No. 18-9005

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NEIL FEINBERG, ANDREA FEINBERG & KELLIE McDONALD,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE DECISION
OF THE UNITED STATES TAX COURT
Nos. 10083-13, 10084-13
JUDGE KATHLEEN KERRIGAN

BRIEF FOR THE APPELLEE

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

GILBERT S. ROTHENBERG	**(202) 514-3361**
FRANCESCA UGOLINI	**(202) 514-1882**
NATHANIEL S. POLLOCK	**(202) 514-8139**

Attorneys, Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases (cont'd): **Page(s)**

Cases (cont'd): **Page(s)**

Statutes:

Statutes (cont'd): **Page(s)**

Regulations:

Miscellaneous:

GLOSSARY

Acronym	Definition
IRS	Internal Revenue Service
I.R.C.	Internal Revenue Code
THC	Total Health Concepts, LLC

STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), counsel for the Commissioner states that *Feinberg v. Commissioner*, 808 F.3d 813 (10th Cir. 2015), is a prior and related appeal in this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-9005

NEIL FEINBERG, ANDREA FEINBERG & KELLIE McDONALD,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE DECISION
OF THE UNITED STATES TAX COURT
Nos. 10083-13, 10084-13
JUDGE KATHLEEN KERRIGAN

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this case, as did the Tax Court. The Commissioner of Internal Revenue issued notices of deficiency to Neil Feinberg, Andrea Feinberg, and Kellie McDonald (taxpayers) on February 6, 2013. (App. 3589.) Taxpayers filed timely petitions for redetermination of the deficiencies on May 7, 2013. (App. 1-12, 1944-

57.) The Tax Court thus had jurisdiction under Sections 6213 and 7442 of the Internal Revenue Code (I.R.C.) of 1986 (26 U.S.C.).

The Tax Court issued a memorandum opinion upholding the deficiencies on October 23, 2017. (App. 3585-97.) Taxpayers sought reconsideration, and the Tax Court denied this request on April 2, 2018. (App. 3687-89.) The Tax Court entered a decision sustaining the deficiencies on April 4, 2018. (App. 3690.) Taxpayers filed a timely notice of appeal to this Court on May 25, 2018. (App. 3692); *see also* I.R.C. § 7483 & Fed. R. App. P. 13(a)(1)(A). This Court has jurisdiction over this appeal under I.R.C. § 7482(a)(1).

STATEMENT OF THE ISSUE

This appeal is about I.R.C. § 280E, a tax provision that prohibits the deduction of any amount incurred in carrying on a business that "consists of trafficking in controlled substances." Taxpayers here were the owners of a company that openly operated state-licensed marijuana dispensaries. The IRS relied on Section 280E to disallow the company's business-expense deductions. The issues before this Court are:

1) Whether the IRS correctly applied Section 280E, and

2) Whether the IRS's application of Section 280E violated taxpayers' Fifth Amendment right to avoid self-incrimination.

STATEMENT OF THE CASE

A. Overview of the case and proceedings below

Taxpayers were shareholders of Total Health Concepts, LLC (THC), a company that was licensed to grow and sell—and did grow and sell—medical marijuana from 2009 to 2012. (App. 2749, 3373, 3386, 3587.) For 2009 through 2011, the IRS disallowed THC's business-expense deductions under I.R.C. § 280E, and made some other adjustments to its tax reporting. (App. 3586-88.) It issued notices of deficiency to taxpayers, and the deficiencies are largely attributable to the application of Section 280E. (App. 3586-88.)

Taxpayers challenged the IRS's deficiency notices in the Tax Court. (App. 1-12.) The Tax Court case was delayed by a discovery dispute. Taxpayers resisted the Commissioner's discovery requests arguing that the requests violated their Fifth Amendment rights to avoid incriminating themselves. (App. 83-88.) The Tax Court rejected this argument and issued an order compelling taxpayers to produce discovery. (App. 1144.) Taxpayers then sought mandamus relief in this

Court. (App. 1157, 1161.) This Court denied the relief, but indicated that taxpayers faced a sufficient threat of prosecution to trigger a valid Fifth Amendment claim. *Feinberg v. Commissioner*, 808 F.3d 813, 816 (10th Cir. 2015). This Court also questioned why the Commissioner had sought to compel taxpayers to produce discovery when it was taxpayers who bore the "burden of showing the IRS erred in denying their deductions." *Id.* at 815.

When proceedings resumed in the Tax Court, taxpayers still did not produce any evidence or respond to the Commissioner's discovery requests. But the Commissioner did not seek sanctions, and the Tax Court did not impose them. The case proceeded to trial. The trial focused on the IRS's calculation of THC's cost of goods sold—*i.e.*, a reduction to gross receipts unaffected by Section 280E. (App. 3296-3370.) The Tax Court rejected taxpayers' cost-of-goods-sold arguments (App. 3596), and taxpayers do not challenge that aspect of the Tax Court's ruling here.

The Tax Court also upheld the IRS's disallowance of THC's business-expense deductions, but for a reason other than the one the Commissioner advanced. Because taxpayers had refused to produce

any documentary evidence regarding their business expenses, the court determined that taxpayers failed to substantiate those expenses. (App. 3598.) It accordingly disallowed the business-expense deductions without addressing the parties' Section 280E arguments. Taxpayers moved for reconsideration, pointing out that the IRS had never challenged substantiation for most of the business expenses. (App. 3627.) The Commissioner filed a response agreeing with this point and urging the Tax Court to address Section 280E. (App. 3648-56.) In an order denying reconsideration, the Tax Court adhered to its original opinion. (App. 3687-88.)

In this appeal, the Commissioner agrees with taxpayers that lack of substantiation is not a proper basis in this case for disallowing the business-expense deductions. But this Court can affirm the Tax Court's decision for any reason supported by the record, and, as the Commissioner argued below, the deductions should be disallowed under Section 280E.

B. Legal framework

Section 280E of the Internal Revenue Code provides:

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade

> or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

Marijuana is classified under Schedule I of the Controlled Substances Act. 21 U.S.C. § 812(c)(10). And operating a marijuana dispensary constitutes trafficking in controlled substances within the meaning of Section 280E. *See, e.g., Green Solution Retail, Inc. v. United States*, 855 F.3d 1111, 1114 (10th Cir. 2017); *Olive v. Commissioner*, 792 F.3d 1146, 1150 (9th Cir. 2015); *Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner* (*CHAMP*), 128 T.C. 173, 182-83 (2007).

Federal tax law recognizes two basic measures of income: gross income and taxable income. Generally speaking, gross income includes "all income from whatever source derived," including "income derived from business." I.R.C. § 61(a). Businesses calculate their gross income by subtracting the cost of any goods sold from their gross receipts. *See* 26 C.F.R. § 1.61-3(a) (Treas. Reg.). The cost of goods sold includes both the cost of items acquired for resale and the cost of producing any items for sale, adjusted for opening and closing inventories. *See* Treas. Reg. § 1.162-1(a); *Kazhukauskas v. Commissioner*, T.C. Memo. 2012-191 at

[*9]. To ensure that the Government taxes income instead of sales, accounting for the cost of goods sold is a "mandatory exclusion from the calculation of a taxpayer's gross income." *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1199 (10th Cir. 2018). Because this "exclusion" is not a deduction, it is not precluded by Section 280E. *See, e.g., Alterman v. Commissioner*, T.C. Memo. 2018-83 at [*30].

Taxable income, in turn, is computed by reducing a taxpayer's gross income using deductions allowed by the Tax Code. I.R.C. § 63(a). Among these deductions are certain deductions related to the carrying on of a trade or business. Section 162(a) of the Tax Code, for example, allows taxpayers to deduct "ordinary and necessary expenses" incurred or paid during a taxable year "in carrying on any trade or business." I.R.C. § 162(a). Taxpayers also may deduct "interest paid or accrued on indebtedness properly allocable to a trade or business," I.R.C. § 163(a) & (h)(2)(A), and generally may take "as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear . . . of property used in the trade or business," I.R.C. § 167(a). But because these deductions are for the carrying on of a trade or business, they are not

permitted when the business "consists of trafficking in controlled substances." I.R.C. § 280E.

C. Facts

1. The medical marijuana business

Neil and Andrea Feinberg and Kellie McDonald (taxpayers) were the owners of THC, a medical marijuana company, during the tax years at issue in this case (2009-2011). (App. 3587.) THC was licensed in the state of Colorado to grow and sell medical marijuana. (App. 630, 3587).[1] THC's operating agreement "stated that its purpose was to promote the cultivation and sale of medical marijuana products." (App. 3587 (internal quotation marks omitted).) "During the tax years in issue it held licenses to operate at least two medical marijuana dispensaries." (App. 3587.) THC openly sold marijuana in the presence of an IRS

[1] In 2000, Colorado voters enacted an amendment to the Colorado state constitution, which provided an affirmative defense to Colorado criminal law relating to a medical patient's use of marijuana (provided that such use complied with certain enumerated requirements). Colo. Rev. Stat. Const. Art. 18, § 14. In 2012, Colorado voters amended the state constitution to permit the "personal use of marijuana" and the "lawful operation of marijuana-related facilities," as defined in the amendment. Colo. Rev. Stat. Const. Art. 18, § 16.

agent in 2012, and the agent was told that THC likewise sold marijuana in 2009, 2010 and 2011.[2] (App. 3373-74, 3386.)

2. Tax reporting and notices of deficiency

THC, an "S" corporation, reported business losses of $105,478 for 2009, $295,321 for 2010, and $54,231 for 2011. (App. 3587.) Because S corporations pass income, losses, deductions, and credits to their shareholders for federal tax purposes, *see* I.R.C. §§ 1363, 1366, the Feinbergs and Kellie McDonald reported these losses on their own income tax returns. (App. 3588.)

The IRS determined deficiencies for Kellie McDonald of $13,369, $63,641, and $12,262 for tax years 2009-2011, respectively. (App. 3586.) The IRS determined deficiencies for the Feinbergs of $47,203 for 2010 and of $35,809 for 2011. (App. 3586.) These deficiencies are largely attributable to adjustments the IRS made to the taxable income of THC. (App. 3586.) The most significant of those adjustments resulted from the disallowance pursuant to I.R.C. § 280E of business-expense deductions. (App. 42-60, 3588.) The IRS determined that THC

[2] THC ceased operating and was dissolved in February 2013. (App. 2749-50, 2777.)

"operates medical marijuana dispensaries and marijuana growing facilities." (App. 41.)

The IRS also made adjustments to the cost of goods sold in THC's favor. The IRS disallowed some of the expenses THC claimed as cost-of-goods-sold exclusions because THC "was unable or unwilling to provide any documents supporting" those expenses. (App. 42-43.) But the IRS also concluded that many of the expenses THC claimed as deductions were actually legitimate cost-of-goods-sold exclusions from gross receipts. (App. 44-60, 3379-80, 3394-95, 3588.) For instance, the IRS did not simply eliminate THC's deduction of wages; instead, it re-characterized as costs of goods sold the portions of the wages THC paid to employees as part of its marijuana growing and harvesting operation, and only disallowed the wages paid as part of its sales operation. (App. 44-46, 3394-95.) Because of this and other similar re-characterizations, the IRS's determination provided THC with a more favorable cost-of-goods-sold calculation than the one reflected on its original tax returns. (App. 3588.)

The more favorable cost-of-goods-sold calculation did not, however, offset the denial, under Section 280E, of THC's business-expense

deductions. So the net result of the IRS's adjustments was a determination that THC's taxable income must be increased by $104,051 for 2009, by $630,835 for 2010, and by $375,442 for 2011. (App. 3588.)

3. Tax Court proceedings

Taxpayers filed timely petitions for redetermination in the spring of 2013. The main thrust of the petitions was a variety of challenges to Section 280E's applicability and constitutionality. (App. 2-5, 1945-48.) Taxpayers did not deny that they operated a marijuana dispensary, but instead raised a number of arguments regarding the IRS's alleged lack of proof. (App. 2-3, 1945-46.) The petitions also challenged the IRS's redetermination of THC's cost of goods sold. (App. 5-6, 1948-49.)

a. Discovery dispute

The case quickly got derailed by a drawn-out discovery dispute. The Commissioner propounded interrogatories, document requests, and requests for admission relating to the THC's business operations. (App. 78-80, 94-101.) Taxpayers did not answer these discovery requests.

Taxpayers instead filed three motions. First, they moved for summary judgment arguing, *inter alia*, that the IRS's application of

Section 280E to THC violated the Fifth and Sixteenth Amendments. (App. 202-11.) The Tax Court denied summary judgment, concluding that there were material issues of fact in dispute. (App. 1059-60.) Second, taxpayers moved for a protective order, invoking their Fifth Amendment privilege against self-incrimination on the grounds that the Commissioner's discovery requests were designed to establish that they were engaged in illegal drug trafficking. (App. 83-88.) The Tax Court denied this motion, holding that taxpayers had not asserted a valid Fifth Amendment claim. (App. 1067-68.) And third, taxpayers sought, via a motion *in limine*, a determination concerning the applicable burden of proof. They sought an order establishing that, because of the Fifth Amendment concerns implicated, the Commissioner must prove that taxpayers are *not* entitled to business-expense deductions—*i.e.*, that THC's business consists in trafficking in a controlled substance. (App. 207-08, 301.) The Tax Court also denied this motion, explaining that a civil litigant "must accept the consequences of asserting the Fifth Amendment and cannot avoid the burden of proof by claiming the privilege." (App. 1066.)

The Commissioner sought to compel taxpayers to answer interrogatories and respond to document requests, or, in the alternative and if taxpayers still refused, the Commissioner asked the Tax Court to simply rule in his favor. (App. 1070-73, 1083-86). The court granted the motion to compel and set a due date for taxpayers' discovery responses. (App 1144.) Taxpayers responded on the due date by simply objecting to each request based upon the Fifth Amendment privilege against self-incrimination. (App. 1146-48.)

While the Commissioner's motion to compel was pending, taxpayers sought certification of an interlocutory appeal on the issues of burden of proof and Fifth Amendment privilege. (App. 1110-19.) The Tax Court denied the motion. (App. 1140-43.) Taxpayers then sought mandamus relief in this Court. (*See* App. 1157, 1161.)

This Court denied taxpayers' petition for mandamus relief. *Feinberg v. Commissioner*, 808 F.3d 813, 814 (10th Cir. 2015). It held that an error in a lower court's "order compelling production of civil discovery that the petitioners believed protected by the Fifth Amendment [can] be satisfactorily redressed in an appeal after final judgment." *Id.* at 816-17. This Court explained that it would be able to

unwind any harm that accrued whether the taxpayers refused to comply with the order compelling production of discovery and suffered sanction or complied under protest. *Id.* at 817. Moreover, this Court found the Commissioner's motion to compel a discovery response "curious," given that (1) taxpayers "carry the burden of showing the IRS erred in denying their deductions" and (2) "in civil matters an invocation of the Fifth Amendment may sometimes lawfully result in an inference that what you refuse to produce isn't favorable to your cause." *Id.* at 815 (citations omitted).

When the case resumed in Tax Court, the Commissioner abandoned his discovery requests and instead moved for summary judgment. (App. 1198-1217.) The Commissioner argued that, because taxpayers chose not to proffer any evidence, they could not meet their burden of proof. (App. 1202-05.) In response, taxpayers made legal arguments regarding the inapplicability or unconstitutionality of Section 280E. (App. 2047-80.) But they also briefly contended that there was a dispute of fact about the IRS's calculation of THC's costs of goods sold and corresponding reduction of gross receipts. (App. 2080.) The Tax Court denied the Commissioner's motion for summary

judgment, stating that "it appears to the Court that there are material issues of fact in dispute." (App. 2227.)

b. Trial

The case proceeded to a trial that focused on the cost-of-goods-sold issue. The majority of the trial was spent on expert testimony about the average cost of goods sold in the marijuana industry. (App. 3296-3370.) Instead of producing evidence regarding their actual goods sold or the cost of those goods, taxpayers attempted to prove their cost of goods sold through expert testimony. They offered a report and testimony from Jim Marty, a CPA with alleged expertise in the medical marijuana industry. (App. 2787-2791, 3296-3370.) His report purported to offer data regarding the average costs of growing and selling medical marijuana. (*Id.*) Taxpayers further argued that they should be allowed some increase in cost of goods sold under *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930), which allowed a taxpayer conducting a theater business to approximate his business expenses where he had kept no records to show exact amounts.

The Commissioner contended that this evidence was not legally relevant because it could not substitute for actual evidence of the

disputed elements of the cost-of-goods-sold calculation (App. 3271-72), and the court ultimately agreed (App. 3590-94). For his part, the Commissioner submitted evidence that THC sold marijuana, while maintaining that—as the Tax Court had already determined (App. 1065-66)—it was taxpayers' burden to establish their eligibility for the business-expense deductions by showing that THC's business did *not* consist in trafficking marijuana. (App. 3294-95.) The IRS revenue agent who audited THC testified that she personally observed THC "growing and selling marijuana" when she toured two of its facilities in 2012. (App. 3373, 3384.) Specifically, she saw customers coming into THC facilities and buying marijuana, she saw marijuana plants, and she observed THC's use of "420 software" designed specifically for marijuana dispensaries. (App. 3373-74.) Asked on cross-examination why she concluded that Section 280E applied in 2009 through 2011 if she only witnessed THC selling marijuana in 2012, the agent responded that "based on their [*i.e.*, THC employees'] oral testimony, they did the same thing in 2009 and 2010 and 2011." (App. 3386.)

The Tax Court also admitted into evidence (App. 3285) various THC filings with Colorado and/or localities within Colorado, which showed, *inter alia*, that:

- THC entered into a management agreement to retain an individual to "manage and operate the sales and production of medical marijuana" at one of its locations. (App. 518.)
- On THC's medical-marijuana-business-license application with the City of Colorado Springs, "medical marijuana center" is checked as the type of business. (App. 531.) The application defines "medical marijuana center" as a "[b]usiness authorized to sell Medical Marijuana to registered patients or primary caregivers." (App. 531; *see also* App. 891 & 903 (same language on pre-application forms).)
- THC submitted medical marijuana sales tax compliance forms that affirmed, under the category of Medical Marijuana Center, that it had submitted sales tax license applications "for each location conducting retail sales." (App. 552-53, 894, 907, 910.)
- THC entered into a lease agreement for a Colorado Springs property that provided that the property may be used as a "medical marijuana dispensary only." (App. 668.)

- THC's operating agreement, signed by Neil Feinberg and Kellie McDonald, stated that its purpose is to "promote the cultivation and sale of medical marijuana products." (App. 855, 865.)

- On a Colorado Springs labor-related form, THC checked "Retail Trade" as the description that best describes its business activity and wrote "Medical marijuana dispensary" in the box that requested a list of specific products or services. (App. 899.)

c. The Tax Court's opinions

The Tax Court sustained the IRS's deficiency determinations. (App. 3598.) Its opinion focused on the cost-of-goods-sold issue that dominated the trial. The court ruled that taxpayers' expert report was unreliable and based on conjecture, and thus was inadmissible. (App. 3592-94.) The court sustained the IRS's determinations concerning THC's cost of goods sold because taxpayers produced no evidence to substantiate a more favorable calculation. (App. 3596.)

The Tax Court also rejected taxpayers' reliance on *Cohan*. It held that taxpayers had failed to adduce any proof of what they sold, stating that "there is not enough evidence in the record to make a finding of fact that THC sold medical marijuana" (App. 3597), but the court

assumed in any event that "THC was in the business of selling medical marijuana" (App. 3596-97). The court observed that the IRS had allowed "for some COGS"[3] and that "under the Cohan rule there must be sufficient evidence in the record to provide a basis upon which an estimate can be made." (App. 3597.) Because there was "no evidence to support a higher COGS for THC" (App. 3597), the court sustained the IRS's determination.

Finally, regarding the business-expense deductions, the Tax Court observed that "[d]eductions are a matter of legislative grace, and a taxpayer must prove his or her entitlement to deductions." (App. 3597.) In the court's view, it did not need to decide whether Section 280E applies because taxpayers "failed to substantiate any expenses for which [the IRS] disallowed deductions." (App. 3598.) The court stated that "[p]etitioners did not produce any business records or any other supporting documents. They have not met their burden of proving respondent's determinations in the notices of deficiency are incorrect." (App. 3598.)

[3] COGS is shorthand for cost of goods sold.

In a motion for reconsideration, taxpayers contended, among other things, that the Tax Court erred by relying on lack of substantiation to uphold the IRS's disallowance of all of THC's business-expense deductions. (App. 3627.) The Commissioner agreed. Specifically, the Commissioner explained that, for many of the denied deductions, the IRS had not asked for substantiation of the amount or existence of the expense and had denied the deduction solely because of Section 280E. (App. 3650-51.) The Commissioner took the position that the Tax Court had to address Section 280E's applicability. (App. 3648, 3656.) The Commissioner thus urged the court to supplement its prior opinion, hold that Section 280E applies, and rule that taxpayers failed to meet their burden of establishing eligibility for business-expense deductions because they failed to "prove that THC did not sell medical marijuana." (App. 3648, 3656.)

The Tax Court denied taxpayers' motion for reconsideration. (App. 3687-89). The court did not supplement its prior opinion but instead reasserted its prior determination that it was unnecessary to address the application of Section 280E. (App. 3688.) The court stated that it is entitled to "sustain [a] determination of a deficiency or any

portion thereof on any appropriate ground, including grounds not stated in the notice of deficiency." (App. 3688.) And it concluded that taxpayers had "faced no unfair surprise or disadvantage by our holding that they had the burden of substantiating the amounts they contend should be allowed as offsets and deductions." (App. 3688.)

The Tax Court issued its final decision (App. 3690), and taxpayers appealed (App. 3692).

SUMMARY OF ARGUMENT

In this appeal, taxpayers mount two meritless challenges to the IRS's disallowance of tax deductions for amounts incurred by their medical marijuana dispensary business. The IRS disallowed the deductions under Section 280E of the Internal Revenue Code. Section 280E prohibits the deduction of any amount incurred in carrying on a business that "consists of trafficking in [illegal] controlled substances."

Before we get to taxpayers' Section 280E arguments, we note our agreement with taxpayers that the Tax Court erred in failing to address Section 280E because, for the majority of the disallowed tax deductions, Section 280E was the sole basis for the IRS's determination. Taxpayers have not, however, asked this Court to remand the case back to the Tax

Court for a ruling on Section 280E's applicability and, instead, have addressed their Section 280E arguments to this Court. This Court should consider those arguments, and it should affirm because the IRS correctly and constitutionally applied Section 280E to deny THC's claimed deductions. This Court can affirm for any reason supported by the record and, in any event, if the Tax Court had resolved the Section 280E issues, this Court would have reviewed those rulings *de novo*.

Taxpayers raise two Section 280E arguments. First, they argue that the IRS bore the burden of establishing that the disallowed deductions were for amounts incurred in carrying on a business that consists in trafficking marijuana. That argument is directly foreclosed by this Court's decision in *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187 (10th Cir. 2018), a case in which this Court considered and rejected the very same argument made by the very same attorneys making it here.

Second, they argue that Section 280E somehow violates their Fifth Amendment rights to avoid self-incrimination. This argument makes no sense. It is true that, when the Tax Court granted the Commissioner's motion to compel, it appeared that taxpayers would be

forced to respond to the Commissioner's discovery requests. If they had been, they might have had an argument that such compulsion violated their Fifth Amendment rights. But they never actually were compelled. Because they never provided discovery—*i.e.*, never turned over potentially incriminating information (or any information at all)—and never faced any sanction for their decision not to provide discovery, no Fifth Amendment harm even arguably occurred. As such, taxpayers' rights to avoid self-incrimination could not have been (and were not) violated.

And even if there were some Fifth Amendment claim lurking here, its expiration date has passed. The right to avoid self-incrimination does not survive the expiration of the statute of limitations for the relevant crime. By the time of the Tax Court trial, the statute of limitations for prosecution of any drug trafficking that occurred during the tax periods at issue had run.

This Court should affirm the Tax Court's decision in this case.

ARGUMENT

The Tax Court correctly upheld the Commissioner's deficiency determinations because taxpayers' business-expense deductions are barred by I.R.C. § 280E

Standard of review

This Court reviews Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." *Kurzet v. Commissioner*, 222 F.3d 830, 833 (10th Cir. 2000) (quoting I.R.C. § 7482(a)(1)). As such, it reviews the Tax Court's factual findings for clear error and its legal conclusions *de novo*. *Anderson v. Commissioner*, 62 F.3d 1266, 1270 (10th Cir. 1995).

A. Introduction

At its core, this appeal is about I.R.C. § 280E: whether it was correctly applied (it was), and whether its application violated taxpayers' Fifth Amendment rights (it did not). Section 280E prohibits the deduction of any amount incurred in carrying on a business that "consists of trafficking in controlled substances." Because taxpayers' business, Total Health Concepts (THC),[4] was a marijuana dispensary,

[4] THC is also the acronym for Tetrahydrocannabinol, which is the principal psychoactive constituent of marijuana. *Cf. Feinberg v.*

the IRS disallowed the business-expense deductions that taxpayers claimed. (App. 44-60.) It based these disallowances on Section 280E. (App. 44-60.) Indeed, for most of taxpayers' claimed business deductions, Section 280E was the sole basis for the IRS's disallowance. (App. 44-48, 51-52, 55-56.)

A separate dispute before the Tax Court involved cost of goods sold. When taxpayers account for the cost of goods sold (*i.e.*, reduce gross receipts by the costs of producing goods, bringing them to market, *etc.*), that adjustment of income is not a tax deduction and is not barred by Section 280E. *See, e.g., Alterman v. Commissioner of Internal Revenue*, T.C. Memo. 2018-83 at [*30]. The IRS did subtract from THC's gross receipts significant sums that it determined fit into the category of allowable reductions to account for cost of goods sold. (*See* App. 3498.) Taxpayers argued that they should have been permitted a greater reduction, but the Tax Court held that they failed to

---

Commissioner, 808 F.3d 813, 814 (10th Cir. 2015) (describing THC as "a not-so-subtly-named Colorado marijuana dispensary").

substantiate any reduction over and above what the IRS allowed and that no evidence in the record supported an increased deduction. (App. 3596-97.) Taxpayers have *not* disputed that determination here. So the only issue this Court needs to decide is whether the IRS properly disallowed taxpayers' business deductions pursuant to Section 280E. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."); *id.* ("[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue.").

The Tax Court did not reach the question whether Section 280E applies because, in its view, taxpayers failed to prove their entitlement to *any* deductions by failing to submit any documentary evidence regarding THC's business expenses during the trial. (App. 3598.) The Commissioner, however, did not argue below or during the audit that all of THC's marijuana-business expenses should be disallowed on the alternative ground that taxpayers failed to substantiate the amount or existence of expenditures. Rather, for many of the claimed deductions, the Commissioner argued solely that marijuana-business expenses were

not deductible as a matter of law under Section 280E.[5] Thus, to the extent the Tax Court held that all of the marijuana-business expenses were not deductible because they were not substantiated, the Commissioner agrees with taxpayers that that aspect of the court's opinion is in error.[6]

Nevertheless, the court's ultimate judgment—that no business-expense deductions are allowed—is correct because the deductions are barred by Section 280E. This Court may affirm for any reason supported by the record. *See United States v. Springer*, 875 F.3d 968,

---

[5] The Commissioner attempted to clarify this issue in response to taxpayers' motion for reconsideration and urged the court to address the applicability of Section 280E. (App. 3648-56.)

[6] We submit that the Tax Court's reasoning on this issue is not entirely clear. As discussed in detail *infra*, the Commissioner maintained throughout these proceedings that in order to get the benefit of any business-expense deductions, taxpayers had to prove that THC's expenses were incurred in the course of a *non*-marijuana business, in which case Section 280E would not apply. The Commissioner repeatedly argued that taxpayers failed to substantiate any *non*-marijuana business, inasmuch as they did not allege any existed and refused to produce any evidence regarding THC's business activities. Thus, to the extent the Tax Court held that taxpayers were not allowed to deduct business expenses because they failed to substantiate any *non*-marijuana-business expenses, the Tax Court's ruling is correct.

981 (10th Cir. 2017), *cert. denied,* 138 S. Ct. 2002 (2018) (citations omitted). And, had the Tax Court addressed Section 280E's applicability and constitutionality, its decision on those purely legal issues would not have warranted any deference. *See Mitchell v. Commissioner*, 775 F.3d 1243, 1246 (10th Cir. 2015). This Court's *de novo*—literally "anew"[7]—review of these issues will be unaffected by the lack of Tax Court analysis. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable."). Moreover, taxpayers themselves have *not* asked this Court to remand so that the Tax Court can address the Section 280E issues in the first instance; instead, they raise those issues before this Court. (Br. 13-17.)

Thus, we respectfully submit that this Court can and should address taxpayers' Section 280E arguments in the first instance. And it should reject them. That is, it should rule that the IRS correctly and constitutionally applied Section 280E to disallow taxpayers' claimed business deductions.

---

[7] De novo, Black's Law Dictionary (10th ed. 2014).

B. The Commissioner correctly denied taxpayers' business-expense deductions pursuant to I.R.C. § 280E

1. Legal framework

This Court has long recognized that "[d]eductions . . . are not a matter of right. Neither do they turn upon equitable considerations. They are a matter of legislative grace." *Green Sol. Retail, Inc. v. United States*, 855 F.3d 1111, 1121 (10th Cir. 2017), *cert. denied sub nom.*, 138 S. Ct. 1281 (2018) (*quoting United States v. Akin*, 248 F.2d 742, 743 (10th Cir. 1957)). *See also New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934); *Esgar Corp. v. Commissioner*, 744 F.3d 648, 653 (10th Cir. 2014). "The right to take deduction[s] must be found in congressional legislative enactments, and one claiming such a right must bring himself clearly and strictly within the exemption provisions of the Statute." *Chicago Mines Co. v. Commissioner*, 164 F.2d 785, 787 (10th Cir. 1947). *See also Helvering v. Nw. Steel Rolling Mills, Inc.*, 311 U.S. 46, 49 (1940) (provisions for deductions "are to be strictly construed" against a taxpayer); *Akin*, 248 F.2d at 743 ("[A] taxpayer asserting a deduction must bring himself squarely within the terms of a statute expressly authorizing it."). The taxpayer has " 'the burden of clearly showing the right to the claimed deduction.' " *INDOPCO, Inc. v.*

Commissioner, 503 U.S. 79, 84 (1992) (quoting *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593 (1943)); *Knight v. Commissioner*, 552 U.S. 181, 192 (2008); *see also Green v. United States*, 880 F.3d 519, 529 (10th Cir. 2018).

Section 280E was enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982. Pub. L. No. 97-248, § 351, 96 Stat. 324, 640. The Senate Report that accompanied the bill prior to its passage notes that the Tax Code already provided that certain illegal business expenses are not deductible, and concluded that expenses incurred in illegal drug trafficking should also "be disallowed on public policy grounds." S. Rep. No. 97-494, at 309 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 1050. In recent years, as more states have legalized the production and sale of medical marijuana, numerous courts have addressed the propriety of applying Section 280E to deny the business-expense deductions of state-licensed marijuana dispensaries.

Every court to address the issue, including this Court, has rejected taxpayer challenges to Section 280E in this context. *See Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187 (10th Cir. 2018) (upholding the IRS's application of Section 280E to a marijuana

dispensary and rejecting various challenges to the statute, including a contention that the IRS lacks authority to enforce it and a claim that the statute violates the Eighth and Sixteenth Amendments); *Green Solution Retail*, 855 F.3d at 1121 (rejecting, among other arguments, a marijuana dispensary's contention that Section 280E could be enforced only against taxpayers convicted of illegal drug trafficking); *Olive v. Commissioner*, 792 F.3d 1146 (9th Cir. 2015) (upholding the IRS's application of Section 280E to a marijuana dispensary; rejecting the dispensary's legislative history argument, as well as various others).[8]

---

[8] *See also Futurevision, LTD v. United States*, No. 17-MC-00041-RBJ, 2017 WL 2799931 (D. Colo. May 25, 2017) (rejecting various challenges to Section 280E in the context of motion to quash a third-party summons); *High Desert Relief, Inc. v. United States through Internal Revenue Serv.*, No. 16-CV-469 MCA/SCY, 2017 WL 1740467 (D.N.M. Mar. 31, 2017) (same); *Alterman v. Commissioner*, T.C. Memo. 2018-83 at [*26]-[*27] (upholding the IRS's denial, under Section 280E, of expenses related not only to a marijuana dispensary's sale of marijuana but also to its sale of "pipes and other paraphernalia"); *Canna Care, Inc. v. Commissioner*, T.C. Memo. 2015-206 (T.C. 2015), *aff'd sub nom.*, 694 F. App'x 570 (9th Cir. 2017) (upholding the IRS's application of Section 280E to a state-licensed marijuana dispensary); *Beck v. Commissioner*, T.C. Memo. 2015-149 at [*14]-[*16] (same); *Californians Helping to Alleviate Med. Problems, Inc. v. Commissioner*, 128 T.C. 173, 182-83 (2007) (upholding the IRS's application of Section 280E to deny deductions for expenses incurred in carrying on a taxpayer's medical marijuana business but concluding

2. Taxpayers' burden-of-proof argument fails

In this appeal, taxpayers argue (Br. 14) that the IRS's Section 280E-based denial of THC's business-expense deductions was "arbitrary" because there was "no evidence" to support the conclusion that THC trafficked in a controlled substance.[9]

This Court's decision in *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187 (10th Cir. 2018), completely forecloses that argument. In *Alpenglow*, as here, taxpayers contended that "the IRS's denial of its deductions was arbitrary because the IRS had no proof [they] trafficked in a controlled substance." 894 F.3d at 1197-98. But this Court explained that taxpayers have the burden of establishing that the IRS's determination in a deficiency notice is erroneous, and that "[u]nder this rule, the burden falls on Alpenglow to show error, not on the IRS to prove trafficking." *Id.* at 1198 (citations omitted). This Court's conclusion in *Alpenglow* was fully consistent with its mandamus

---

that expenses incurred in the carrying on of taxpayer's separate counseling and caregiving business were deductible).

[9] Taxpayers raised a variety of challenges to Section 280E below—*e.g.*, that the statute violates the Eighth Amendment, violates the Due Process Clause, and is unconstitutionally vague (App. 5, 1948)—that they do not maintain in this appeal.

opinion in this case, which clearly expressed the expectation that taxpayers here would have to show that THC had not trafficked in a controlled substance in order to show entitlement to the disputed deductions. *Feinberg*, 808 F.3d at 815 (explaining that "it's the petitioners who carry the burden of showing the IRS erred in denying their deductions"). The *Alpenglow* holding is also fully consistent with the well-established principle that the IRS's notice of deficiency is presumed to be correct, and taxpayers have the burden of showing otherwise. *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *Esgar*, 744 F.3d at 653; *Jones v. Commissioner*, 903 F.2d 1301, 1303 (10th Cir. 1990).

Taxpayers nonetheless claim that the "unusual assertion" that they must show that THC's business did not consist in unlawful trafficking "is not supported by law." (Br. 14.) Actually, it is. *Alpenglow* directly holds that taxpayers must show that they have *not* trafficked in a controlled substance in order to prove that the IRS erroneously disallowed deductions under I.R.C. § 280E. Taxpayers have failed to make that showing; indeed, they do not even contend (and could not plausibly contend) that they have made that showing.

Because the burden is on taxpayers, the Tax Court's statement that "there is not enough evidence in the record to make a finding of fact that THC sold medical marijuana" (App. 3597) is irrelevant.[10] The relevant question is whether taxpayers have proffered enough evidence to show that their business did *not* consist of trafficking in a controlled substance. Doing this would have been a simple matter of submitting documentation showing that, all appearances to the contrary and despite openly selling marijuana in 2012 (App. 3373), THC actually sold

---

[10] Taxpayers take this statement out of context (Br. 13). As explained pp. 18-19, *supra*, the Tax Court made this statement in the context of rejecting taxpayers' reliance on *Cohan* to increase their cost of goods sold. We submit that what the Tax Court meant was that, unlike in *Cohan*, where the taxpayer proved that he had a theater business and that he spent substantial amounts on it, *see* 39 F.2d at 543-44, taxpayers here did not even prove what goods they sold, much less the cost of any such goods. We submit that the court's statement should be read as criticizing *taxpayers'* lack of proof.

Indeed, read in isolation, the court's statement would be plainly wrong. As discussed on pp. 16-18, *supra*, the record is replete with evidence, submitted by the Commissioner, that THC sold marijuana. In fact, taxpayers have all but conceded that this is so by seeking an increase in *cost of goods sold*. If they did not have any sales of the one thing they were licensed to sell—marijuana—then they would have no entitlement to a cost-of-goods-sold adjustment. Moreover, their *own* proffered evidence in support of their increased cost of goods sold was expert testimony regarding the costs of selling medical marijuana. (App. 2787-91, 3296-3370.) If THC did not actually sell marijuana, taxpayers' own evidence would have had no conceivable relevance.

(for instance) stationary, handbags, or shower curtain rings from 2009 to 2011.

Even setting *Alpenglow* aside, the authorities taxpayers cite do not support their argument. Taxpayers rely on *Senter v. Commissioner*, 70 T.C.M. (CCH) 54, 1995 WL 412147 (1995) (Br. 14), to argue that the IRS's deficiency notice is a "naked assessment" and therefore the presumption of correctness that normally attaches to a notice of deficiency is inapplicable here. In *Senter*, the Tax Court recognized that "the burden of proof is ordinarily on the taxpayer to show that the Commissioner's determination is in error" and that "[t]he Commissioner's determination is generally presumed correct." *Id.* at *2-*3. The Tax Court stated, however, that some courts had recognized an exception to these principles "for situations where the Commissioner determines that the taxpayer received income that was not reported on the taxpayer's return." *Id.* at *3. It explained that "[t]he rationale for this exception is based on the recognized difficulty that the taxpayer bears in proving the nonreceipt of income." *Id.*

Senter does not help taxpayers. First, *Senter*, and the cases it relied on, recognized a narrow exception solely for deficiencies based on

unreported income. Here, the deficiencies were not based on unreported income, so the narrow exception does not apply. Second, this Court does not recognize even the narrow exception *Senter* discussed. *See Erickson v. Commissioner*, 937 F.2d 1548, 1554-55 (10th Cir. 1991) ("This court has stated that in unreported income cases, the taxpayer bears the burden of proving that the Commissioner's determination is arbitrary or erroneous.") Third, even if the IRS was required to show that its assessment was supported by some evidence, it easily satisfied that burden. The IRS agent who conducted the audit actually observed THC selling marijuana in 2012 (App. 3373); she testified that she was told that THC "did the same thing in 2009 and 2010 and 2011" (App. 3386), and THC was licensed to sell marijuana during the 2009, 2010, and 2011 tax years (App. 3587). *See also* pp. 17-18, *supra* (describing additional evidence of THC's marijuana trafficking).

Taxpayers also cite *Clark v. Commissioner*, 266 F.2d 698, 717 (9th Cir. 1959) (Br. 14), in support of their burden-of-proof argument. But *Clark* in no way supports the notion that the Commissioner bears the burden of justifying the IRS's notice of deficiency. Instead, the cited

portion of *Clark* suggests that, where the Tax Court makes its own determinations that diverge from the notice of deficiency, there "is no presumption" of correctness for the Commissioner to rely on, and the Tax Court's determinations must be supported by record evidence. *Id.* at 717. That is not the situation here.

Finally, taxpayers cite *Californians Helping to Alleviate Medical Problems, Inc. (CHAMP) v. Commissioner*, 128 T.C. 173 (2007) (Br. 13-14), seemingly in support of an argument that the Tax Court's statement that it could not "make a finding of fact that THC sold medical marijuana" is "dispositive of the case." But that case stands for the proposition that supplying medical marijuana to customers is trafficking within the meaning of Section 280E. *Id.* at 182. *CHAMP* did not address the burden of proof, presumably because the taxpayer in that case conceded that it supplied medical marijuana to its members. *Id.* at 180.

In sum, taxpayers rely on three cases that are completely inapplicable. And they fail to acknowledge a recent decision of this Court, *Alpenglow*, that is binding and directly on point.

C. Section 280E does *not* violate taxpayers' Fifth Amendment rights

Taxpayers argue (Br. 15-17) that the Tax Court's ruling that the IRS can compel production of evidence of drug trafficking violated their Fifth Amendment right not to incriminate themselves.[11]

But the question whether taxpayers have a Fifth Amendment right to decline to comply with discovery requests that would compel production of incriminating information did not come to fruition in this case. In its opinion denying mandamus in this case, this Court indicated that a taxpayer may invoke the Fifth Amendment right to avoid self-incrimination during an audit. *See Feinberg v. Commissioner*, 808 F.3d 813, 816 (10th Cir. 2015). This Court anticipated that that issue would be presented on appeal from a final Tax Court judgment if (1) taxpayers refused to comply with the Tax

---

[11] Taxpayers spend much of this section of their brief (Br. 15-16) discussing old cases that they claim suggest that an agency determination of criminality may be binding in a subsequent criminal prosecution. This is plainly wrong. All elements of a criminal violation must be proven beyond a reasonable doubt, and a finding by preponderance of the evidence that a taxpayer trafficked in controlled substances cannot alone meet that burden. *See Apprendi v. New Jersey*, 530 U.S. 466, 499-500 (2000) ("[T]he Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime.") (citation omitted).

Court's order compelling production of discovery and were sanctioned, or (2) taxpayers complied with the discovery order under protest—by turning over incriminating documents and information—and the Tax Court relied on that information in resolving the case. *Id.* at 817-18. But neither of those things happened. Taxpayers never produced discovery, the Commissioner never sought sanctions, the Tax Court never imposed sanctions, and the Tax Court decided the case without relying on any information over which taxpayers asserted a Fifth Amendment privilege.

Ultimately, this case proceeded in a way that did not implicate taxpayers' Fifth Amendment right to avoid self-incrimination at all. THC had no legal obligation to attempt to claim its business expenses as deductions. But when it opted to do so, it was required to be ready, willing, and able to show that it was legally entitled to the claimed deductions. *Green*, 880 F.3d at 529. Doing that here would have meant showing that its business did not consist in trafficking marijuana but instead consisted of doing something else. Such a showing would *not* normally be incriminating—quite the opposite—and meeting that burden thus does not implicate the Fifth Amendment.

Nonetheless, as this Court recognized, THC was free to decide not "to produce the materials that might support their deductions." *Feinberg*, 808 F.3d at 815. But if taxpayers refused for any reason to produce certain evidence to support their claimed deductions, that refusal would make it harder for them to carry their burden of showing entitlement to the deductions. And, if taxpayers refused to produce any evidence at all to support their entitlement to the claimed deductions, meeting the burden would be impossible.

As this Court recognized, Fifth Amendment concerns were implicated here because the case took "an especially curious turn." 808 F.3d at 815. The Tax Court ended up (admittedly at the Commissioner's request) compelling production of potentially incriminating discovery, despite the fact that the IRS actually did not need such discovery to prevail in the Tax Court. And this unusual circumstance threatened to make the case more like *Leary v. United States*, 395 U.S. 6 (1969), *Grosso v. United States*, 390 U.S. 62 (1968), and *Marchetti v. United States*, 390 U.S. 39 (1968) (see Br. 16-17)—all cases in which compliance with a law or regulation dealing with the taxation of illegal conduct would potentially have required self-

incrimination. But, again, this threat was not realized because the Tax Court ultimately did not force taxpayers to choose between producing incriminating discovery and sanctions (or any other adverse consequence).

Moreover, to the extent that taxpayers are arguing that their reluctance to produce incriminating evidence somehow relieves them of a burden of proof they would otherwise bear, that argument is foreclosed. The Supreme Court has explained that assertion of the Fifth Amendment privilege against compulsory self-incrimination "has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production." *United States v. Rylander*, 460 U.S. 752, 758 (1983). And the Court rejected the notion that the privilege against compulsory self-incrimination can be fashioned "into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his." *Id.*

Finally, taxpayers had no Fifth Amendment right to avoid incrimination concerning documents or statements material to this case because, at the time of trial, any Fifth Amendment right that taxpayers

had had expired. The Supreme Court has made plain that the Fifth Amendment privilege against self-incrimination no longer applies once the statute of limitations on the relevant crime runs. *Brown v. Walker*, 161 U.S. 591, 597-98 (1896); *see also Stogner v. California*, 539 U.S. 607, 620 (2003) (describing the Court's opinion in *Brown v. Walker* as having "clearly stated that the Fifth Amendment's privilege against self-incrimination does not apply after the relevant limitations period has expired"). The limitations period for the federal criminal offense of distributing a controlled substance (21 U.S.C. § 841(a)) is five years. 18 U.S.C. § 3282(a).

The tax years at issue in this case are 2009 through 2011. As such, the evidence relevant to this case concerns THC's business activities through December 31, 2011. The Tax Court held the trial in this case in January 2017, which was outside the five-year limitations period for prosecuting drug-trafficking offenses committed in 2009-2011. It follows that, by the time the trial in this case occurred, taxpayers could not validly assert a Fifth Amendment privilege against self-incrimination.

CONCLUSION

This Court should affirm the Tax Court's decision.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for the Commissioner respectfully inform the Court that, although we believe the issues in this appeal are straightforward, oral argument may be helpful to the Court and we do not object to appellants' request to hold argument.

Respectfully submitted,

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

/s/ Nathaniel S. Pollock

GILBERT S. ROTHENBERG (202) 514-3361
FRANCESCA UGOLINI (202) 514-1882
NATHANIEL S. POLLOCK (202) 514-8139
Appellate.TaxCivil@usdoj.gov
Nathaniel.S.Pollock@usdoj.gov
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

OCTOBER 2018

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

[X] this document contains 8,011 words, **or**

[ ] this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14, **or**

[ ] this document has been prepared in a monospaced typeface using _____ with _____.

Date: October 4, 2018

s/ Nathaniel S. Pollock
NATHANIEL S. POLLOCK
Attorney for Appellee
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044
Nathaniel.S.Pollock@usdoj.gov
(202) 514-8139

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I hereby certify that on October 4, 2018, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

James D. Thorburn
jthorburn@thorburnwalker.com

Richard A. Walker
rwalker@thorburnwalker.com

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection 2016 (updated daily), and according to the program are free of viruses.

Date: October 4, 2018

s/ Nathaniel S. Pollock
NATHANIEL S. POLLOCK
Attorney for Appellee
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044
Nathaniel.S.Pollock@usdoj.gov
(202) 514-8139