No. 19-71432

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

PEYMON MOTTAHEDEH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DECISION OF
THE UNITED STATES TAX COURT,
HON. RICHARD T. MORRISON
(Tax Court Case No. 22039-11)

AMENDED OPENING BRIEF OF APPELLANT

Peymon Mottahedeh, Pro Se
(760) 964-5579
P.O. Box 10599
Brooksville, FL 34603
Peymon96@gmail.com

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STATEMENT OF JURISDICTION

PEYMON AND APRIL filed a petition in US Tax Court on October 3, 2011 for review of income taxes that the IRS had proposed against PEYMON AND APRIL for years 2001 through 2006. The last motion for this case, US Tax Court case No. 22039-11, was ruled on February 2, 2016. PEYMON AND APRIL each timely filed separate appeals on May 2, 2016 with the Eleventh Circuit where PEYMON AND APRIL have been living since 2013.

On June 7, 2019, the Eleventh Circuit on request of APPELLEE transferred this case to the Ninth Circuit.

STATEMENT OF RELATED CASE

The US Tax Court case being appealed here was a joint case of husband and wife, PEYMON AND APRIL that was heard in the US Tax Court, where the Court ruled against PEYMON AND APRIL and then split the total taxes in half between PEYMON AND APRIL, despite the fact that PEYMON AND APRIL had at time of marriage signed a document that specifically disavowed the California's community property laws and chose to treat each spouses, income, assets and liabilities, as income, asset and liabilities of each of them.

APRIL chose to file a separate appeal from the adverse decision of the US Tax Court, so that APRIL could make her separate arguments about the US Tax

Court's erroneous application of community property laws on APRIL which led to an adverse finding against APRIL.

The arguments of this case about the IRS's failure to carry the IRS's burden of proof as required per 26 USC §7491(b) apply to APRIL'S appeal as well, as it will be shown below. That appeal, also before the Ninth Circuit Court of Appeals, is Case No. 19-71410.

STATEMENT OF THE ISSUE

The IRS used data from the Bureau of Labor Statistics (hereafter, "BLS") to propose taxes on Appellant Peymon Mottahedeh (hereafter, "PEYMON) and PEYMON'S wife April Mottahedeh (hereafter, "APRIL"), collectively hereafter referred to as "PEYMON AND APRIL", for years 2001 through 2006.

In 26 USC §7491(b), Congress in 1998 placed the burden of proof on the IRS whenever the IRS uses "*unrelated taxpayer*" statistics, such as BLS data, to propose taxes on taxpayers. The Tax Court failed to address which party has the burden of proof in Tax Court for use of unrelated taxpayer statistics from BLS to propose taxes on PEYMON AND APRIL. After a 4-day trial and a 5,266-page record, the Tax Court approved the IRS's use of unrelated taxpayer statistics from BLS to assess taxes on PEYMON AND APRIL.

The IRS did not meet the burden of proof necessary for the IRS to use unrelated taxpayer statistics from BLS to propose taxes on PEYMON AND

APRIL. Furthermore, the US Tax Court erred by not placing the burden of proof on the IRS for use of unrelated taxpayer statistics from BLS – and the resulting US Tax Court's upholding of the IRS's use of unrelated taxpayer statistics from BLS to assess taxes on PEYMON AND APRIL should be reversed by this Court and all taxes and penalties for years 2001 through 2006 should be abated in full.

STATEMENT OF THE CASE

A. Factual Background.

This case is a Notice of Deficiency Income Tax case for years 2001 through 2006, where APPELEE (hereafter, "IRS") primarily used unrelated taxpayer statistics from the Bureau of Labor Statistics to assess income taxes on APPELLANT (hereafter, "PEYMON"), APPELLANT's wife, APRIL MOTTAHEDEH (hereafter, "APRIL") and US Tax Court approved IRS's proposed taxes.

Trial was conducted on September 18-19 and November 4-5, 2013, in Los Angeles, California before Judge Richard T. Morrison.

The record in this case consists of: 8 volumes, 40 exhibits, 2 separate 2-day trials, and excerpts from 3 of those trial days.

This case is an unreported income case where IRS employee and manager had over 726 pages of bank and other financial records of APPELLANTS, but

repeatedly failed to meet with the taxpayers to discuss these financial records to determine the taxable income of Peymon.

Instead, the IRS employee manager chose to primarily use Bureau of Labor Statistics (hereafter, "BLS") data as the methodology (with very minor modifications) of attributing unreported gross income to propose an imposition of income taxes on PEYMON for years 2001 through 2006. IRS then attributed half of these alleged BLS taxable income numbers and taxes to APRIL under California Community Property Laws and issued Notices of Deficiency against both PEYMON AND APRIL (collectively called "PEYMON AND APRIL")

PEYMON AND APRIL filed separate appeals from US Tax Court's ruling against each of them.

PEYMON during years 2001 through 2006 was the president of Freedom Law School (hereafter, "FLS"). APRIL and PEYMON married on June 24, 2001, 11 days after APRIL's divorce from APRIL's ex-husband was finalized on June 13, 2001.

FLS is a part of Freedom Church. Freedom Church was located in Tustin, California from 2001 through 2006. FLS was located in Phelan, California where PEYMON AND APRIL resided from the end of 2001 through the end of 2006.

On January 25, 2008, an IRS auditor named Christiane Thai (hereafter, "AUDITOR") was assigned to investigate PEYMON AND APRIL for years

2001 to 2006.

AUDITOR sloppily gathered some poorly organized and lightly reviewed material that previous IRS employees had gathered about PEYMON AND APRIL. AUDITOR had received substantial bank and credit union deposit records of PEYMON AND APRIL, but incorrectly added them up to be only a fraction of what they were. AUDITOR repeatedly refused to meet with PEYMON AND APRIL to discuss the audit. Instead, AUDITOR used unrelated taxpayer statistics from BLS with minor modifications to impute taxable income on PEYMON AND APRIL.

The IRS summoned the bank records of APRIL, which APRIL timely challenged in the District Court. AUDITOR, who is located in California, on March 28, 2008 issued a bank summons to obtain bank records about PEYMON AND APRIL. After APRIL filed a complaint in the District Court in Florida to quash the summons, the IRS flew the AUDITOR to Florida to testify in support of AUDITOR's summons.

After a two-year court case, on May 18, 2010, the IRS won a bank Summons court case against APRIL, and thereafter an employee of the IRS, John Black, added up the extensive (726 plus pages) of bank and credit union deposits of PEYMON AND APRIL's bank accounts. Just one of those accounts showed total yearly bank deposits in amounts **up to $71,408.57**. Only two of the six years

totaled under $25,000. Another alleged account of PEYMON AND APRIL showed total yearly bank deposits in amounts **up to $67,388.00**. These records and calculations of yearly bank deposit totals were turned over to the IRS AUDITOR who handled this case.

However, AUDITOR mistakenly concluded that the bank deposits were very small; between $10,000 and $25,000 per year. Based on this erroneous conclusion of the IRS AUDITOR, IRS Counsel instructed AUDITOR to use BLS data to impute PROPOSED taxes on PEYMON AND APRIL.

After all this work of John Black, just 5 months later, without ever having met PEYMON AND APRIL, on November 17, 2010 the AUDITOR met with IRS counsel who, based on AUDITOR's erroneous understatement of the bank deposit totals, misadvised the AUDITOR to use unrelated taxpayer statistics from BLS, instead of Black's hard-won bank deposit records, to propose taxes on PEYMON AND APRIL.

AUDITOR and MANAGER wrote two letters to PEYMON AND APRIL inviting PEYMON AND APRIL to meet with AUDITOR and/or MANAGER. PEYMON AND APRIL made calls, wrote letters, and faxed AUDITOR and MANAGER expressing PEYMON AND APRIL's desire to meet with AUDITOR and MANAGER to discuss these tax proposals.

Both AUDITOR and MANAGER refused to meet with PEYMON AND

APRIL to discuss anything about the proposed tax letters that were sent by AUDITOR and MANAGER to PEYMON AND APRIL. Within a few days after PEYMON AND APRIL's last call, FAX, and letter to AUDITOR and MANAGER, Notices of Deficiency were issued by the IRS to PEYMON AND APRIL and the US Tax Court erroneously upheld these proposed taxes by failing to rule that the IRS had failed to meet the IRS's burden of proof to use unrelated taxpayer statistics from BLS to assess taxes against PEYMON AND APRIL for years 2001 through 2006.

B. Proceedings in US Tax Court

In the US Tax Court, a 2-day court case was followed by another 2-day trial at a later Tax Court Session in Los Angeles, California. For the first time the 1,300-plus pages of bank and other financial records and internal communications of various IRS employees and testimony of the AUDITOR came to be seen by PEYMON AND APRIL, just a few days before the first 2-day trial session.

All the facts above were brought before the US Tax Court, but the US Tax Court failed to hold the burden of proof on the IRS as required in 26 USC §7491(b). The Tax Court failed to mention the facts presented above in its Memorandum Opinion (hereafter, "MEMO") and erroneously upheld the IRS's use of unrelated taxpayer statistics from BLS to assess income taxes on PEYMON AND APRIL.

This appeal followed.

SUMMARY OF ARGUMENTS

US Tax Court erred by ignoring 26 USC §7491(b), which placed the burden of proof on the IRS, who used unrelated taxpayer statistics from BLS to estimate taxes on PEYMON AND APRIL; and the Court, by not imposing this specific burden of proof on IRS, erroneously assessed the income taxes on PEYMON AND APRIL.

The IRS failed to prove why bank deposits and expenditures of PEYMON AND APRIL, which are prima facia proof of taxable income, were not used by IRS. The Court's holding that the IRS could disregard the Bank Deposit Method, which was readily available to the IRS, and instead use unrelated taxpayer statistics from BLS to propose taxes on PEYMON AND APRIL, was a reversible error.

The record shows that PEYMON AND APRIL repeatedly called and wrote AUDITOR and MANAGER to discuss the tax proposals of AUDITOR, but AUDITOR, based on arbitrary reasons and arbitrary instructions of MANAGER, refused to meet with PEYMON AND APRIL to discuss the tax proposals and records of AUDITOR. Therefore, the IRS should not have used unrelated taxpayer statistics from BLS to propose taxes on PEYMON AND APRIL and the US Tax

Court's approval of the IRS's use of unrelated taxpayer statistics from BLS to propose taxes on PEYMON AND APRIL was a reversible error.

ARGUMENTS

1. The Court erred by not applying the burden of proof that 26 USC § 7491(b) placed on IRS when using unrelated taxpayer statistics from BLS to estimate taxes on PEYMON AND APRIL

This is a case of first impression that requires a proper analysis to create a well-reasoned precedent for future Court cases.

Generally, in tax cases, the burden of proof is on the taxpayer. However, in many specific instances, Congress has specifically imposed the burden of proof on the IRS. As an example, see 26 USC §§ 7454(a), (b), 6902(a), 534(a), 6201(d).

In 1998, Congress enacted the 1998 IRS Restructuring and Reform Act, which created another exception to general burden of proof law and put the burden of proof on the IRS whenever the IRS decides to use third party information that is not related to the taxpayers, such as data from the Bureau of Labor Statistics, to propose taxes on taxpayers.

26 USC §7491(b) states: "*In the case of an individual taxpayer, the* ***Secretary shall have the burden of proof*** *in any Court proceeding with respect* to any item *of* ***income*** *which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers*." Emphasis added. Although

the US Tax Court in **footnote 13** on **page 15** of the MEMO acknowledged that "*Mottahedeh's contend that sec. 7491(a) and ((b) imposes the burden of proof on the IRS*", the Court erroneously avoided the burden of proof issue by stating: "*we need not consider whether the IRS has the burden of proof.*"

The reliance of the US Tax Court on Estate Bongard v. Commissioner, 124 T.C. 95 to make the above conclusion was in error. *Bongard, supra*, did **not** state that the Court may ignore 26 USC §7491(a) and (b)'s clear command and instead, by judicial fiat, decide the case by a **preponderance of evidence instead**, as this Court did here.

The Tax Court's MEMO and Decision should be reversed for the clear failure of the Court to impose the burden of proof on the IRS as required by the clear and unambiguous language of 26 USC §7491(b).

In addition, the IRS, as in all other cases in which the burden of proof is on the IRS, had the burden of production to move forward and upon satisfactory evidence could have reversed the burden of proof on PEYMON AND APRIL, which the IRS failed to do.

In conclusion, the Tax Court erred by relieving the IRS of the IRS's burden of production and moving forward the IRS's burden of proof; a burden that the IRS failed to meet and requires reversal of the Tax Court Memo.

2. Bank Deposits are prima facia proof of income. The Court's holding that the IRS could discard the Bank Deposit Method, which was readily available to the IRS, and the IRS's repeated failure to meet with PEYMON AND APRIL to review those bank records and instead approved IRS use of unrelated taxpayer statistics from BLS to estimate taxes on PEYMON AND APRIL was reversible error.

"*A bank deposit is prima facia evidence of income and respondent* [IRS] *need not prove a likely source of that income. Estate of Mason v. Commissioner, 64 T.C. 651, 656-657 (1975), affd, 566 F.2d 2 (6th Cir. 1977), and Tokarski v. Commissioner, 87 T.C. 74 (1986).* "*This method of determining a taxpayer's income assumes that all the money deposited into a taxpayer's bank account during a specific period constitutes taxable income.*" Price v. United States, 335 F.2d 671, 677 (5th Cir. 1964).

Under the bank deposit method, "*all deposits to the taxpayer's bank and similar accounts in a single year are added together to determine the gross deposits.* ***An effort is made to identify amounts deposited that are non-taxable****, such as gifts, transfers of money between accounts, repayment of loans and cash that taxpayer had in his possession prior to that year that was deposited in a bank during that year. This process is called '****purification****.' It results in a figure called net taxable bank deposits.*" United States v. Boulet, 577 F.2d 1165, 1167 (5th Cir. 1978).

The AUDITOR, who was located in California, on March 28, 2008 issued a bank summons to a credit union to obtain bank records about PEYMON AND APRIL. After APRIL filed a complaint in the District Court in Florida to quash the summons, the IRS flew the AUDITOR TO Florida to testify in support of AUDITOR's summons.

After a 2-year court case, on May 18, 2010, the IRS won the bank summons court case against APRIL and an employee of the IRS added up the extensive (726-plus pages) of bank deposits of PEYMON AND APRIL. Just one of those accounts showed total yearly bank deposits in amounts **between $10,324.94 and $71,408.57**.

APPELLANT's AUDITOR, in the course of her investigation, was provided bank and other financial records 2-ER-12 through 8-ER-1 (hereafter "bank and financial records") of PEYMON AND APRIL by revenue officer John Black (hereafter "BLACK**".)** and totaled the annual deposits **2-ER-10**, **2-ER-9**, **2-ER-4**, and **2-ER-1**. The February 13, 2008 notes of AUDITOR state: "*Met with collection officer, John Black. Reviewed files and made copies of related files.*" See 8-ER-4.

Also see pages 674-676 of the 11/05/13 trial transcript where collection officer John Black testified that BLACK added up the credit union bank deposits and gave it to the AUDITOR. See 2-ER-1.

For about five months, from 06/14/10 through 11/15/10, AUDITOR "*scheduled out*" "*seminar events*", "*expenses*", and "*deposited items*" related to the bank records of PEYMON AND APRIL. See 8-ER-3, AUDITOR'S activity record on bottom of **page 4** and to **page 5**.

After all BLACK's efforts to obtain and add up the bank deposits, on November 17, 2010, without ever having met PEYMON AND APRIL, the AUDITOR met with IRS counsel who mistakenly advised the AUDITOR, based on AUDITOR's own miscalculations, to use unrelated taxpayer statistics from BLS instead of BLACK's hard-won bank deposits to propose taxes on PEYMON AND APRIL.

AUDITOR testified at trial about her erroneous reasons for not using the bank deposit method **2-ER-4**:

"*Q So you received all of these bank records. Did you do a bank deposit analysis of these records?*

A Yes, I did.

Q Did you use it?

A No I did not because –

Q and why not?

A Because the deposits were not sufficient for me to determine their income.

***

Q Okay. So from all the documentation that you gathered, was all that sufficient to determine APPELLANT's income?

A No, they were not.

Q And why not?

A ***That's because *** Bank deposit analysis for each year from 10, 15 to 20, 25 thousand dollars.***" Emphasis added.

However, the bank deposit totals of PEYMON AND APRIL for each year of one credit union account were added up by BLACK as follows: $10,324.94 for 2001, $71,408.57 for 2002, $28,436.98 for 2003, $21,017.21 for 2004, $21,017.21 for 2005, and $44,973.71 for 2006. See **2-ER-9**.

Also see **2-ER-10** for additional bank records alleged to be owned or controlled by PEYMON AND APRIL. The IRS obtained bank statements from 12/13/2000 to 12/10/2004 for a bank account on which "*The name on the statements is Peymon Mottahedeh ITF Mary Mottahedeh*." According to BLACK yearly deposits added up as follows: "2000 = $1,295, 2002 = $3,156, 2003 = $13,549.61, 2004 = $6,7388.00 (sic)". The latter can be seen to total $67,388.00.

The total yearly amounts of the two bank account deposits were not added together in the brief. Adding these totals together would make the total bank deposits that BLACK claimed to belong to PEYMON AND APRIL as follows:

2001 = **$11,619.94**, 2002 = **$74,565.57**, 2003 = **$41,986.59**, 2004 = **$88,405.21,** 2005 = **$21,017.21**, and 2006 = **$44,973.71**.

The highest amount of total yearly bank deposits according to AUDITOR was $25,000, yet the bank deposits for four out of the six years at issue were **well over** that amount based on BLACK's calculation of total deposits of PEYMON AND APRIL's bank accounts, **not** the "***10, 15 to 20, 25 thousand dollars***' that AUDITOR **erroneously claimed!** See **2-ER-10**, **2-ER-9**, and **"bank and credit union records"**, which are over 726 pages amounting to a stack more than 4 inches high, which verify that BLACK'S bank deposit totals are correct – and AUDITOR'S numbers are **grossly incorrect**.

PEYMON AND APRIL should not be penalized for the incompetence of AUDITOR who did not bother to read BLACK's reports and apparently cannot perform basic math computations. By adding up the bank and credit union records correctly, AUDITOR would have learned that the bank and credit union deposits for years 2002 through 2006 were often **double or triple** what the AUDITOR **claimed**. The IRS should have utilized the bank deposit method and provided PEYMON AND APRIL the opportunity to do a "purification" of the bank deposits. The Court's finding to the contrary is erroneous and should be reversed.

The fact that AUDITOR grossly erred in adding up the total bank deposits of PEYMON AND APRIL, which were handed to her on a silver platter by BLACK,

is proof that AUDITOR erroneously made the decision to not use PEYMON AND APRIL's bank account records and chose instead to use **unrelated taxpayer statistics** from BLS. AUDITOR's erroneous and lower additions of bank deposits of PEYMON AND APRIL caused AUDITOR to erroneously and without justification use the higher amounts based on BLS data as the alleged taxable income of PEYMON AND APRIL.

Plenty of bank deposit records were available for AUDITOR to use to calculate PEYMON AND APRIL's income for 2001 through 2006. AUDITOR failed to "purify" the bank deposits of PEYMON AND APRIL to identify the taxable versus the non-taxable deposits of bank accounts of PEYMON AND APRIL as required per *United States v. Boulet*, *supra*. Therefore, AUDITOR should not have abandoned the bank deposit method and replaced it with the use of unrelated taxpayer statistics from BLS to calculate PEYMON AND APRIL's income and propose taxes on PEYMON AND APRIL.

The bank deposit method is a time-tested method of figuring out taxable income in the absence of other financial records. AUDITOR should not have abandoned the bank deposit method and replaced it with the use of unrelated taxpayer statistics from BLS to calculate PEYMON AND APRIL's income and propose taxes on PEYMON AND APRIL.

Based on the above, the IRS failed to meet the IRS's burden of proof for abandoning the bank deposit method of calculating taxable income and taxes and instead using unrelated taxpayer data to impute taxable income and taxes for PEYMON AND APRIL and the US Tax Court's relieving the IRS of the IRS's burden of proof for using unrelated taxpayer data is a reversible error.

The conclusion of the US Tax Court on **page 18** of the MEMO that "*Their bank records would not provide sufficient information about their income*" is erroneous. The IRS should have used bank records instead of unrelated taxpayer statistics from BLS to calculate taxes on PEYMON AND APRIL.

Therefore, this Court should abate the proposed taxes that were affirmed by the US Tax Court for years 2001 through 2006.

3. The record shows that the IRS repeatedly denied PEYMON AND APRIL's opportunity to defend themselves from the IRS's use of unrelated taxpayer statistics from BLS. Therefore, the Court erroneously held that the use of unrelated taxpayer statistics from BLS was the last resort of AUDITOR.

"*The essential elements of due process of law are notice and* ***the opportunity to defend***." Simon v. Craft, 182 U.S. 427, 436 (1901). Emphasis added. As seen below, the record shows that the IRS, although giving **notice** of opportunity to

defend, repeatedly denied PEYMON AND APRIL of **any** real "*opportunity to defend*" themselves prior to the IRS issuing of notices of deficiency, forcing PEYMON AND APRIL to go to Tax Court, which in turn caused this unnecessary, lengthy litigation, wasting the Tax Court's and the Circuit Court of Appeal's scarce resources.

The MEMO on **P. 8** correctly states: "*On March 28, 2008, the revenue agent served each of the Mottahedehs with a summons* ***. [On] *Saturday, April 26, 2008 the* [IRS] *mailed a letter about the summonses* *** *to the revenue agent*.". However, the Court erroneously states: "*In the Letter the Mottahedehs stated that they would comply with the summons only if the revenue agent answered 36 questions set forth in the letter.*"

PEYMON AND APRIL did **not** state that they "*would comply with the summons only if the revenue agent answered 36 questions set forth in the letter*." PEYMON AND APRIL made 36 observations/questions in response to the IRS Summons, numbered 1 through 36. See **2-ER-11**. Nowhere did PEYMON AND APRIL in their letter imply, suggest, or state that PEYMON AND APRIL "*would comply with the summons only if the revenue agent answered 36 questions set forth in the letter.*"

PEYMON AND APRIL stated the opposite of what the US Tax Court stated in numbered paragraph 36 of PEYMON AND APRIL response to the IRS summons Letter:

"*After carefully reading and considering the above words, if you still refuse to withdraw these summonses, then* ***please do your best to give us specific answers to the questions that we have posed to you, so that we may be able to form a more specific idea of what you are looking for*** *and what part of it may be allowed by law and what part may not be allowed by law* ***so that we may bring the documents which would be responsive to your specific requests****.

"We hope my suspicions of the IRS and government corruption and harassment of Peymon turn out to be wrong. Too often government officials try to hide the uncomfortable truth by simply ignoring people's legitimate concerns and questions. I hope that will not be the case here with you. ***Your open honest and complete responses to my questions and concerns may*** *alleviate some of the suspicions and concerns that we have expressed in this letter and* ***assist us both to better resolve the issues at hand****.

"Until we meet (if you do not cancel these Summonses*), we prefer to keep our communications in the written form, so that miscommunications can be minimized.* ***When we meet*** *we will bring with us a Court reporter and an audio recording device and up to 3 witnesses*."

PEYMON AND APRIL did **not** state that they would not comply with the summons. PEYMON AND APRIL rightfully wanted clarification on many issues so that when they met with AUDITOR, they could "*bring the documents which would be responsive to [AUDITOR'S] specific requests" "Until we meet" "When we meet we will bring with us a Court reporter.*"

It was AUDITOR herself that cancelled the summons, without even having the Courtesy of informing PEYMON AND APRIL that AUDITOR had cancelled the summons. The entire record shows that there was no follow up on this summons by AUDITOR. This was a blatant denial of PEYMON AND APRIL's "*opportunity to defend*". *Simon, supra*.

In fact, in an email on April 28, 2008, AUDITOR told her associates "***Peymon has called*** *last Friday* ***on 4/25/08*** *at 2:63 and later (****4 times****). He* ***left me a voice mail*** *to request my fax number. He said it is faster and easier to fax to me the summons due on 4/28**** ***I don't want to call him****."* **2-ER-3.**"

AUDITOR'S statement on Page 9 of the MEMO that AUDITOR "*did not want to call Peymon Mottahedeh because he might be playing 'another game'*" is a baseless paranoid fear of AUDITOR that the Tax Court erroneously restated in the MEMO. This was a blatant denial **by the Tax Court** of PEYMON AND APRIL's "*opportunity to defend*". *Simon, supra*.

Besides the summons and response letter stated above, and PEYMON's **four** calls to AUDITOR leaving a voicemail message each time, there were no communications between PEYMON AND APRIL and AUDITOR. There was no factual basis for AUDITOR to conclude that PEYMON was going to "*play 'another game'*" with AUDITOR, because PEYMON had not 'played' any "*game*" with AUDITOR in the first place. The Court's conclusion about PEYMON AND APRIL 'playing' a "*game*" should be taken out of the MEMO.

AUDITOR compiled a tax audit proposal ("AUDIT LETTER") that AUDITOR mailed to PEYMON AND APRIL on April 25, 2011, which gave PEYMON AND APRIL until May 9, 2011 to respond to AUDITOR's proposal. 2-ER-6.

The AUDIT LETTER stated in part: "*If you do not accept our findings, you may request a review of the proposed adjustments with the group manager. You may also appeal the proposed changes. These options are explained in the enclosed Publication 3498.*"

Enclosed with the AUDIT LETTER was IRS Publication 3498 which on its front page states: "***The IRS Mission provide [sic] America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.***" Font size and bolding is in the original. On the same pages it also stated: "***As a taxpayer, you have the right***

to fair, professional, prompt, and Courteous service from IRS employees, as outlined in the Declaration of Taxpayer Rights found on page 3… You must request reconsideration in writing and submit it to your local IRS office." Bolding in original. Underline added. See 2-ER-6, P. 16.

The front page of Publication 3498 continues: "*If your examination is conducted in person, it can take place in your home, your place of business, an IRS office, or the office of your attorney, accountant, or enrolled agent***. If the time or place is not convenient for you, the examiner will try to work out something more suitable.*"

On the next page, Publication 3498 continues: "***If You Do Not Agree*** *with the proposed changes, the examiner will explain your appeal rights. If your examination takes place in an IRS office you may request an immediate meeting with the examiner's supervisor to explain your situation… If you cannot reach an agreement …, the examiner will prepare a report explaining your position and ours. The examiner will forward your case to the Area office for processing. You will receive: A letter (known as a 30 day letter) notifying you of your rights to appeal the proposed changes; and … You generally have 30 days from the date of the 30 day letter to tell us whether you will accept the proposed changes or appeal them… Be sure to follow the instructions carefully.* ***Caution*** *If you do not respond to the 30-day letter, or if you respond but do not reach an agreement with*

an appeals officer, we will send you a 90 day letter, also known as a Notice of Deficiency." Large font and bolding in original. Underlining added.

On May 9, 2011, PEYMON AND APRIL by US mail replied to the April 25, 2011 AUDIT LETTER which stated: "*We have reviewed the 2001 Tax Proposal Letter that you sent us, dated April 25, 2011. We have no idea where your numbers came from to make such assessments.* ***Please send us a copy of any and all paper work, notes, testimony, documents and anything else you relied on to make such calculations. This way we may be able to review those documents and set a time to meet with you to discuss your tax proposals****. You gave us only fifteen days from the date of your letter to respond. Please send your response on or before May 31st, 2011.*" Emphasis added. See 2-ER-7.

AUDITOR's notes (hereafter, "NOTES") in **8-ER-2, P. 7**, show that on 05/10/11, the following entry is made: "*It appeared that t/p [APPELLANT PEYMON] called and left no message. T/p called [again and] requested work papers. I told him majority was from BLS.*"

The 05/11/11 NOTES further state: "*Mailed 30 day package, 2 L950, 2 F870, standard paragraph to t/ph and t/pw. I received his letter 2 days after due date of RAR.*" On 05/19/11 and 05/20/11 some unspecified "*Work papers*" were created by AUDITOR. On 06/03/11, the NOTES state: "*Per manager, t/ph called and left a message at 4:00 P.M.*...." The 06/07/11 NOTES of AUDITOR state:

"*T/ph sent a fax to request more work papers and label as* ***2nd protest letter***. *Manager sent the agent an email and advice from counsel while the agent is out to the field."* Emphasis added.

In summary: Despite the IRS Mission stating in big, bold letters that PEYMON AND APRIL "*have the right to fair, professional, prompt, and Courteous service from IRS employees*", and despite the requirement for AUDITOR to inform PEYMON AND APRIL of their "*appeal rights*", and despite the notice given that PEYMON AND APRIL "*may request an immediate meeting with the examiner's supervisor to explain*" PEYMON AND APRIL's "*situation*", there was no "*fair, professional,* ***prompt*** *and Courteous service,*" because a meeting with the IRS to discuss and review the tax proposals was flatly denied!

This was a blatant denial of PEYMON AND APRIL's "*opportunity to defend*". *Simon, supra*.

AUDITOR basically ignored PEYMON AND APRIL's respectful oral and written request to see the factual basis of AUDITOR's audit calculations and to schedule a time to meet with PEYMON AND APRIL to go over those files of AUDITOR.

AUDITOR, rather than simply answering PEYMON AND APRIL's call or letter, ignored PEYMON AND APRIL's phone call and letter, instead wasting 2 days of work on some unspecified, vague, other "*work papers*." What work papers

can be more important than answering PEYMON AND APRIL's call and letter and to provide PEYMON AND APRIL the factual basis of the audit so that an informed and meaningful meeting could be had by all parties to come to a mutually satisfactory resolution?

On June 7, 2011, PEYMON AND APRIL faxed and mailed a letter in reply to both the IRS AUDITOR's and the IRS manager's May 10, 2011 letters, which stated:

"*We are in receipt of two May 10, 2011 letters from the IRS which is signed by John A. Consoli and lists his name, address, phone numbers and address for where to mail our response to. I, Peymon, just spoke with* ***John A. Consoli*** *by telephone two days ago. Mr. Consoli* ***claimed that he is your supervisor and that we should contact you instead of him****. We are writing you as orally instructed by Mr. Consoli, and ccing Mr. Consoli as well to cover our bases.*

"In our May 9, 2011 letter which we sent in response to April 25, 2011 letters of Christine Thai to us, we asked for a copy of any and all paperwork … that was used to make her tax calculations against us in the April 25, 2011 letter to us, so that we can review them and then meet with you to resolve this disputed matter. On May 12, 2011, you mailed us the tax calculations, but not the actual documents used to come up with your tax calculations. We are patiently waiting for receipt of the actual documents that the calculations are based on.

"Please consider this a repeat of our previous May 9, 2011 protest letter*. **We want to** have all the above-mentioned documents in our hands at least 30 days before we **schedule a meeting between us and both of you (Christine Thai and her supervisor/manager, John A. Consoli) to resolve this matter**."* Emphasis added. See **2-ER-8.**

It is obvious here that PEYMON AND APRIL were calling AUDITOR and her manager, John Consoli (hereafter "MANAGER"), and writing both AUDITOR and MANAGER to obtain the documents that showed the factual basis of the audit assessment numbers so that PEYMON AND APRIL could "*schedule a meeting*" with AUDITOR and MANAGER "*to resolve this [tax] matter*."

MANAGER evaded talking to or responding to PEYMON AND APRIL despite the fact that the 30-day letter had MANAGER's name and signature on it as the issuer of the 30-day letter and listed only MANAGER's name, address and phone numbers for PEYMON AND APRIL to mail or call in response to the 30-day letter **2-ER-5**.

Both 30-day letters were issued on May 10, 2011 and **pages 59-60 and 83-84** state: "**What to Do if You Do Not Agree with the Proposed Changes.** *If after reviewing the proposed changes on the examination report you do not agree, you may request a meeting or telephone conference with the supervisor of the person identified in the heading of this letter. If you still do not*

agree after the meeting or telephone conference, you can request a conference with our Appeals Office… If you decide to request a conference with the examiner's supervisor, please make the request by the response indicated. Mail Responses To: Internal Revenue Service Attn: John Consoli 24000 Avila Road, MS 5114 Laguna Niguel CA 92677." Bolding and font in original. Underlining added.

These 30-day letters were accompanied with IRS Publication 1, which is headlined in big bold lettering, "**Your Rights as a Taxpayer**". Emphasis in Original. This publication states in relevant part: "*The first part of this publication explains* ***some of your most important rights as a taxpayer****. The second part* ***explains the examination, appeal… processes****… I. Protection of Your Rights. IRS employees will explain and protect your rights as a taxpayer throughout your contact with us*." Emphasis added.

The next enclosed publication entitled "**Your Appeal Rights and How to Prepare a Protest if You Don't Agree**" (bold and big font in original) began by stating: "*This Publication tells you how to appeal your tax case. If you don't agree with the Internal Revenue Service (IRS) findings,* ***you may request a meeting or a telephone conference with the supervisor of the person who issued the findings****. If you still don't agree,* ***you may appeal your case to the IRS Appeals Office of IRS***."

AUDITOR and MANAGER ignored these important due process rights of PEYMON AND APRIL, and the reason for so ignoring are obvious: AUDITOR sought to conceal the AUDITOR's very faulty method of determining PEYMON AND APRIL's income.

AUDITOR, as shown on page. 556 of the 11/15/13 trial transcript**,** admits that even though the IRS publications AUDITOR sent to PEYMON AND APRIL stated that PEYMON AND APRIL have a right to meet with AUDITOR and MANAGER to dispute AUDITOR's proposals, the MANAGER to AUDITOR to not meet with PEYMON AND APRIL as shown below (2-ER-2):

Q: Despite all that, your supervisor told you, "***Ignore what the publication says. Just move on to the next step. He doesn't have that right to not agree at this time. Just ignore that process; go to the next step. He doesn't have that right to not agree at this time. Just Ignore that process; go to the next step." That's what your manager told you, correct?***

A (AUDITOR)***: Indirectly YES***.

Q: Okay. And then you issued the 30-day letter after that, correct?

A: Yes.

It is now proven that MANAGER ordered AUDITOR to arbitrarily ignore and violate all the meeting, review, and appeal due process rights of PEYMON AND APRIL. Clearly, the Commissioner by these IRS publications and the

procedures outlined above intended to provide some pre-Tax Court due process hearing procedures before a taxpayer is forced to litigate possibly resolvable disputes such as this tax case with PEYMON AND APRIL so as to not burden the Court's limited resources with this case which consumed four days in trial with a 5,266 page record that should have been informally and amicably resolved between PEYMON AND APRIL and the IRS.

"'*[A] primary function of legal process is to minimize the risk of erroneous decisions'. Mackey v. Montrym, 443 U.S. 1, 13 (1979). Consequently, a foreseeable action that may cause deprivation of property must be 'preceded by notice*.' *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (emphasis added). As we made clear in Goldberg, 397 U.S., at 267, in statutory entitlement cases the* ***Due Process Clause normally requires 'timely and adequate notice detailing the reasons****' for proposed adverse administrative action. Such process is constitutionally required whenever the action may be 'challenged . . . as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.' Id., at 268*." Atkins v. Parker, 472 U.S. 115, 148 (1985). Emphasis added.

AUDITOR and MANAGER arbitrarily chose not to provide PEYMON AND APRIL with the documents and the reasoning behind AUDITOR's audit of PEYMON AND APRIL and refused to meet with PEYMON AND APRIL.

MANAGER also failed to provide a managerial review to PEYMON AND APRIL and refused to meet with PEYMON AND APRIL, and MANAGER refusal to meet with PEYMON AND APRIL denied PEYMON AND APRIL the ability to appeal MANAGER'S findings to the IRS Appeals Office.

In so failing, the IRS blatantly denied PEYMON AND APRIL of any "*opportunity to defend*". *Simon, supra*.

Therefore, the IRS consequently failed to carry its burden of proof as to why the IRS used the unrelated taxpayer statistics from BLS to propose taxes against PEYMON AND APRIL.

On **page 18**, the MEMO correctly states: "*The courts have permitted the IRS to rely on the use of average spending statistics, when the taxpayer fails to cooperate with the IRS*", citing Palmer v. United States, 116 F.3d 1309, 1312 (9th Cir. 1997) that the IRS may use "*statistics to reconstruct income where taxpayers fail to offer accurate records*."

However, in the instant case, as opposed to Palmer, it was not PEYMON AND APRIL who failed to cooperate or offer accurate records, it was the IRS AUDITOR and MANAGER who repeatedly and intentionally failed to cooperate with PEYMON AND APRIL, refusing to meet with PEYMON AND APRIL to go over the bank and other financial records that the IRS AUDITOR and MANAGER had obtained to arrive at the taxable income amounts of PEYMON AND APRIL.

Not only *Palmer, Supra* from 1997 is factually controlling in this case, but in 1998 when Congress enacted 26 USC §7491(b), Congress further put the burden on the IRS, by clearly requiring the IRS to prove that the taxpayer have failed to cooperate with the IRS before the IRS is allowed to use unrelated taxpayer statistics from BLS to reconstruct income, a burden that the IRS clearly failed to carry in the instant case since it is abundantly clear that the IRS employees repeatedly failed to meet and cooperate with PEYMON AND APRIL in the audit process before using unrelated taxpayer statistics from BLS to reconstruct the income of PEYMON AND APRIL.

Therefore, this Court should reverse the Tax Court's MEMO and hold that AUDITOR and MANAGER should have met with PEYMON AND APRIL before employing unrelated taxpayer statistics from BLS to propose taxes against PEYMON AND APRIL.

CONCLUDING SUMMARY

1) Congress placed the burden of proof on the IRS whenever the IRS chooses to employ BLS or other unrelated taxpayer statistics to assess taxes, as the IRS attempted to do in this case. The IRS failed to carry this burden and the US Tax Court's evasion of this issue is a reversible error.
2) AUDITOR had bank deposit records of PEYMON AND APRIL that AUDITOR miscalculated at only "*10, 15 to 20, 25 thousand dollars*" of yearly

bank deposits of PEYMON AND APRIL, when the actual amounts of the bank deposits were **mostly over $41,986** and as much as **$88,405**. Failure of AUDITOR to use the bank deposit records of PEYMON AND APRIL and instead use unrelated taxpayer statistics from BLS to impute taxable income for PEYMON AND APRIL was in error. Tax Court's failure to rule that the IRS had failed to meet the burden of proof by using unrelated taxpayer statistics from BLS to calculate taxable income of PEYMON AND APRIL was a reversible error.

3) The IRS's AUDITOR and MANAGER's:

   a. Deliberate refusal to return PEYMON AND APRIL's calls;

   b. Deliberate refusal to respond to APRIL AND PEYMON's FAX, letters to AUDITOR and MANAGER asking AUDITOR and MANAGER to meet with PEYMON AND APRIL to review and "*purify*" PEYMON AND APRIL's over 726 pages of bank records to calculate PEYMON AND APRIL's taxable income; and

   c. Violating all the IRS internal audit meeting and appeal procedures and taxpayer rights publications as published in the IRS letters and materials that were mailed to PEYMON AND APRIL and which said that PEYMON AND APRIL had a right to meet with AUDITOR and MANAGER to review the tax audit proposals of the IRS

denied PEYMON AND APRIL's "*opportunity to defend*" (*Simon, supra*), therefore was error and negated any excuse the IRS may have had to use unrelated taxpayer statistics from BLS to impute taxes on PEYMON AND APRIL for tax years 2001 through 2006.

4) Failure of the US Tax Court to hold the burden of proof on the IRS for using unrelated taxpayer statistics from BLS instead of purified bank deposits analysis which the IRS should have used in this case is a reversible error and requires a reversal of the MEMO and judgement of the US Tax Court and abatement of all taxes and penalties for years 2001 through 2006 that were unlawfully assessed on PEYMON.

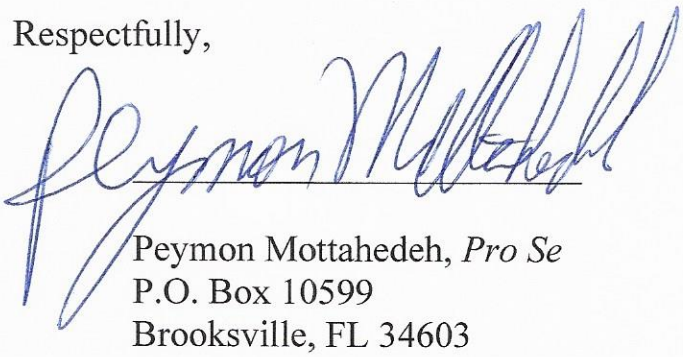
CONCLUSION

WHEREFORE, this Court should rule that:

1. The IRS failed to meet the IRS's burden of proof in using unrelated taxpayer statistics from BLS instead of PEYMON AND APRIL'S bank records to calculate taxes on PEYMON AND APRIL; and
2. Failure of the US Tax Court to rule that the IRS failed to meet IRS's burden of proof in using unrelated taxpayer statistics from BLS instead of PEYMON AND APRIL'S bank records to calculate taxes on PEYMON AND APRIL is a reversible error and all taxes and penalties assessed for years 2001 through 2006 on PEYMON should be abated.

Dated: March 1, 2022

Respectfully,



Peymon Mottahedeh, *Pro Se*
P.O. Box 10599
Brooksville, FL 34603
Peymon96@gmail.com
760-964-5519

CERTIFICATE OF SERVICE

This is to certify that I filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by emailing all documents to the clerk at prose_pleadings@ca9.uscourts.gov on the date listed below:

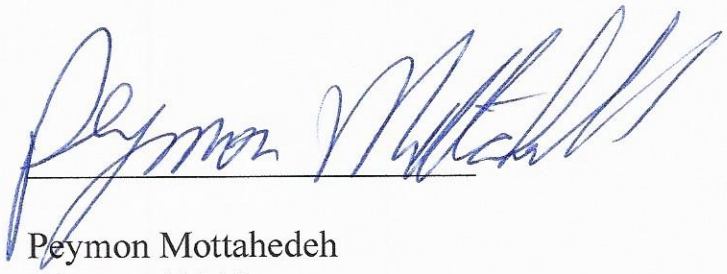
AMENDED OPENING BRIEF OF APPELLANT

I hereby certify that all participants in the case are registered CM/ECF users but Appellant's request for E-filing was rejected and Appellant was instructed by the Clerk of Court to email all documents.

Therefore, Appellant emailed the Clerk of Court as noted above and served Appellee by emailing the above described document on

March 1, 2022, to the following email address:

CURTIS C PETT, Attorney
United States Department of Justice/ Tax Division
Curtis.C.Pett@usdoj.gov



Peymon Mottahedeh
PO Box 10599
Brooksville, FL 34603
Peymon96@gmail.com
760-964-5519

Dated: March 1, 2022