Method

If you use an accrual method of accounting and qualify under the rules explained in this section, you can use the nonaccrual-experience method for bad debts. Under this method, you do not accrue service-related income you expect to be uncollectible. Because the expected uncollectible amounts are not included in income, these amounts are not later deducted from income.

Generally, you can use the nonaccrual-experience method for accounts receivable for services you performed only if:

- The services are provided in the fields of accounting, actuarial science, architecture, consulting, engineering, health, law, or the performing arts; or
- You meet the $5 million gross receipts test for all prior years.

Service-related income. You can use the nonaccrual-experience method only for amounts earned by performing services. You can't use this method for amounts owed to you from activities such as lending money, selling goods, or acquiring receivables or other rights to receive payment.

Gross receipts test. To find out if you meet the $5 million gross receipts test for all prior years, you must figure the average annual gross receipts for each prior year. If your average annual gross receipts for any year exceeds $5 million, you can't use the nonaccrual-experience method.

The average annual gross receipts for any year is the average of gross receipts from the year in question and the 2 previous years. For example, if you were figuring the average annual gross receipts for 2016, you would average your gross receipts for 2014, 2015, and 2016.

Interest or penalty charged. Generally, you can't use the nonaccrual-experience method for amounts due on which you charge interest or a late payment penalty. However, do not treat a discount offered for early payment as the charging of interest or a penalty if both the following apply.

- You otherwise accrue the full amount due as gross income at the time you provide the services.
- You treat the discount allowed for early payment as an adjustment to gross income in the year of payment.

Change in accounting method. Generally, you must obtain consent to change to a nonaccrual-experience method (other than one of the safe harbor methods) or to change from one method to another. See Form 3115 and its instructions for more information and exceptions.

Recovery of a Bad Debt

If you claim a deduction for a bad debt on your income tax return and later recover (collect) all or part of it, you may have to include all or part of the recovery in gross income. The amount you include is limited to the amount you actually deducted. However, you can exclude the amount deducted that did not reduce your tax. Report the recovery as "Other income" on the appropriate business form or schedule.

See *Recoveries* in Pub. 525 for more information.

NOL carryover. If a bad debt deduction increases an NOL carryover that has not expired before the beginning of the tax year in which the recovery takes place, you treat the deduction as having reduced your tax. A bad debt deduction that contributes to an NOL helps lower taxes in the year to which you carry the NOL. For more information about NOLs for individuals, see Pub. 536. Also, see the Instructions for Form 1045, and the Instructions for Form 1139.

11. Other Expenses

What's New

Standard mileage rate. Beginning in 2016, the standard mileage rate for the cost of operating your car, van, pickup, or panel truck for business use is 54 cents per mile. For more information, see Car and truck expenses under Miscellaneous Expenses, later.

Introduction

This chapter covers business expenses that may not have been explained to you, as a business owner, in previous chapters of this publication.

Topics

This chapter discusses:

- Travel, meals, and entertainment
- Bribes and kickbacks
- Charitable contributions
- Education expenses
- Lobbying expenses
- Penalties and fines
- Repayments (claim of right)
- Other miscellaneous expenses

Useful Items

You may want to see:

Publication

- ☐ **15-B** Employer's Tax Guide to Fringe Benefits
- ☐ **463** Travel, Entertainment, Gift, and Car Expenses
- ☐ **526** Charitable Contributions
- ☐ **529** Miscellaneous Deductions
- ☐ **544** Sales and Other Dispositions of Assets
- ☐ **946** How To Depreciate Property
- ☐ **970** Tax Benefits for Education

Form (and Instructions)

- ☐ **Schedule A (Form 1040)** Itemized Deductions
- ☐ **Schedule C (Form 1040)** Profit or Loss From Business
- ☐ **Schedule C-EZ (Form 1040)** Net Profit From Business
- ☐ **Schedule F (Form 1040)** Profit or Loss From Farming
- ☐ **1099-MISC** Miscellaneous Income
- ☐ **1120** U.S. Corporation Income Tax Return
- ☐ **4562** Depreciation and Amortization
- ☐ **8949** Sales and Other Dispositions of Capital Assets
- ☐ **W-2** Wage and Tax Statement

See chapter 12 for information about getting publications and forms.

Reimbursement of Travel, Meals, and Entertainment

The following discussion explains how to handle any reimbursements or allowances you may provide to your employees under a reimbursement or allowance arrangement for travel, meals, and entertainment expenses. If you are self-employed and report your income and expenses on Schedule C (Form 1040) or Schedule C-EZ (Form 1040), see Pub. 463.

To be deductible for tax purposes, expenses incurred for travel, meals, and entertainment must be ordinary and necessary expenses incurred while carrying on your trade or business. Generally, you also must show that entertainment expenses (including meals) are directly related to, or associated with, the conduct of your trade or business. For more information on travel, meals, and entertainment, including deductibility, see Pub. 463.

Reimbursements

A "reimbursement or allowance arrangement" provides for payment of advances, reimbursements, and allowances for travel, meals, and entertainment expenses incurred by your employees during the ordinary course of business. If the expenses are substantiated, you can deduct the allowable amount on your tax return. Because of differences between accounting methods and tax law, the amount you can deduct for tax purposes may not be the same as the amount you deduct on your business books and records. For example, you can deduct 100% of the cost of meals on your business books and records. However, only 50% of these costs are allowed by law as a tax deduction.

How you deduct a business expense under a reimbursement or allowance arrangement depends on whether you have:

- An accountable plan, or
- A nonaccountable plan.

If you reimburse these expenses under an accountable plan, deduct them as travel, meals, or entertainment expenses.

If you reimburse these expenses under a nonaccountable plan, report the reimbursements as wages on Form W-2, and deduct them as wages on the appropriate line of your tax return. If you make a single payment to your employees and it includes both wages and an expense reimbursement, you must specify the amount of the reimbursement and report it accordingly. See Table 11-1.

Accountable Plans

An accountable plan requires your employees to meet all of the following requirements. Each employee must:

1. Have paid or incurred deductible expenses while performing services as your employee,
2. Adequately account to you for these expenses within a reasonable period of time, and
3. Return any excess reimbursement or allowance within a reasonable period of time.

An arrangement under which you advance money to employees is treated as meeting (3) above only if the following requirements are also met.

- The advance is reasonably calculated not to exceed the amount of anticipated expenses.
- You make the advance within a reasonable period of time of your employee paying or incurring the expense.

If any expenses reimbursed under this arrangement aren't substantiated, or an excess reimbursement isn't returned within a reasonable period of time by an employee, you cannot treat these expenses as reimbursed under an accountable plan. Instead, treat the reimbursed expenses as paid under a nonaccountable plan, discussed later.

Adequate accounting. Your employees must adequately account to you for their travel, meals, and entertainment expenses. They must give you documentary evidence of their travel, mileage, and other employee business expenses. This evidence should include items such as receipts, along with either a statement of expenses, an account book, a day-planner, or similar record in which the employee entered each expense at or near the time the expense was incurred.

Excess reimbursement or allowance. An excess reimbursement or allowance is any amount you pay to an employee that is more than the business-related expenses for which the employee adequately accounted. The employee must return any excess reimbursement or other expense allowance to you within a reasonable period of time.

Reasonable period of time. A reasonable period of time depends on the facts and circumstances. Generally, actions that take place within the times specified in the following list will be treated as taking place within a reasonable period of time.

1. You give an advance within 30 days of the time the employee pays or incurs the expense.
2. Your employees adequately account for their expenses within 60 days after the expenses were paid or incurred.
3. Your employees return any excess reimbursement within 120 days after the expenses were paid or incurred.
4. You give a periodic statement (at least quarterly) to your employees that asks them to either return or adequately account for outstanding advances ***and*** they comply within 120 days of the date of the statement.

How to deduct. You can claim a deduction for travel, meals, and entertainment expenses if you reimburse your employees for these expenses under an accountable plan. Generally, the amount you can deduct for meals and entertainment is subject to a 50% limit, discussed later. If you are a sole proprietor, or are filing as a single member limited liability company, deduct the travel reimbursement on line 24a and the deductible part of the meals and entertainment reimbursement on line 24b, Schedule C (Form 1040), or line 2, Schedule C-EZ (Form 1040).

If you are filing an income tax return for a corporation, include the reimbursement on the *Other deductions* line of Form 1120. If you are filing any other business income tax return, such as a partnership or S corporation return, deduct the reimbursement on the appropriate line of the return as provided in the instructions for that return.

Per Diem and Car Allowances

You can reimburse your employees under an accountable plan based on travel days, miles, or some other fixed allowance. In these cases, your employee is considered to have accounted to you for the amount of the expense that doesn't exceed the rates established by the federal government. Your employee must actually substantiate to you the other elements of the expense, such as time, place, and business purpose.

Federal rate. The federal rate can be figured using any one of the following methods.

1. For car expenses:
   a. The standard mileage rate.
   b. A fixed and variable rate (FAVR).
2. For per diem amounts:
   a. The regular federal per diem rate.
   b. The standard meal allowance.
   c. The high-low rate.

Table 11-1. **Reporting Reimbursements**

IF the type of reimbursement (or other expense allowance) arrangement is under	THEN the employer reports on Form W-2
An accountable plan with:	
Actual expense reimbursement: Adequate accounting made and excess returned	No amount.
Actual expense reimbursement: Adequate accounting and return of excess both required but excess not returned	The excess amount as wages in box 1.
Per diem or mileage allowance up to the federal rate: Adequate accounting made and excess returned	No amount.
Per diem or mileage allowance up to the federal rate: Adequate accounting and return of excess both required but excess not returned	The excess amount as wages in box 1. The amount up to the federal rate is reported only in box 12—it is not reported in box 1.
Per diem or mileage allowance exceeds the federal rate: Adequate accounting made up to the federal rate only and excess not returned	The excess amount as wages in box 1. The amount up to the federal rate is reported only in box 12—it is not reported in box 1.
A nonaccountable plan with:	
Either adequate accounting or return of excess, or both, not required by plan	The entire amount as wages in box 1.
No reimbursement plan	The entire amount as wages in box 1.

Car allowance. Your employee is considered to have accounted to you for car expenses that do not exceed the standard mileage rate. Beginning in 2016, the standard business mileage rate is 54 cents per mile.

You can choose to reimburse your employees using an FAVR allowance. This is an allowance that includes a combination of payments covering fixed and variable costs, such as a cents-per-mile rate to cover your employees' variable operating costs (such as gas, oil, etc.) plus a flat amount to cover your employees' fixed costs (such as depreciation, insurance, etc.). For information on using an FAVR allowance, see Revenue Procedure 2010-51, available at *IRS.gov/irb/2010-51_IRB/ar14.html*, and Notice 2016-1, available at *IRS.gov/irb/2016-02_IRB/ar08.html*.

Per diem allowance. If your employee actually substantiates to you the other elements (discussed earlier) of the expenses reimbursed using the per diem allowance, how you report and deduct the allowance depends on whether the allowance is for lodging and meal expenses or for meal expenses only and whether the allowance is more than the federal rate.

Regular federal per diem rate. The regular federal per diem rate is the highest amount the federal government will pay to its employees while away from home on travel. It has the following two components.

1. Lodging expense.
2. Meal and incidental expense (M&IE).

The rates are different for different locations. See *GSA.gov/perdiem* for the per diem rates in the continental United States.

Standard meal allowance. The federal rate for M&IE is the standard meal allowance. You can pay only an M&IE allowance to employees who travel away from home if:

- You pay the employee for actual expenses for lodging based on receipts submitted to you,
- You provide for the lodging,
- You pay for the actual expense of the lodging directly to the provider,
- You don't have a reasonable belief that lodging expenses were incurred by the employee, or
- The allowance is figured on a basis similar to that used in figuring the employee's wages (that is, number of hours worked or miles traveled).

Per diem rates online. You can access per diem rates at *GSA.gov/perdiem*.

High-low method. This is a simplified method of figuring the federal per diem rate for travel within the continental United States. It eliminates the need to keep a current list of the per diem rate for each city.

Under the high-low method, the per diem amount for travel during January through September of 2016 is $275 ($68 for M&IE) for certain high-cost locations. All other areas have a per diem amount of $185 ($57 for M&IE). The high-cost localities eligible for the higher per diem amount under the high-low method are listed in Notice 2016-58, available at *IRS.gov/2016-41_IRB/ar06.html*.

Effective October 1, 2016, the per diem rate for high-cost locations increased to $282 ($68 for M&IE). The rate for all other locations increased to $189 ($57 for M&IE). For October, November, and December 2016, you can either continue to use the rates described in the preceding paragraph or change to the new rates. However, you must use the same rate for all employees reimbursed under the high-low method.

For more information about the high-low method, see Notice 2016-58, available at *IRS.gov/irb/2016-41_IRB/ar06.html*. See *GSA.gov/perdiem* for the current per diem rates for all locations.

Reporting per diem and car allowances. The following discussion explains how to report per diem and car allowances. The manner in which you report them depends on how the allowance compares to the federal rate. See Table 11-1.

Allowance less than or equal to the federal rate. If your allowance for the employee is less than or equal to the appropriate federal rate, that allowance isn't included as part of the employee's pay in box 1 of the employee's Form W-2. Deduct the allowance as travel expenses (including meals that may be subject to the 50% limit, discussed later). See *How to deduct* under *Accountable Plans*, earlier.

Allowance more than the federal rate. If your employee's allowance is more than the appropriate federal rate, you must report the allowance as two separate items.

Include the allowance amount up to the federal rate in box 12 (code L) of the employee's Form W-2. Deduct it as travel expenses (as explained above). This part of the allowance is treated as reimbursed under an accountable plan.

Include the amount that is more than the federal rate in box 1 (and in boxes 3 and 5 if they apply) of the employee's Form W-2. Deduct it as wages subject to income tax withholding, social security, Medicare, and federal unemployment taxes. This part of the allowance is treated as reimbursed under a nonaccountable plan as explained later under *Nonaccountable Plans*.

Meals and Entertainment

Under an accountable plan, you can generally deduct only 50% of any otherwise deductible business-related meal and entertainment expenses you reimburse your employees. The deduction limit applies even if you reimburse them for 100% of the expenses.

Application of the 50% limit. The 50% deduction limit applies to reimbursements you make to your employees for expenses they incur for meals while traveling away from home on business and for entertaining business customers at your place of business, a restaurant, or another location. It applies to expenses incurred at a business convention or reception, business meeting, or business luncheon at a club. The deduction limit may also apply to meals you furnish on your premises to your employees.

Related expenses. Taxes and tips relating to a meal or entertainment activity you reimburse to your employee under an accountable plan are included in the amount subject to the 50% limit. Reimbursements you make for expenses, such as cover charges for admission to a nightclub, rent paid for a room to hold a dinner or cocktail party, or the amount you pay for parking at a sports arena, are all subject to the 50% limit. However, the cost of transportation to and from an otherwise allowable business meal or a business-related entertainment activity isn't subject to the 50% limit.

Amount subject to 50% limit. If you provide your employees with a per diem allowance only for meal and incidental expenses, the amount treated as an expense for food and beverages is the lesser of the following.

- The per diem allowance.
- The federal rate for M&IE.

If you provide your employees with a per diem allowance that covers lodging, meals, and incidental expenses, you must treat an amount equal to the federal M&IE rate for the area of travel as an expense for food and beverages. If the per diem allowance you provide is less than the federal per diem rate for the area of travel, you can treat 40% of the per diem allowance as the amount for food and beverages.

Meal expenses when subject to "hours of service" limits. You can deduct 80% of the cost of reimbursed meals your employees consume while away from their tax home on business during, or incident to, any period subject to the Department of Transportation's "hours of service" limits.

See Pub. 463 for a detailed discussion of individuals subject to the Department of Transportation's "hours of service" limits.

De minimis (minimal) fringe benefit. The 50% limit doesn't apply to an expense for food or beverage that is excluded from the gross income of an employee because it is a de minimis fringe benefit. See Pub.15-B for additional information on de minimis fringe benefits.

Company cafeteria or executive dining room. The cost of food and beverages you provide primarily to your employees on your business premises is deductible. This includes the cost of maintaining the facilities for providing the food and beverages. These expenses are subject to the 50% limit unless they qualify as a de minimis fringe benefit, as just discussed, or unless they are compensation to your employees (explained later).

Employee activities. The expense of providing recreational, social, or similar activities (including the use of a facility) for your employees is deductible and isn't subject to the 50% limit. The benefit must be primarily for your employees who aren't highly compensated.

For this purpose, a highly compensated employee is an employee who meets either of the following requirements.

1. Owned a 10% or more interest in the business during the year or the preceding year. An employee is treated as owning any interest owned by his or her brother, sister, spouse, ancestors, and lineal descendants.
2. Received more than $120,000 in pay for the preceding year. You can choose to include only employees who were also in the top 20% of employees when ranked by pay for the preceding year.

For example, the expenses for food, beverages, and entertainment for a company-wide picnic aren't subject to the 50% limit.

Meals or entertainment treated as compensation. The 50% limit doesn't apply to either of the following.

1. Expenses for meals or entertainment that you treat as:
   a. Compensation to an employee who was the recipient of the meals or entertainment, and
   b. Wages subject to withholding of federal income tax.
2. Expenses for meals or entertainment if:
   a. A recipient of the meals or entertainment who isn't your employee has to include the expenses in gross income as compensation for services or as a prize or award; and
   b. You include that amount on a Form 1099-MISC issued to the recipient, if a Form 1099-MISC is required.

Sales of meals or entertainment. You can deduct the cost of meals or entertainment (including the use of facilities) you sell to the public. For example, if you run a nightclub, your expense for the entertainment you furnish to your customers, such as a floor show, is a business expense that is fully deductible. The 50% limit doesn't apply to this expense.

Providing meals or entertainment to general public to promote goodwill. You can deduct the cost of providing meals, entertainment, or recreational facilities to the general public as a means of advertising or promoting goodwill in the community. The 50% limit doesn't apply to this expense.

Director, stockholder, or employee meetings. You can deduct entertainment expenses directly related to business meetings of your employees, partners, stockholders, agents, or directors. You can provide some minor social activities, but the main purpose of the meeting must be your company's business. These expenses are subject to the 50% limit.

Trade association meetings. You can deduct expenses directly related to and necessary for attending business meetings or conventions of certain tax-exempt organizations. These organizations include business leagues, chambers of commerce, real estate boards, and trade and professional associations.

Nonaccountable Plans

A nonaccountable plan is an arrangement that doesn't meet the requirements for an accountable plan. All amounts paid, or treated as paid, under a nonaccountable plan are reported as wages on Form W-2. The payments are subject to income tax withholding, social security, Medicare, and federal unemployment taxes. You can deduct the reimbursement as compensation or wages only to the extent it meets the deductibility tests for employees' pay in chapter 2. Deduct the allowable amount as compensation or wages on the appropriate line of your income tax return, as provided in its instructions.

Miscellaneous Expenses

In addition to travel, meal, and entertainment expenses, there are other expenses you can deduct.

Advertising expenses. You generally can deduct reasonable advertising expenses that are directly related to your business activities.

Generally, you can't deduct amounts paid to influence legislation (for example, lobbying). For more information, see Lobbying expenses, later.

You can usually deduct as a business expense the cost of institutional or goodwill advertising to keep your name before the public if it relates to business you reasonably expect to gain in the future. For example, the cost of advertising that encourages people to contribute to the Red Cross, to buy U.S. Savings Bonds, or to participate in similar causes is usually deductible.

Anticipated liabilities. Anticipated liabilities or reserves for anticipated liabilities aren't deductible. For example, assume you sold 1-year TV service contracts this year totaling $50,000. From experience, you know you will have expenses of about $15,000 in the coming year for these contracts. You can't deduct any of the $15,000 this year by charging expenses to a reserve or liability account. You can deduct your expenses only when you actually pay or accrue them, depending on your accounting method.

Bribes and kickbacks. Engaging in the payment of bribes or kickbacks is a serious criminal matter. Such activity could result in criminal prosecution. Any payments that appear to have been made, either directly or indirectly, to an official or employee of any government or an agency or instrumentality of any government aren't deductible for tax purposes and are in violation of the law.

Payments paid directly or indirectly to a person in violation of any federal or state law (but only if that state law is generally enforced, defined below) that provides for a criminal penalty or for the loss of a license or privilege to engage in a trade or business aren't allowed as a deduction for tax purposes.

Meaning of "generally enforced." A state law is considered generally enforced unless it is never enforced or enforced only for infamous persons or persons whose violations are extraordinarily flagrant. For example, a state law is generally enforced unless proper reporting of a violation of the law results in enforcement only under unusual circumstances.

Kickbacks. A kickback is a payment for referring a client, patient, or customer. The common kickback situation occurs when money or property is given to someone as payment for influencing a third party to purchase from, use the services of, or otherwise deal with the person who pays the kickback. In many cases, the person whose business is being sought or enjoyed by the person who pays the kickback isn't aware of the payment.

For example, the Yard Corporation is in the business of repairing ships. It returns 10% of the repair bills as kickbacks to the captains and chief officers of the vessels it repairs. Although this practice is considered an ordinary and necessary expense of getting business, it is clearly a violation of a state law that is generally enforced. These expenditures aren't deductible for tax purposes, whether or not the owners of the shipyard are subsequently prosecuted.

Form 1099-MISC. It doesn't matter whether any kickbacks paid during the tax year are deductible on your income tax return in regards to information reporting. See Form 1099-MISC for more information.

Car and truck expenses. The costs of operating a car, truck, or other vehicle in your business are deductible. For more information on how to figure your deduction, see Pub. 463.

Charitable contributions. Cash payments to an organization, charitable or otherwise, may be deductible as business expenses if the payments aren't charitable contributions or gifts and are directly related to your business. If the payments are charitable contributions or gifts, you can't deduct them as business expenses. However, corporations (other than S corporations) can deduct charitable contributions on their income tax returns, subject to limitations. See the Instructions for Form 1120 for more information. Sole proprietors, partners in a partnership, or shareholders in an S corporation may be able to deduct charitable contributions made by their business on Schedule A (Form 1040).

Example. You paid $15 to a local church for a half-page ad in a program for a concert it is sponsoring. The purpose of the ad was to encourage readers to buy your products. Your payment isn't a charitable contribution. You can deduct it as an advertising expense.

Example. You made a $100,000 donation to a committee organized by the local Chamber of Commerce to bring a convention to your city, intended to increase business activity, including yours. Your payment isn't a charitable contribution. You can deduct it as a business expense.

See Pub. 526 for a discussion of donated inventory, including capital gain property.

Club dues and membership fees. Generally, you can't deduct amounts paid or incurred for membership in any club organized for business, pleasure, recreation, or any other social purpose. This includes country clubs, golf and athletic clubs, hotel clubs, sporting clubs, airline clubs, and clubs operated to provide meals under circumstances generally considered to be conducive to business discussions.

Exception. The following organizations aren't treated as clubs organized for business, pleasure, recreation, or other social purpose unless one of the main purposes is to conduct entertainment activities for members or their guests or to provide members or their guests with access to entertainment facilities.

- Boards of trade.
- Business leagues.
- Chambers of commerce.
- Civic or public service organizations.
- Professional organizations such as bar associations and medical associations.
- Real estate boards.
- Trade associations.

Credit card convenience fees. Credit card companies charge a fee to businesses who accept their cards. This fee when paid or incurred by the business can be deducted as a business expense.

Damages recovered. Special rules apply to compensation you receive for damages sustained as a result of patent infringement, breach of contract or fiduciary duty, or antitrust violations. You must include this compensation in your income. However, you may be able to take a special deduction. The deduction applies only to amounts recovered for actual economic injury, not any additional amount. The deduction is the smaller of the following.

- The amount you received or accrued for damages in the tax year reduced by the amount you paid or incurred in the year to recover that amount.
- Your losses from the injury you haven't deducted.

Demolition expenses or losses. Amounts paid or incurred to demolish a structure aren't deductible. These amounts are added to the basis of the land where the demolished structure was located. Any loss for the remaining undepreciated basis of a demolished structure wouldn't be recognized until the property is disposed of.

Education expenses. Ordinary and necessary expenses paid for the cost of the education and training of your employees are deductible. See Education Expenses in chapter 2.

You can also deduct the cost of your own education (including certain related travel) related to your trade or business. You must be able to show the education maintains or improves skills required in your trade or business, or that it is required by law or regulations, for keeping your license to practice, status, or job. For example, an attorney can deduct the cost of attending Continuing Legal Education (CLE) classes that are required by the state bar association to maintain his or her license to practice law.

Education expenses you incur to meet the minimum requirements of your present trade or business, or those that qualify you for a new trade or business, aren't deductible. This is true even if the education maintains or improves skills presently required in your business. For more information on education expenses, see Pub. 970.

Franchise, trademark, trade name. If you buy a franchise, trademark, or trade name, you can deduct the amount you pay or incur as a business expense only if your payments are part of a series of payments that are:

1. Contingent on productivity, use, or disposition of the item;
2. Payable at least annually for the entire term of the transfer agreement; and
3. Substantially equal in amount (or payable under a fixed formula).

When determining the term of the transfer agreement, include all renewal options and any other period for which you and the transferor reasonably expect the agreement to be renewed.

A franchise includes an agreement that gives one of the parties to the agreement the right to distribute, sell, or provide goods, services, or facilities within a specified area.

Impairment-related expenses. If you are disabled, you can deduct expenses necessary for you to be able to work (impairment-related expenses) as a business expense, rather than as a medical expense.

You are disabled if you have either of the following.

- A physical or mental disability (for example, blindness or deafness) that functionally limits your being employed.
- A physical or mental impairment that substantially limits one or more of your major life activities.

The expense qualifies as a business expense if all the following apply.

- Your work clearly requires the expense for you to satisfactorily perform that work.
- The goods or services purchased are clearly not needed or used, other than incidentally, in your personal activities.
- Their treatment isn't specifically provided for under other tax law provisions.

Example. You are blind. You must use a reader to do your work, both at and away from your place of work. The reader's services are only for your work. You can deduct your expenses for the reader as a business expense.

Internet-related expenses. Generally, you can deduct Internet-related expenses including domain registration fees and webmaster consulting costs. If you are starting a business, you may have to amortize these expenses as start-up costs. For more information about amortizing start-up and organizational costs, see chapter 8.

Interview expense allowances. Reimbursements you make to job candidates for transportation or other expenses related to interviews for possible employment aren't wages. You can deduct the reimbursements as a business expense. However, expenses for food, beverages, and entertainment are subject to the 50% limit discussed earlier under *Meals and Entertainment*.

Legal and professional fees. Fees charged by accountants and attorneys that are ordinary and necessary expenses directly related to operating your business are deductible as business expenses. However, usually legal fees you pay to acquire business assets aren't deductible. These costs are added to the basis of the property.

Fees that include payments for work of a personal nature (such as drafting a will, or damages arising from a personal injury) aren't allowed as a business deduction on Schedule C (Form 1040) or Schedule C-EZ (Form 1040). If the invoice includes both business and personal charges, figure the business portion as follows: multiply the total amount of the bill by a fraction, the numerator of which is the amount attributable to business matters, the denominator of which is the total amount paid. The result is the portion of the invoice attributable to business expenses. The portion attributable to personal matters is the difference between the total amount and the business portion (figured above).

Legal fees relating to personal tax advice may be deductible on Schedule A (Form 1040), if you itemize deductions. However, the deduction is subject to the 2% limitation on miscellaneous itemized deductions. For more information, see Pub. 529.

Tax preparation fees. The cost of hiring a tax professional, such as a Certified Public Accountant (CPA), to prepare that part of your tax return relating to your business as a sole proprietor is deductible on Schedule C (Form 1040) or Schedule C-EZ (Form 1040). Any remaining cost may be deductible on Schedule A (Form 1040) if you itemize deductions.

You can also claim a business deduction for amounts paid or incurred in resolving asserted tax deficiencies for your business operated as a sole proprietor.

Licenses and regulatory fees. Licenses and regulatory fees for your trade or business paid annually to state or local governments generally are deductible. Some licenses and fees may have to be amortized. See chapter 8 for more information.

Lobbying expenses. Generally, lobbying expenses aren't deductible. Lobbying expenses include amounts paid or incurred for any of the following activities.

- Influencing legislation.
- Participating in or intervening in any political campaign for, or against, any candidate for public office.
- Attempting to influence the general public, or segments of the public, about elections, legislative matters, or referendums.
- Communicating directly with covered executive branch officials (defined later) in any attempt to influence the official actions or positions of those officials.
- Researching, preparing, planning, or coordinating any of the preceding activities.

Your expenses for influencing legislation and communicating directly with a covered executive branch official include a portion of your labor costs and general and administrative costs of your business. For information on making this allocation, see section 1.162-28 of the regulations.

You can't claim a charitable or business expense deduction for amounts paid to an organization if both of the following apply.

- The organization conducts lobbying activities on matters of direct financial interest to your business.
- A principal purpose of your contribution is to avoid the rules discussed earlier that prohibit a business deduction for lobbying expenses.

If a tax-exempt organization, other than a section 501(c)(3) organization, provides you with a notice on the part of dues that is allocable to nondeductible lobbying and political expenses, you can't deduct that part of the dues.

Covered executive branch official. For purposes of this discussion, a covered executive branch official is any of the following.

1. The President.
2. The Vice President.
3. Any officer or employee of the White House Office of the Executive Office of the President and the two most senior level officers of each of the other agencies in the Executive Office.
4. Any individual who:
   a. Is serving in a position in Level I of the Executive Schedule under section 5312 of title 5, United States Code;
   b. Has been designated by the President as having Cabinet-level status; or
   c. Is an immediate deputy of an individual listed in item (a) or (b).

Exceptions to denial of deduction. The general denial of the deduction doesn't apply to the following.

- Expenses of appearing before, or communicating with, any committee or member of any local council or similar governing body concerning its legislation (local legislation) if the legislation is of direct interest to you, or to you and an organization of which you are a member. An Indian tribal government is treated as a local council or similar governing body.
- Any in-house expenses for influencing legislation and communicating directly with a covered executive branch official if those expenses for the tax year don't exceed $2,000 (excluding overhead expenses).
- Expenses incurred by taxpayers engaged in the trade or business of lobbying (professional lobbyists) on behalf of another person (but does apply to payments by the other person to the lobbyist for lobbying activities).

Moving machinery. Generally, the cost of moving machinery from one city to another is a deductible expense. So is the cost of moving machinery from one plant to another, or from one part of your plant to another. You can deduct the cost of installing the machinery in the new location. However, you must capitalize the costs of installing or moving newly purchased machinery.

Outplacement services. The costs of outplacement services you provide to your employees to help them find new employment, such as career counseling, résumé assistance, skills assessment, etc., are deductible.

The costs of outplacement services may cover more than one deduction category. For example, deduct as a utilities expense the cost of telephone calls made under this service and deduct as a rental expense the cost of renting machinery and equipment for this service.

For information on whether the value of outplacement services is includible in your employees' income, see Pub. 15-B.

Penalties and fines. Penalties paid for late performance or nonperformance of a contract are generally deductible. For instance, you own and operate a construction company. Under a contract, you are to finish construction of a building by a certain date. Due to construction delays, the building isn't completed and ready for occupancy on the date stipulated in the only for the tax year in which it is a proper deduction under your accounting method. For example, if you use the accrual method, you are entitled to the deduction or credit in the tax year in which the obligation for the repayment accrues.

Subscriptions. Subscriptions to professional, technical, and trade journals that deal with your business field are deductible.

Supplies and materials. Unless you have deducted the cost in any earlier year, you generally can deduct the cost of materials and supplies actually consumed and used during the tax year.

If you keep incidental materials and supplies on hand, you can deduct the cost of the incidental materials and supplies you bought during the tax year if all the following requirements are met.

- You don't keep a record of when they are used.
- You don't take an inventory of the amount on hand at the beginning and end of the tax year.
- This method doesn't distort your income.

You can also deduct the cost of books, professional instruments, equipment, etc., if you normally use them within a year. However, if the usefulness of these items extends substantially beyond the year they are placed in service, you generally must recover their costs through depreciation. For more information regarding depreciation, see Pub. 946.

Utilities. Business expenses for heat, lights, power, telephone service, and water and sewerage are deductible. However, any part due to personal use isn't deductible.

Telephone. You can't deduct the cost of basic local telephone service (including any taxes) for the first telephone line you have in your home, even if you have an office in your home. However, charges for business long-distance phone calls on that line, as well as the cost of a second line into your home used exclusively for business, are deductible business expenses.

12. How To Get Tax Help

Do you need help with a tax issue or preparing your tax return, or do you need a free publication or form?

Small Business and Self-Employed (SB/SE) Tax Center. SB/SE serves taxpayers who file Form 1040, Schedules C, E, F, or Form 2106, as well as small businesses with assets under $10 million.

A–Z Index for Business. *Find it fast!* Know what you're looking for and want to find it fast? Select business topics using our A–Z listing, or by business type such as sole proprietor, corporation, etc. We also provide links to major business subjects, such as Business Expenses, which provide a gateway to all related information on those subjects.

- *Small Business Forms and Publications*. You can download forms and publications for small business and self-employed individuals.
- *Employer ID Numbers (EINs)*. Find out about EINs or apply for one online.
- *e-File Form 940, 941, or 944 for Small Businesses*. Learn your options for *e-filing* Form 940, 941, or 944 for small businesses.
- *Starting, Operating, or Closing a Business*. Important tax information related to the various stages of owning a business.
- *Employment Taxes*. Federal income tax, social security and Medicare taxes, FUTA, self-employment tax, and more.
- *Independent Contractor (Self-Employed) or Employee?* It is critical that you, the employer, correctly determine whether the individuals providing services are employees or independent contractors.
- *Self-Employed Individuals Tax Center*. The basics on self-employment, filing requirements, and reporting responsibilities for independent contractors.
- *Information Return Filing Requirements*. If you made or received a payment as a small business or self-employed individual, you are most likely required to file an information return to the IRS.
- *IRS Video Portal*. Video, webinars, and audio presentations for small businesses, individuals, and tax pros.
- *Small Business Events*. Workshops and webinars on a variety of topics for small businesses.
- *Online Tools & Educational Products*. Choose from a variety of products, including the Tax Calendar desktop tool, to help you learn about business taxes on your own time, and at your own pace.
- *Subscribe to e-News*. A free electronic mail service keeping you up to date on tax topics.

Requirements for filing. If you made or received a payment during the calendar year as a small business or self-employed individual, you are most likely required to file an information return to the IRS. For more information, see *Am I required to File a Form 1099 or Other Information Return?* on IRS.gov.

Preparing and filing your tax return. Find free options to prepare and file your return on IRS.gov or in your local community if you qualify.

The Volunteer Income Tax Assistance (VITA) program offers free tax help to people who generally make $54,000 or less, persons with disabilities, the elderly, and limited-English-speaking taxpayers who need help preparing their own tax returns. The Tax Counseling for the Elderly (TCE) program offers free tax help for all taxpayers, particularly those who are 60 years of age and older. TCE volunteers specialize in answering questions about pensions and retirement-related issues unique to seniors.

You can go to *IRS.gov/filing* to see your options for preparing and filing your return which include the following.

- **Free File.** Go to *IRS.gov/freefile*. See if you qualify to use brand-name software to prepare and *e-file* your federal tax return for free.
- **VITA.** Go to *IRS.gov/vita*, download the free IRS2Go app, or call 1-800-906-9887 to find the nearest VITA location for free tax preparation.
- **TCE.** Go to *IRS.gov/tce*, download the free IRS2Go app, or call 1-888-227-7669 to find the nearest TCE location for free tax preparation.

People who are deaf, hard of hearing, or have a speech disability and who have access to TTY/TDD equipment can call toll free 1-800-829-4059. Deaf or hard-of-hearing individuals can also contact the IRS through relay services such as the Federal Relay Service, available at *GSA.gov/fedrelay*.

How to choose a tax return preparer. If you choose to have someone prepare your tax return, choose that preparer wisely. A paid tax return preparer is primarily responsible for the overall substantive accuracy of your tax return and, by law, is required to sign the return and include their preparer tax identification number (PTIN) on it. Although the tax return preparer signs the return, you are ultimately responsible for the accuracy of every item reported on your return. Anyone paid to prepare tax returns for others should have a thorough understanding of tax matters and is required to have a PTIN. You may want to ask friends, co-workers, or your employer for help in selecting a competent tax return preparer.

For your convenience, the IRS provides an online database for all Authorized IRS *e-file* Providers that choose to be included in the database. You can locate the closest Authorized IRS *e-file* Providers in your area where you can electronically file your tax return. For more information on finding a tax return preparer who provides IRS *e-file*, see *Authorized IRS e-file Providers for Individuals* on IRS.gov, or go to *IRS.gov/uac/Authorized-IRS-e-file-Providers-for-Individuals*. The inclusion in this database does not constitute any endorsement by the IRS of the *e-file* Providers listed in this database or any of the products or services that they provide. You should always be sure to conduct your own due diligence when selecting an *e-file* Provider. In addition to the Authorized IRS *e-file* Provider locator tool above, you can also find professional help through the *IRS Tax Professional Partner* page at *IRS.gov/Tax-Professionals/IRSTaxProAssociationPartners*.

Choose a tax return preparer you will be able to contact in case the IRS examines your return and has questions regarding how your return was prepared. You can designate your paid tax return preparer or another third party to speak to the IRS concerning the preparation of your return, payment/refund issues, and mathematical errors. The third party authorization checkbox on Form 1040, Form 1040A, and Form 1040EZ gives the designated party the

APPENDIX ATTACHMENT 'E'

Accounting For Sticky Fingers, McLain and Lebow

Journal of Accountancy, August 1, 1999

JOURNAL OF ACCOUNTANCY®

Accounting for Sticky Fingers

August 1, 1999

In the crime of embezzlement, there are tax implications for both the embezzler and the embezzled.

Embezzled income is taxable to the person who does the embezzling (revenue ruling 61-185, 1961-2 CB 9; revenue ruling 65-254, 1965-2 CB 50; James v. United States, 366 US 213 (1961), Ct. D. 1863). The embezzled amount should be included in the embezzler's gross income in the year of the embezzlement. In addition, the embezzler/employee may be subject to self-employment taxes on the embezzled amount.

Since the embezzlement constitutes income to the embezzler, the entity that has suffered the loss should report it to the IRS.

Proper reporting of the embezzled income to the IRS will provide the employer with documentation for deducting its loss and also meet the filing requirements of section 6721 and section 6722. It will, in addition, alert the IRS to possible unreported income by the employee.

The employer should report the embezzled income on form 1099-MISC as non-employee-compensation. The employer must prepare a form 1099-MISC for each tax year the employee embezzled funds.

Restoration of embezzled funds does not affect the reporting requirement. Income is recognized at the time the embezzler takes control of the funds (Ernestine K. Alcorn, TC Memo 1969-751), and, is, therefore, not affected by subsequent restitution. Thus the embezzler would be required to report the restitution as a miscellaneous itemized deduction subject to the two-percent adjusted gross income exclusion in the year of the restitution.

The following example shows how embezzled income should be reported for tax purposes.

An organization's bookkeeper embezzled funds for three calendar years beginning in 1996. The company dismissed the employee in 1998 when it discovered his theft. At that time, the organization decided to prosecute, and the employee made a $5,000 payment in restitution. The amounts embezzled were

$5,000 in 1996, $30,000 in 1997, and $10,000 in 1998.

The company must file 1099-MISC forms with the IRS for the tax years 1996 through 1998.

In 1998, the embezzler would have an additional $10,000 in gross income but could include the $5,000 restitution payment as a miscellaneous itemized deduction. As the $10,000 may be subject to self-employment taxes as well as income taxes, the $5,000 payment would be the only reduction of the embezzler's increased taxable income.

The embezzler would also be subject to penalties if the additional income for the 1996 and 1997 tax years was not reported. The embezzler would have to file amended returns for those two years, and the income might be subject to self-employment taxes.

The IRS offers the embezzler two options for reporting the increased income. If the embezzled funds are from self-employment activity, schedule C or schedule C-EZ should be used and the amount is subject to self-employment taxes. If not, the embezzled funds can be reported on line 21 of form 1040 and are not subject to self-employment taxes.

Observation: Taxpayers who embezzle funds over several tax periods are subject to a variety of income taxes and penalties. Companies that have been embezzled are subject to additional reporting requirements.

If the amounts embezzled cannot be absolutely determined, it is the responsibility of the embezzler to prove to the IRS that the amounts reported by his or her employer to the IRS are not correct. Such evidence could benefit an employer during legal proceedings against the embezzler.

—P. Michael McLain, CPA, DBA, associate professor of accounting, and Marc I. Lebow, CPA, PhD, associate professor of accounting, Hampton University, Hampton, Virginia.

APPENDIX ATTACHMENT 'F'

Petrunak/Abyss Fireworks Display Resume

Abyss Special FX, Inc./Wolverine Fireworks Displays, Inc.

320 West 9th
Anderson, IN 46016

Phone 989/662-0121
Phone 317/603-9415
www.abyssfx.com

Résumé
Charles V. Petrunak
Pyrotechnician

Training:

BA (Music with minors in Education and Psychology)	Baldwin-Wallace College	Fall 1993
MM (Music: Piano Pedagogy)	Kent State University	Spring 2000
Connecticut Pyro Association Safety Course	Connecticut Pyro Association	May 6, 1998
Fireworks Safety Course	Ohio Fire Academy	June 1998
Pyrotechnics-In-Service	Ohio Fire Academy	May 16, 2002
Aerial Fireworks	Ohio Fire Academy	April 28, 2005
Aerial Fireworks	Ohio Fire Academy	April 30, 2008
Aerial Fireworks	Wolverine Fireworks	May 3, 2008
Aerial Fireworks	Wolverine Fireworks	May 16, 2009
Fireworks and Pyrotechnics	Ohio Fire Academy	May 1, 2010
Aerial Fireworks/DOT	Wolverine Fireworks	May 22, 2010
Aerial Fireworks/DOT	Wolverine Fireworks	May 14, 2011
Fireworks/DOT	Wolverine Fireworks	May 5, 2012
Fireworks and Pyrotechnics	Ohio Fire Academy	March 31, 2013
Aerial Fireworks/DOT	Wolverine Fireworks	May 4, 2013
Aerial/Indoor/DOT	Wolverine Fireworks	May 3, 2014
Fireworks and Pyrotechnics	Ohio Fire Academy	March 21, 2015

Licenses:	Arkansas:	FWS 2010 320	Exp: 3/9/2015
	Detroit, MI:	679	Exp: 8/24/2013 - Lapse
	Illinois:	DNR: F00 5217	Exp: 1/16/2016
		SFM: IL10-OP-00024-00831	Exp: 11/1/2016
		Chicago: 2284178	Exp: 9/15/2017
	North Carolina:	1752	Exp: Oct 2013 - Lapse
	Ohio:	Fireworks/Pyro/Flame:56-18-0051	Exp: 04/01/2016

Address: 320 West 9th Street
Anderson, IN 46016

Aerial Displays with Various Companies

Berea, OH	7/4/95
Brunswick, OH	7/4/96
Brecksville, OH	7/5/96
Lodi, OH	7/19/96
Kelly's Island, OH	7/27/96
Cuy. County Fair, Berea, OH	8/8/96
Mayfield Heights, OH	8/24/96
Orange, OH	9/1/96
Burton, OH	9/2/96
U of Akron, OH	9/7/96
Cleveland Heights, OH	9/8/96
Ravenna, OH	9/21/96
Brunswick, OH	10/19/96
Grafton, OH	10/25/96
Rocky River, OH	5/10/97
Warren, OH	5/11/97

Austintown, OH	6/7/97	
Lake Milton, OH	6/21/97	
Willoughby Hills, OH	6/28/97	
Rocky River, OH	6/29/97	St. Thomas
Ravenna, OH	7/4/97	
Bedford, OH	7/6/97	
Newport, RI	7/16/97	
Lodi, OH	7/18/97	
Hubbard, OH	7/20/97	
Kirkland, OH	7/27/97	Lake Farm
Kirkland, OH	8/1/97	Vintage Wine Festival
Sagamore Hills, OH	8/14/97	State Home
Mayfield Heights, OH	8/23/97	
Burton, OH	9/1/97	Geauga County Fair
Cleveland Heights, OH	9/7/97	
Willoughby Hills, OH	9/27/97	Squire's Castle
Fairview Park, OH	10/9/97	High School
Akron, OH	10/28/97	Holiday Lights
Mentor, OH	10/29/97	Holiday Lights
Akron, OH	1/1/98	First Night
New Haven, CT	5/6/98	Fire Marshal's Fireworks Safety Course
Elyria, OH	7/4/98	Elyria Country Club
Bedford, OH	7/5/98	
Durham, NH	7/3/99	
Ossippee, NH	7/4/99	
New Rochelle, NY	5/2/09	Barge – Gryphon FX

Indoor Displays with Various Companies

Cleveland Lumberjacks	January through March 1995 (8 Games)	
Dole's Campaign, Kirkland, OH	10/1/95	
WWF, Cleveland, OH	11/9/96	
Pyro Demo KSU Basketball, Kent, OH	1/6/97	
Lord of the Dance, Cleveland, OH	4/16-17/97	2 Displays
Mary J. Blige, Cleveland, OH	8/29/97	
WWF, Cincinnati, OH	9/8/97	
WWF, Cleveland, OH	3/2/98	
WWF, Cleveland, OH	6/30/98	
WWF, Cincinnati, OH	4/10/99	
WWF, Cleveland, OH	6/13/99	
Brandy, Cincinnati, OH	6/30/99	
Motley Crue, Columbus, OH	7/11/99	
Motley Crue, Cincinnati, OH	7/14/99	
WWF, Cincinnati, OH	11/16/99	
WWF, Dayton, OH	1/29/00	
WWF, Cleveland, OH	1/30/00	
WWF, Cincinnati, OH	5/13/00	
WWF, Columbus, OH	5/14/00	
WWF, Cleveland, OH	5/15/00	
Slipknot, Cleveland, OH	6/24/00	
AC/DC, Cleveland, OH	8/4/00	
WWF, Cleveland, OH	8/5/00	
Motley Crue, Van Wert, OH	9/3/00	
WWF, Cleveland, OH	10/17/00	
Pokemon Live, Columbus, OH	11/2-4/00	5 Shows
WWF, Cincinnati, OH	11/11/00	
WWF, Dayton, OH	11/12/00	
WWF, Columbus, OH	11/13/00	
WWF, Cleveland, OH	1/26/01	

WWF, Columbus, OH	1/30/01		
WWF, Cleveland, OH	3/26/01		
Carman Ministries, Columbus, OH	3/29/01		
WWF, Cincinnati, OH	5/15/01		
WWF, Cleveland, OH	7/22/01		
WWF, Columbus, OH	9/24/01		
WWF, Cincinnati, OH	10/30/01		
WWF, Cleveland, OH	11/10/01		
WWF, Cleveland, OH	3/12/02		
WWE, Columbus, OH	6/23/02		
Ted Nugent, Akron Rib Fest, Akron, OH	7/7/02		
WWE, Columbus, OH	11/14/02		
WWE, Columbus, OH	2/17/03		
Carrot Top, Mansfield, OH	4/29/03		
Deep Attack, Cleveland, OH	Aug-Oct 2003		
WWE, Columbus, OH	3/30/04		
WWE, Columbus, OH	6/13/04		
WWE, Columbus, OH	8/9/05		
Big & Rich, Cuyahoga Falls, OH	8/12/05		
Big & Rich, Cincinnati, OH	8/13/05		
Rascal Flats, Cincinnati, OH	9/9/05		
Big & Rich, Columbus, OH	9/30/05		
Carrot Top, Mansfield, OH	10/8/05		
Mary J. Blige, Cleveland, OH	7/29/06		
Mary J. Blige, Columbus, OH	8/18/06		
Kings of Leon, Cuyahoga Falls, OH	7/26/10		
Rascal Flatts, Cincinnati, OH	8/6/10		
Toby Keith, Cincinnati, OH	8/27/10		
Kings of Leon, Cincinnati, OH	9/4/10		
Oak Lawn Summer Concert Series, Oak Lawn, IL	8/21/11		
Alice Cooper, Rockford, IL	6/28/13		

Abyss Special FX, Inc./Wolverine Fireworks Display

Rib Cook-Off, Berea, OH	5/23/98	Proximate	
Rib Cook-Off, Berea, OH	5/24/98	Proximate	
UPN/WWHO 53, Columbus, OH	9/2/98	Proximate	
Big Walnut, Sunbury, OH	10/16/98	Proximate	
Safety Course, Hinckley, OH	10/20/98	Proximate	
Crestwood High School, Mantua, OH	5/6-8-/99	Indoor	3 Displays
OMA Leadership Forum, Cleveland, OH	12/9/99	Indoor	
Aladdin Shriners' Complex, Columbus, OH	1/1/00	Indoor	
Kirby Inc., Cleveland, OH	2/24/00	Indoor	
Kirby Inc. Cleveland, OH	2/26/00	Indoor	
Ohio Credit Union, Cleveland, OH	4/15/00	Indoor	
Crunch, Cleveland, OH	4/27/00	Indoor	
Seawolves, Hartford, CT	4/29/00	Indoor	
Seawolves, Harftord, CT	5/5/00	Indoor	
Seawolves, Harftord, CT	5/19/00	Indoor	
Wolfpack, Hartford, CT	5/24/00	Indoor	
Wolfpack, Hartford, CT	5/26/00	Indoor	
Wolfpack, Hartford, CT	6/2/00	Indoor	
Seawolves, Harford, CT	6/3/00	Indoor	
Wolfpack Calder Cup Celebration, Hartford, CT	6/7/00	Indoor	
Seawolves, Harford, CT	6/16/00	Indoor	
Seawolves, Harford, CT	6/29/00	Indoor	
North Industry, OH	7/1/00	Aerial Display	
Independence, OH	7/2/00	Aerial/Proximate Display	
Elyria Country Club, Elyria, OH	7/4/00	Aerial/Proximate Display	

Fairview Park, OH	7/8/00	Aerial Display
Seawolves, Hartford, CT	7/13/00	Indoor
Seawolves, Hartford, CT	7/28/00	Indoor
Nutmeg State Games, Hartford, CT	7/29/00	Indoor
Hinckley, OH 175th Celebration	9/3/00	Aerial/Proximate
South HS, Willoughby, OH	9/29/00	Proximate
Wolfpack, Hartford, CT	10/7/00	Indoor
South HS, Willoughby, OH	10/13/00	Proximate
South HS, Willoughby, OH	10/27/00	Proximate
Aladdin Shriners' Complex, Columbus, OH	1/1/01	Indoor
Mansour/Aziz Wedding	3/18/01	Indoor
Indiana Firebirds, Indianapolis, IN	4/7/01	Indoor
Indiana Firebirds, Indianapolis, IN	4/14/01	Indoor
Milwaukee Mustangs, Milwaukee, WI	4/19/01	Indoor
Indiana Firebirds, Indianapolis, IN	4/27/01	Indoor
Milwaukee Mustangs, Milwaukee, WI	5/4/01	Indoor
Indiana Firebirds, Indianapolis, IN	5/5/01	Indoor
Milwaukee Mustangs, Milwaukee, WI	5/18/01	Indoor
Indiana Firebirds, Indianapolis, IN	5/25/01	Indoor
Milwaukee Mustangs, Milwaukee, WI	5/25/01	Indoor
Berea Rib Cook-off, Berea, OH	5/26/01	Aerial Display
Berea Rib Cook-off, Berea, OH	5/27/01	Aerial Display
Indiana Firebirds, Indianapolis, IN	6/15/01	Indoor
Milwaukee Mustangs, Milwaukee, WI	6/16/01	Indoor
Indiana Firebirds, Indianapolis, IN	6/30/01	Indoor
Independence, OH	7/3/01	Aerial Display
Elyria Country Club, Elyria, OH	7/4/01	Aerial/Proximate Display
Indiana Firebirds, Indianapolis, IN	7/15/01	Indoor
Indiana Firebirds, Indianapolis, IN	7/29/01	Indoor
ArenaBowl XV, Grand Rapids, MI	8/19/01	Indoor
South H.S., Willoughby, OH	8/24/01	Proximate
South H.S., Willoughby, OH	9/7/01	Proximate
South H.S., Willoughby, OH	9/21/01	Proximate
South H.S., Willoughby, OH	10/5/01	Proximate
Wolfpack, Hartford, CT	10/13/01	Indoor
South H.S., Willoughby, OH	10/19/01	Proximate
Crunch Soccer, Cleveland, OH	10/27/01	Indoor
First Night, Rittman, OH	1/1/02	Aerial
MISL All-Star Game, Cleveland, OH	2/17/02	Indoor
Indiana Firebirds, Indianapolis, IN	4/6/02	Indoor
Indiana Firebirds, Indianapolis, IN	4/19/02	Indoor
Indiana Firebirds, Indianapolis, IN	5/4/02	Indoor
Homecoming, North Industry, OH	5/10/02	Aerial
Indiana Firebirds, Indianapolis, IN	5/24/02	Indoor
Berea Rib Cook-off, Berea, OH	5/26/02	Aerial
Indiana Firebirds, Indianapolis, IN	5/31/02	Indoor
Indiana Firebirds, Indianapolis, IN	6/14/02	Indoor
Richville Homecoming, Navarre, OH	6/28/02	Aerial
Indiana Firebirds, Indianapolis, IN	6/29/02	Indoor
Independence, OH	7/3/02	Aerial
Elyria Country Club, Elyria, OH	7/6/02	Aerial
Indiana Firebirds, Indianapolis, IN	7/14/02	Indoor
First Merit Bank, Cleveland, OH	7/23/02	Indoor
Nutmeg State Games, New Haven, CT	7/27/02	Proximate
Arenabowl XVI, San Jose, CA	8/18/02	Indoor
South HS, Willoughby, OH	8/30/02	Proximate
U of Pittsburgh, Pittsburgh, PA	9/5/02	Proximate
South HS, Willoughby, OH	9/13/02	Proximate
South HS, Willoughby, OH	9/27/02	Proximate

Digeronimo/Sanuk Wedding, Cleveland, OH	9/28/02	Indoor
South HS, Willoughby, OH	10/11/02	Proximate
South HS, Willoughby, OH	10/25/02	Proximate
KSU, New Philadelphia, OH	11/20/02	Proximate
Aladdin Shriners' Complex, Columbus, OH	1/1/03	Indoor
Schwan's Convention, Pittsburgh, PA	2/8/03	Indoor
Indiana Firebirds, Indianapolis, IN	2/16/03	Indoor
Indiana Firebirds, Indianapolis, IN	2/23/03	Indoor
Indiana Firebirds, Indianapolis, IN	3/2/03	Indoor
Indiana Firebirds, Indianapolis, IN	3/16/03	Indoor
Indiana Firebirds, Indianapolis, IN	3/23/03	Indoor
Indiana Firebirds, Indianapolis, IN	4/5/03	Indoor
Indiana Firebirds, Indianapolis, IN	4/13/03	Indoor
Indiana Firebirds, Indianapolis, IN	5/4/03	Indoor
Berea Rib Cook-Off, Berea, OH	5/25/03	Aerial
Richville Homecoming, Navarre, OH	6/27/03	Aerial
Independence, OH	7/3/03	Aerial
Berea, OH	7/4/03	Aerial
Elyria Country Club, Elyria, OH	7/5/03	Aerial
Nutmeg State Games, New London, CT	7/12/03	Proximate
South HS, Willoughby, OH	8/22/03	Proximate
South HS, Willoughby, OH	9/5/03	Proximate
South HS, Willoughby, OH	9/19/03	Proximate
South HS, Willoughby, OH	10/3/03	Proximate
U of Pittsburgh, Pittsburgh, PA	10/9/03	Proximate
South HS, Willoughby, OH	10/17/03	Proximate
Independence, OH	7/2/04	Aerial
Lorain Speedway, Lorain, OH	7/3/04	Aerial
Clinical Research Management, Hinckley, OH	7/4/04	Aerial
South HS, Willoughby, OH	9/3/04	Proximate
South HS, Willoughby, OH	9/17/04	Proximate
South HS, Willoughby, OH	9/23/04	Proximate
South HS, Willoughby, OH	10/1/04	Proximate
Jim Rome, Cleveland, OH	10/9/04	Indoor
U of Pittsburgh, Pittsburgh, PA	10/11/04	Proximate
South HS, Willoughby, OH	10/15/04	Proximate
South HS, Willoughby, OH	10/29/04	Proximate
John Kerry Campaign, Warren, OH	10/30/04	Proximate
Elliv Awards, Cedarville University, Cedarville, OH	4/16/05	Indoor
Purdue's Boilermaker Ball, Indianapolis, IN	5/5/05	Indoor
Richville Homecoming, Navarre, OH	6/24/05	Aerial
Independence, OH	7/1/05	Aerial
Lorain Speedway, Amherst, OH	7/2/05	Aerial
Elyria Country Club, Elyria, OH	7/3/05	Aerial
Berea, OH	7/4/05	Aerial
South HS, Willoughby, OH	8/26/05	Proximate
U of Pittsburgh, Pittsburgh, PA	9/1/05	Proximate
South HS, Willoughby, OH	9/9/05	Proximate
South HS, Willoughby, OH	10/7/05	Proximate
South HS, Willoughby, OH	10/14/05	Proximate
South HS, Willoughby, OH	10/21/05	Proximate
South HS, Willoughby, OH	11/4/05	Proximate
Elyria Country Club, Elyria, OH	7/3/06	Aerial
Independence, OH	7/3/06	Aerial
South HS, Willoughby, OH	9/1/06	Proximate
South HS, Willoughby, OH	9/15/06	Proximate
South HS, Willoughby, OH	9/21/06	Proximate
South HS, Willoughby, OH	9/29/06	Proximate
South HS, Willoughby, OH	10/27/06	Proximate

Estates of Bath, Bath, OH	6/30/07	Aerial	
Independence, OH	7/3/07	Aerial	
Elyria Country Club, Elyria, OH	7/4/07	Aerial	
East Sparta Homecoming, East Sparta, OH	7/6/07	Aerial	
South HS, Willoughby, OH	9/7/07	Proximate	
South HS, Willoughby, OH	9/21/07	Proximate	
South HS, Willoughby, OH	10/5/07	Proximate	
South HS, Willoughby, OH	10/12/07	Proximate	
South HS, Willoughby, OH	10/19/07	Proximate	
Independence, OH	7/3/08	Aerial	
East Sparta Homecoming, East Sparta, OH	7/4/08	Aerial	
Elyria Country Club, Elyria, OH	7/5/08	Aerial	
South HS, Willoughby, OH	8/22/08	Proximate	
South HS, Willoughby, OH	8/29/08	Proximate	
South HS, Willoughby, OH	9/12/08	Proximate	
South HS, Willoughby, OH	9/26/08	Proximate	
South HS, Willoughby, OH	10/24/08	Proximate	
East Sparta Homecoming, East Sparta, OH	7/2/09	Aerial	
Independence, OH	7/3/09	Aerial	
Elyria Country Club, Elyria, OH	7/4/09	Aerial	
Summerfest, St. Mary's, OH	8/16/09	Aerial	
Darke County Fair, Greenville, OH	8/26/09	Aerial	
South HS, Willoughby, OH	8/28/09	Proximate	
Cedarfest, Cedarville, OH	9/7/09	Aerial	
St. Mary's Memorial HS, St. Mary's OH	9/25/09	Aerial	
Yager Free Enterprise, Grand Rapids, MI	10/9/09	Indoor	
Yager Free Enterprise, Grand Rapids, MI	10/10/09	Indoor	
South HS, Willoughby, OH	10/16/09	Proximate	
South HS, Willoughby, OH	10/23/09	Proximate	
Harding University, Searcy, AR	3/28-4/3/10	Indoor	7 Displays
Independence, OH	7/2/10	Aerial	
Elyria County Club, Elyria, OH	7/3/10	Aerial	
East Sparta Homecoming, East Sparta, OH	7/10/10	Aerial	
Summerfest, St. Mary's, OH	8/15/10	Aerial	
Darke County Fair, Greenville, OH	8/25/10	Aerial	
South HS, Willoughby, OH	9/3/10	Proximate	
South HS, Willoughby, OH	9/10/10	Proximate	
South HS, Willoughby, OH	9/16/10	Proximate	
South HS, Willoughby, OH	10/1/10	Proximate	
Yager Free Enterprise, Charlotte, NC	10/8/10	Indoor	
Yager Free Enterprise, Charlotte, NC	10/9/10	Indoor	
South HS, Willoughby, OH	10/29/10	Proximate	
Independence, OH	7/1/11	Aerial	
East Sparta Homecoming, East Sparta, OH	7/2/11	Aerial	
Elyria Country Club, Elyria, OH	7/3/11	Aerial	
Summerfest, St. Mary's, OH	8/14/11	Aerial	
South HS, Willoughby, OH	8/26/11	Proximate	
Disney-on-Ice: Mickey/Minnie Tour, Rockford, IL	8/27/11	Indoor	
Ringling Brothers Circus, Moline, IL	9/1 – 9/4/11	Indoor	7 Displays
South HS, Willoughby, OH	10/7/11	Proximate	
Yager Free Enterprise, Indianapolis, IN	10/14/11	Indoor	
Yager Free Enterprise, Indianapolis, IN	10/15/11	Indoor	
South HS, Willoughby, OH	10/27/11	Proximate	
South HS, Willoughby, OH	11/5/11	Proximate	
Independence, OH	7/3/12	Aerial – Event Cancelled	
Elyria Country Club, Elyria, OH	7/4/12	Aerial	
East Sparta Homecoming, East Sparta, OH	7/7/12	Aerial	
Summerfest, St. Mary's, OH	8/12/12	Aerial	
Ringling Brothers Circus, Moline, IL	8/31 – 9/3/12	Indoor	7 Displays

South HS, Willoughby, OH	9/14/12	Proximate	
South HS, Willoughby, OH	9/28/12	Proximate	
South HS, Willoughby, OH	10/12/12	Proximate	
South HS, Willoughby, OH	10/19/12	Proximate	
South HS, Willoughby, OH	11/3/12	Proximate	
East Sparta Homecoming, East Sparta, OH	6/22/13	Aerial	
Elyria Country Club, Elyria, OH	7/5/13	Proximate/Aerial	
Summerfest, St. Mary's, OH	8/11/13	Aerial	
Ringling Brothers Circus, Moline, IL	8/30 - 9/2/13	Indoor	7 Displays
Disney on Ice:100 Years, Rockford, IL	9/7 – 9/8/13	Indoor	2 Displays
Disney on Ice:100 Years, Chicago, Il	9/9 – 9/15/13	Indoor	9 Displays
St. Marys HS, St. Marys, OH	9/27/13	Aerial	
South HS, Willoughby, OH	10/11/13	Proximate	
South HS, Willoughby, OH	11/1/13	Proximate	
South HS, Willoughby, OH	11/8/13	Proximate	
Disney on Ice: 100 Years, Rockford, IL	2/27-3/2/14	Proximate	7 Displays
RBBB: Super Circus Heroes, Carbondale, IL	4/11-4/13/14	Proximate	5 Displays
Wolverine Demo, Kawkawlin, MI	5/3/14	Indoor	
East Sparta Homecoming, East Sparta, OH	6/21/14	Aerial	
Elyria Country Club, Elyria, OH	7/3/14	Aerial/Proximate	
Lorain, OH	7/4/14	Aerial	
Summerfest, St. Mary's, OH	8/10/14	Aerial	
RBBB: Built to Amaze, Moline, IL	8/29-9/1/14	Indoor	7 Displays
South HS, Willoughby, OH	9/3/14	Proximate	
South HS, Willoughby, OH	9/19/14	Proximate	
South HS, Willoughby, OH	10/3/14	Proximate	
Yager Convention, Grand Rapids, MI	10/16-10/18/14	Indoor	2 Displays
RBBB: Super Circus Heroes, Peoria, IL	10/17-10/19/14	Indoor	6 Displays
South HS, Willoughby, OH	10/24/14	Proximate	
South HS, Willoughby, OH	11/7/14	Proximate	
Disney on Ice: Worlds of Fantasy, Moline, IL	12/4-12/7/14	Indoor	7 Displays
Disney on Ice: Frozen, Rosemont, IL	1/21/1/26/15	Indoor	13 Displays
Disney on Ice: Frozen, Chicago, IL	1/28-2/8/15	Indoor	24 Displays
RBBB: Built to Amaze, Rockford, IL	5/8-5/10/15	Indoor	5 Displays
RBBB: Built to Amaze, Bloomington, IL	5/15-5/17/15	Indoor	5 Displays
East Sparta Homecoming, East Sparta, OH	6/27/15	Aerial	
Elyria Country Club, Elyria, OH	7/3/15	Aerial	
South HS, Willoughby, OH	8/28/15	Proximate	
RBBB: Legends, Moline, IL	9/4-7/15	Indoor	7 Displays
Marvel Universe Live, Chicago, IL	9/10-13/15	Indoor	7 Displays
Marvel Universe Live, Rosemont, IL	9/18-20/15	Indoor	7 Displays
St. Marys HS, St. Marys, OH	9/25/15	Aerial	
South HS, Eastlake, OH	10/2/15	Proximate	
South HS, Willoughby, OH	10/9/15	Proximate	
Disney Live: 3 Classic Fairy Tales, Moline, IL	10/16/15	Indoor	2 Displays
RBBB: Circus Xtreme, Rosemont, IL	11/5-11/15/15	Indoor	16 Displays
RBBB: Circus Xtreme, Chicago, IL	11/19-11/29/15	Indoor	20 Displays
Disney on Ice: Treasure Trove, Moline, IL	12/3-12/6/15	Indoor	7 Displays

Certificate of Service

I, Charles V. Petrunak, do hereby certify that a true copy of the foregoing *DEFENDANT'S FIRST APPENDIX OF DOCUMENTS* was served this 17th day of November, 2017, upon the attorney for the government by prepaid First Class United States Mail.

Charles V. Petrunak

Case No. ________________

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES PETRUNAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S APPENDIX II

COMMUNICATION FROM THE SEVENTH CIRCUIT

Seventh Circuit Case No.: 18-1873

District Court No.: 1:17-cv-04396
The Hon. William T. Lawrence
United States District Court Judge

Charles Petrunak, pro se
611 N. Capitol Avenue
Indianapolis, IN 46204

PETITIONER'S APPENDIX II - ATTACHMENT 'A'

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

CIRCUIT RULE 3(b) NOTICE

January 23, 2018

No. 18-1173	CHARLES PETRUNAK, Petitioner - Appellant v. UNITED STATES OF AMERICA, Respondent - Appellee

Originating Case Information:
District Court No: 1:17-cv-04396-WTL-MJD Southern District of Indiana, Indianapolis Division Clerk/Agency Rep Laura A. Briggs Court Reporter Cathy Jones District Judge William T. Lawrence

Circuit Rule 3(b) empowers the clerk to dismiss an appeal if the docket fee is not paid within fourteen (14) days of the docketing of the appeal. This appeal was docketed on January 23, 2018. The District Court has indicated that as of January 23, 2018, the docket fee has not been paid. Depending on your situation, you should:

1. Pay the required $500.00 docketing fee PLUS the $5.00 notice of appeal filing fee to the District Court Clerk, **if you have not already done so.** The Court of Appeals cannot accept this fee. You should keep a copy of the receipt for your records.

2. File a motion to proceed on appeal in forma pauperis with the District Court, if you have not already done so. An original and three (3) copies of that motion, with proof of service on your opponent, is required. This motion must be supported by a sworn affidavit in the form prescribed by **Form 4** of the *Appendix of Forms to the Federal Rules of Appellate Procedure (as amended 12/01/2013)*, listing the assets and income of the appellant(s).

3. If the motion to proceed on appeal in forma pauperis is denied by the district court, you must either pay the required $500.00 docketing fee PLUS the $5.00 notice of appeal filing fee to the District Court Clerk, within fourteen (14) days after service of notice of the action to the district court, or within thirty (30) days of that date, renew your motion to proceed on appeal in forma pauperis with this court.

If the motion is renewed in this court, it must comply with the terms of *Fed.R.App.P. 24(a)*.

If one of the above stated actions is not taken, the appeal will be dismissed.

PETITIONER'S APPENDIX II - ATTACHMENT 'B'

UNITED STATES DISTRICT COURT
Southern District of Indiana

Laura A. Briggs, Clerk of Court

Birch Bayh Federal Building
& U.S. Courthouse, Room 105
46 East Ohio Street
Indianapolis, IN 46204
(317) 229-3700

U.S. Courthouse, Room 104
921 Ohio Street
Terre Haute, IN 47807
(812) 231-1840

Winfield K. Denton Federal Building
& U. S. Courthouse, Room 304
101 NW Martin Luther King Blvd.
Evansville, IN 47708
(812) 434-6410

Lee H. Hamilton Federal Building
& U.S. Courthouse, Room 210
121 West Spring Street
New Albany, IN 47150
(812) 542-4510

January 23, 2018

RE: CHARLES PETRUNAK v. UNITED STATES OF AMERICA

CAUSE NO: 1:17-cv-04396-WTL-MJD

Dear Appellant:

A Notice of Appeal was filed in the above case on January 23, 2018. However, a "Docketing Statement" was not filed along with the Notice of Appeal, as required by Circuit Rule 3(c) of the U.S. Court of Appeals for the Seventh Circuit. A copy of the rule is attached for reference.

Pursuant to the Seventh Circuit Rule 3(c), the appellant must serve on all parties a docketing statement and file said statement with the Clerk of the Seventh Circuit within seven (7) days of the filing of the Notice of Appeal.

IMPORTANT: Please do not submit the docketing statement to the U.S. District Court. The docketing statement must be filed electronically with the Seventh Circuit pursuant to Circuit Rule 25. If the appellant is proceeding pro se, then the docketing statement should be filed on paper by mailing the same to the address below:

Gino Agnello, Clerk
United States Court of Appeals
219 South Dearborn Street, Suite 2722
Chicago, IL 60604

Please contact the Clerk's office with any questions or concerns.

Sincerely,
Laura A. Briggs,
Clerk of Court

By Maggie Twigg, Deputy Clerk
812-542-4510

PETITIONER'S APPENDIX II - ATTACHMENT 'C'

UNITED STATES DISTRICT COURT
Southern District of Indiana

Laura A. Briggs, Clerk of Court

Birch Bayh Federal Building
& U.S. Courthouse, Room 105
46 East Ohio Street
Indianapolis, IN 46204
(317) 229-3700

U.S. Courthouse, Room 104
921 Ohio Street
Terre Haute, IN 47807
(812) 231-1840

Winfield K. Denton Federal Building
& U. S. Courthouse, Room 304
101 NW Martin Luther King Blvd.
Evansville, IN 47708
(812) 434-6410

Lee H. Hamilton Federal Building
& U.S. Courthouse, Room 210
121 West Spring Street
New Albany, IN 47150
(812) 542-4510

January 23, 2018

CHARLES PETRUNAK #12343-028
FEDERAL PRISON CAMP
PO Box 6000
Ashland, KY 41105

MaryAnn Totino Mindrum
UNITED STATES ATTORNEY'S OFFICE
(Indianapolis)
10 West Market Street
Suite 2100
Indianapolis, IN 46204

RE: CHARLES PETRUNAK v. UNITED STATES OF AMERICA

CAUSE NO: 1:17-cv-04396-WTL-MJD

Dear Appellant and Appellee:

Please be advised that the Notice of Appeal filed in 1:17-cv-04396-WTL-MJD has been forwarded to the United States Court of Appeals for the Seventh Circuit. The Clerk of the Seventh Circuit will assign an appellate case number, docket the appeal, and notify case participants of the Seventh Circuit case number assigned to this matter.

Filing a "Designation of Record" in the U.S. District Court case helps ensure that the appropriate documents (*e.g.*, pleadings and attachments, briefs) are effectively transmitted to the Seventh Circuit. A copy of the docket sheet in this case has been included for your convenience. The docket sheet may be annotated (by circling docket numbers, or highlighting electronically) to identify the docket entries that are to be included in the appellate record, then attached as an exhibit to the Designation of Record. The designation may also simply list the docket entry numbers (all attachments to each entry will be included) along with a description of the designated documents.

Please review Southern District of Indiana Local Rule 76-1 and Seventh Circuit Rule 10 (enclosed) for guidance regarding the designation of a record, and comply with the provisions of Federal Rule of Civil Procedure 5 when filing the designation.

Please contact the Clerk's office with any questions or concerns.

Sincerely,
Laura A. Briggs,
Clerk of Court

By Maggie Twigg, Deputy Clerk
812-542-4510

PETITIONER'S APPENDIX II - ATTACHMENT 'D'

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

NOTICE OF CASE OPENING

January 23, 2018

No. 18-1173	CHARLES PETRUNAK, Petitioner - Appellant v. UNITED STATES OF AMERICA, Respondent - Appellee

Originating Case Information:

District Court No. 1:17-cv-04396-WTL-MJD
Southern District of Indiana, Indianapolis Division
Clerk/Agency Rep Laura A. Briggs
Court Reporter Cathy Jones
District Judge William T. Lawrence

Case filed: 01/23/2018
Case type: pr/fed
Fee status: Due
Date of Judgment: 12/21/2017
Date NOA filed: 01/23/2018

The above-captioned appeal has been docketed in the United States Court of Appeals for the Seventh Circuit.

Deadlines:

Appeal No.	Filer	Document	Due Date
18-1173	Charles Petrunak	Docketing statement due	01/30/2018
18-1173	Charles Petrunak	Fee Due	02/06/2018

18-1173	Charles Petrunak	Transcript information sheet	02/06/2018

NOTE: This notice is issued to counsel of record, in furtherance of the revised *Circuit Rule 3(d)*, to provide necessary information regarding this appeal. Please verify this notice for accuracy. Counsel are encouraged to provide a fax and/or e-mail address to the court. If any corrections are necessary, please indicate those corrections on this notice and return it to the Clerk's Office within ten (10) days.

THIS NOTICE SHALL NOT ACT AS A SUBSTITUTE FOR MOTIONS FOR NON-INVOLVEMENT / SUBSTITUTION OF COUNSEL. COUNSEL ARE STILL REQUIRED TO FILE THE APPROPRIATE MOTIONS.

Important Scheduling Notice!

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at http://www.ca7.uscourts.gov/cal/calendar.pdf. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

PETITIONER'S APPENDIX II - ATTACHMENT 'E'

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 25, 2018

By the Court:

CHARLES PETRUNAK, Petitioner-Appellant,	] Appeal from the United] States District Court] for the Southern District
No. 18-1173 v.	] of Indiana, Indianapolis] Division.
UNITED STATES OF AMERICA, Respondent-Appellee.	]] No. 1:17-cv-04396-WTL-MJD]] William T. Lawrence,] Judge.

ORDER

This is an appeal from a decision denying release pending the resolution of a § 2255 motion filed in the district court. Appellant should, therefore, file an appropriate motion rather than having the case proceed to full briefing. *See* Circuit Rule 9. The motion and accompanying memorandum of law shall be filed on or before February 7, 2018.

PETITIONER'S APPENDIX II - ATTACHMENT 'F'

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

January 26, 2018

By the Court:

No. 18-1173	CHARLES PETRUNAK, Petitioner - Appellant v. UNITED STATES OF AMERICA, Respondent - Appellee
Originating Case Information:	
District Court No: 1:17-cv-04396-WTL-MJD Southern District of Indiana, Indianapolis Division District Judge William T. Lawrence	

The appellant filed a motion for release on January 23, 2018, and this court has decided the motion. The court's order dated January 25, 2018, therefore, is **VACATED** as erroneously issued.

PETITIONER'S APPENDIX II - ATTACHMENT 'G'

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

January 26, 2018

Before

DIANE P. WOOD, *Chief Judge*
JOEL M. FLAUM, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 18-1173	CHARLES PETRUNAK, Petitioner - Appellant v. UNITED STATES OF AMERICA, Respondent - Appellee
Originating Case Information:	
District Court No: 1:17-cv-04396-WTL-MJD Southern District of Indiana, Indianapolis Division District Judge William T. Lawrence	

Upon consideration of the **PETITIONER'S RULE 23 MOTION FOR RELEASE ON BAIL PENDING THE DISPOSITION OF HIS MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO TITLE 28 UNITED STATES CODE SECTION 2255**, filed on January 23, 2018, by pro se Charles Petrunak,

IT IS ORDERED that the district court's order denying petitioner's motion for release on bond pending disposition of his 28 U.S.C. § 2255 petition is **AFFIRMED**. Petitioner has not shown that he fulfills the high standard required under *Cherek v. United States*, 767 F.2d 335 (7th Cir. 1985) to warrant release at this time.

PETITIONER'S APPENDIX II - ATTACHMENT 'H'

aseracare
A family-centered hospice

March 22, 2018

Federal Prison Camp
PO Box 6000
Ashland, KY 41105

To Whom It May Concern:

My name is Tamara Hoffman, DO. I am medical director for AseraCare Hospice, Johnstown office. One of our clients, Mr. Matthew Petrunak, has been with us since October 2017. My understanding is that he is the father of Charles V. Petrunak, 12343-028 who is currently residing at your facility.

Mr. M. Petrunak is thought to have a less than 6 month prognosis. His hospice diagnosis is myelodysplastic syndrome with chronic pancytopenia. He has refused further treatments which is basically blood transfusions for his disease and has opted for comfort only. He also carries the diagnoses of hypothyroidism, generalized anxiety, hypertension, atrial fibrillation, depression, peripheral vascular disease. He has had significant declines both physically and cognitively in the last 2 months. His mid arm circumference has decreased to 19 from 23, and indication that he is losing weight. His appetite has declined as well as his ability to safely swallow; his diet has been downgraded to pureed due to risk of aspiration. He has had increased muscle weakness as evident by the fact that he is essentially chair bound at this time and before he was ambulating with a wheeled walker.

Mr. M. Petrunak resides at Forest Hills Personal Care Home, 313 Humbert Road, Sidman, PA 15955. Their phone number is 814-487-7535.

Based on this information, we are hoping you will consider a compassionate release or furlough so Mr. C. Petrunak can visit his father before he passes. These situations are tricky to predict, but with the recent declines I am concerned that Mr. M. Petrunak may not be with us much longer.

Please contact me if you have any further questions.

Sincerely,

Tamara Hoffman DO

Tamara L. Hoffman, DO
Medical Director, AseraCare Hospice, Johnstown #6396

100 CTC Drive, Ste 110
Johnstown, PA 15904
Phone: 814-269-4172
Fax: 814-269-4177
www.aseracare.com