

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41320
Summary Calendar

MICHAEL J. CONNOLLY,

Petitioner,

VERSUS

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appeal from the United States Tax Court
(25457-92)

(June 9, 1995)

Before SMITH, WIENER, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Taxpayer Michael Connolly ("Connolly") appeals a decision of the Tax Court determining deficiencies in the amounts of \$4,156 and \$2,254 for the years 1987 and 1988, respectively, and an addition to tax for 1987 under I.R.C. § 6651(a)(1) of \$875. The Tax Court found that Connolly had not engaged in his tournament fishing activities with a profit objective and that his deduction of

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

fishing expenses therefore had been inappropriate.

Connolly asserts that the Tax Court applied an improper legal standard in concluding that he did not fish for profit, by requiring that he already have achieved professional status before he could be held to be motivated by profit. The Tax Court considered all facts and circumstances with respect to the fishing activity as required by Treas. Reg. § 1.183-2(b), and we review its finding that Connolly's fishing was not motivated by profit under the deferential clear error standard. Tallal v. Commissioner, 778 F.2d 275, 276 (5th Cir. 1985).

The factors set forth in the regulations, derived principally from prior case law, are as follows: (1) the extent to which the taxpayer carries on the activity in a businesslike manner; (2) the taxpayer's expertise; (3) the time and effort expended by the taxpayer; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in similar activities; (6) the taxpayer's history of income or loss in the activity; (7) the amount of occasional profits; (8) the financial status of the taxpayer; and (9) the elements of personal pleasure or recreation in the activity. Treas. Reg. § 1.183-2(b). These factors are not exclusive, and no one factor or set of factors is necessarily dispositive in a case. Id. Nonetheless, "[a] record of substantial losses over many years and the unlikelihood of achieving a profitable operation are important factors bearing on the taxpayer's true intention." Golanty v. Commissioner, 72 T.C. 411, 426 (1979), aff'd, 647 F.2d 170 (9th Cir. 1981).

First examining the manner in which Connolly carried on his fishing activities, the court noted that he was advancing quickly to positions of greater responsibility and salary at the Pontiac dealership where he worked. The court found that Connolly, functioning at a managerial level in his full-time job, had skills and a familiarity with business practices that would not have allowed him to conduct his tournament fishing activity in a manner evidencing a profit objective.

The court determined that Connolly never assessed his chances of recouping the cumulative expenses from his years of unprofitable tournament fishing, as required by Besseney v. Commissioner, 45 T.C. 261, 274 (1965), aff'd, 379 F.2d 252 (2d Cir.), cert. denied, 389 U.S. 931 (1967). It also took note of the fact that Connolly's record-keeping methods, although he did retain some receipts for expenses incurred in his fishing activities, were not sophisticated or methodical enough for him easily to analyze his progress toward profitability in the venture. Finally, the court pointed out that Connolly had not consistently reported his winnings from tournaments as income, omitting one prize of \$880 in 1990 that would have significantly diminished his reported loss for that year. In light of all this evidence, the Tax Court found that the first factor, the manner in which the activity was carried on, cut against the taxpayer.

The Tax Court also found that the second factor, Connolly's fishing expertise, also weighed in the Commissioner's favor. It stressed that Connolly had become an adviser to less experienced

competitors, rather than spending his time consulting with more experienced competitors. This undermined his claim that he had a profit objective, as he was not learning how to make his fishing profitable from those who knew more than he did.

Next, the court analyzed the time and effort expended by Connolly in fishing. Noting that the tournaments entered by Connolly were scheduled on weekends, to accommodate participants with other full-time jobs, the court questioned whether the time he devoted to fishing was geared toward achieving a profit or toward improving his competitive skills and reducing his costs through the sponsorship mechanism.

The remaining factors also militate strongly against Connolly. He admitted that the assets used in his tournament fishing would not appreciate in value, and his history of reported losses flowing from fishing activity was impressive, especially when contrasted against the amounts of his occasional profits. Furthermore, Connolly earned a good income working at the Pontiac dealership. Taken as a whole, the record in this case amply supports the Tax Court's factual finding that Connolly's tournament fishing activity was not undertaken with the objective of making a profit.

AFFIRMED.