PRESTON OLSEN & ELIZABETH OLSEN, ET AL.,
Petitioners,

ELECTRONICALLY FILED

v.

Docket No. 26469-14, 21247-16

COMMISSIONER OF INTERNAL REVENUE,
Respondent

RESPONDENT'S PRETRIAL MEMORANDUM

Special Trial Session: Provo, Utah
Date: January 21, 2020

PRETRIAL MEMORANDUM FOR RESPONDENT

NAME OF CASE:	**DOCKET NO.**
Preston Olsen and Elizabeth Olsen	26469-14 21247-16
	Filed Electronically

ATTORNEYS:

Petitioners:	Respondent:
Paul W. Jones	Skyler K. Bradbury
801-930-5101	801-799-6636

AMOUNTS IN DISPUTE:

		Additions to Tax/Penalties I.R.C. §§
Year	**Deficiency**	**6662(a)***
2010	$30,760.00**	$6,152.00
2011	$22,089.00	$4,417.80
2012	$26,097.00	$5,219.40
2013	$26,718.00	$5,343.60
2014	$20,668.00	$4,133.60

*Pursuant to the Court's holding in Clay v. Commissioner, 152 T.C. No. 13 (April 24, 2019), respondent concedes the accuracy-related penalties under section 6662(a).

**In his answer, Respondent conceded adjustments to tax year 2010 related the "recapture" depreciation expenses ($30,600.00) and general business credit ($7,506.00) that petitioners claimed on their individual income tax return for tax year 2009.

STATUS OF CASE:

Probable Settlement___ Probable Trial__ Definite Trial_X_

CURRENT ESTIMATE OF TRIAL TIME: __4__ days

MOTIONS RESPONDENT EXPECTS TO MAKE:

Respondent may make a Motion in Limine as to potential witnesses identified by the petitioners, who have indicated that they intend to call the three income tax return preparers who prepared the petitioners' various income tax returns, as witnesses. The three return preparers were each selected by the tax shelter promoters and referred to the petitioners as well as all other shelter participants. Since respondent has conceded the section 6662 penalties in this case, the only remaining issues are questions of law as to whether the claimed deductions and credits are allowable; the testimony of the return preparers is irrelevant.

Respondent may make a Motion in Limine as to four engineers, Kerm S. Jackson, Jeffrey L. Jorgensen, Johnny Kraczek, and Paul Freeman who petitioners have indicated they will call as fact witnesses. Petitioners submitted an expert report allegedly authored by the four engineers, but only signed by two of them, and in the report indicated "Petitioners view this report as a factual document that will support their position that the equipment they purchased meets the Treas. Reg. § 1.48-9(d)(1) definition of the term "solar energy property" which includes equipment materials and parts solely related to the functioning of such equipment that use solar energy directly to generate electricity." The engineers allegedly conducted a test on September 5, 2018 to show that the lenses could be used as a component in a system to produce electricity. The respondent has never disputed that the lenses *could* be a component in a system to produce electricity, but rather that the lenses in this case were never a part of any system. Further, any "test" conducted in 2018 has no relevancy on what occurred in 2009 through 2014 with the lenses allegedly purchased by the petitioners.

STATUS OF STIPULATION OF FACTS: Completed ___ In Process _X_

ISSUES:

1. Are petitioners entitled to deduct the depreciation expenses they claimed on the Schedules C they attached to their individual income tax returns for the tax years at issue?

2. Are petitioners entitled to deduct the legal and professional services expenses they claimed on the Schedules C they attached to their individual income tax returns for tax years 2010 and 2011?

3. Are petitioners entitled to claim the general business credit (and related carryforward of that credit) based on the purchase price of the solar lenses they purchased in 2009, 2011, 2012, 2013, and 2014?

All other adjustments determined in the notices of deficiency at issue in this case are computational.

WITNESS(ES) RESPONDENT EXPECTS TO CALL:

Dr. Thomas R. Mancini will provide expert testimony regarding the scientific failings and commercial nonviability of the Concentrated Solar Production ("CSP") system imagined by Neldon Johnson and sold (in the form of solar lenses) to petitioners.

Respondent reserves the right to call petitioners or other witness listed in petitioners' pretrial memorandum as witnesses in the event they do not testify.

SUMMARY OF FACTS:

Petitioner Preston Olsen, a public finance attorney and graduate of the University of Chicago Law School, and Elizabeth Olsen, a homemaker, resided in South Jordan, Utah at the time they filed their petitions in these cases. During the tax years at issue, Mr. Olsen worked at the law firm Ballard Spahr, which had 14 offices throughout the country. In July 2015, Mr. Olsen became a partner at Ballard Spahr.

Beginning in tax year 2009, petitioners invested in a tax shelter being promoted out of Delta, Utah. As part of the

abusive scheme, petitioners would purchase solar lenses (called alternative energy systems in "equipment purchase agreements"), which are plastic Fresnel lenses, from International Automated Systems, Inc. (IAS) or RaPower3, LLC, (Rapower3), two of the many companies owned and controlled by the individuals behind the tax avoidance scheme.[1] IAS and RaPower3 claimed to be constructing a CSP plant in Delta, Utah.

On October 14, 2018, the United States District Court for the District of Utah entered Findings of Fact and Conclusions of Law in the civil case filed by the United States against the promoters of the abusive solar energy tax avoidance scheme. United States v. RaPower3, LLC, International Automated Systems, Inc., LTB1, LLC, R. Gregory Shepard, and Neldon Johnson, Case No. 2:15-cv-00828. After 25 days of trial, the district court found that the defendants promoted an abusive tax scheme centered on purported solar energy technology to customers across the United States. The district court further held that the defendants caused serious harm to the United State Treasury and the system of honest and voluntary tax compliance. The district court found that the promoters created multiple entities to perpetrate a fraud "to enable funding of the unsubstantiated, irrational dream of Neldon Johnson." The district court permanently enjoined the defendants from promoting the solar energy tax shelter and ordered the defendants to disgorge over $50 million in gains from the fraudulent solar energy tax scheme. The district court appointed a Receiver to take control over the defendant entities and the assets of all the defendants.

Though he had no background or expertise in the area, IAS's founder and president, Neldon Johnson, provided the "scientific" aspects of the solar energy tax avoidance scheme. According to Mr. Johnson and the marketing materials from IAS and RaPower3, the solar lenses would allegedly be placed in arrays on towers that would track the sun and focus sunlight into a receiver. The focused sunlight would heat a transfer fluid, alleged to be either water or molten salt or oil at various times during the years, that would be pumped to a heat exchanger, which would use the heat to boil water and create steam. The steam would turn a turbine to create electricity to be sent via transmission lines

[1] IAS, RaPower3 and all other entities involved in the scheme were wholly owned and controlled by Neldon Johnson and his entities and family members.

connected to the power grid. Mr. Johnson, however, failed to bring his CSP vision to fruition. Most importantly for this case, the solar lenses petitioners purchased were never used to produce electricity or generate heat for any meaningful purpose.

IAS hired Greg Shepard as one of its initial salespeople to market the solar lenses. Shepard developed a multi-level marketing (or network marketing) approach to selling the solar lenses. In late 2009, Mr. Johnson formed RaPower3, which became the seller of the solar lenses.[2] Mr. Shepard gave himself the title "Chief Director of Operations" for RaPower3 and became the distributor at the top of the selling pyramid. Petitioner Preston Olsen learned of the solar lens tax avoidance scheme from his childhood friend, Matt Shepard, the son of Greg Shepard.

Petitioners in this case, as did the vast majority of individuals who bought these lenses, paid only a portion of the "purchase price" of the solar lenses they purchased, but they reduced or eliminated their federal income tax liability[3] by claiming a combination of depreciation expenses and tax credits based on the full "purchase price" as detailed in Table 1 below.

[2] RaPower3 identified itself as a multi-level marketer of the solar lens, encouraging the individuals who purchased lenses to create a "downstream" line to generate income.

[3] Petitioners reported $0.00 in total tax due for tax years 2010, 2011, 2012, and 2013 and received a refund of all the federal income tax that Mr. Olsen's employer withheld. They reported $1,538.00 in total tax due for tax year 2014, but they still received a refund of $27,973.00.

Table 1

Tax year	# of lenses purchased	Total [4] "Purchase price" for all lenses	Total amount paid [5]	Depreciation claimed	Credit claimed
2009	2	$60,000	$18,000	$30,600	$4,629
2010	0[6]			$8,160	$10,306
2011	14	$49,000	$8,470	$46,546	$7,531
2012	13	$45,500	$13,650	$23,342	$19,136
2013	15	$52,500	$15,750	$33,715	$16,540
2014	10	$35,000	$10,500	$29,975	$11,851
Totals	54	$242,000	$66,370	$172,338	$69,993

Pursuant to the equipment purchase agreements petitioners signed, they owed IAS and RaPower3 a total of $175,630 at the time the district court appointed a Receiver to take control of the promoter entities; petitioners never made any payments on this liability nor did they expect to ever to pay this amount.

Petitioners never physically received or controlled the solar lenses they purportedly purchased. On the same date they

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[4] In tax year 2009, the purchase price per solar lens was $30,000. For the other tax years at issue, the purchase price per solar lens was $3,500.

[5] For the solar lenses purchased in tax year 2009, petitioners paid this full $18,000 on the date they signed the agreement to purchase the solar lenses. For all the other years at issue, petitioners would pay a portion of this total on or about the date they entered into the purchase agreement, typically ten percent, and they paid the remainder of this amount during the following tax year after receiving their tax refund.

[6] Petitioners did not purchase any solar lenses in tax year 2010. But they claimed depreciation expenses and credits based on the solar lenses they purchased in tax year 2009; they carried back to tax year 2008 other tax benefits based on the solar lenses they purchased in 2009.

signed equipment purchase agreements in the tax years at issue, petitioners also signed "Operation and Maintenance" agreements that required them to "lease" their lenses to another entity controlled by the solar tax shelter promoters in exchange for rent payments. Petitioners, however, never received "rent" or any other payment from IAS, RaPower3, or any other related entity or individual for the use of the solar lenses they purchased. No entity or individual ever placed into service the solar lenses petitioners purportedly purchased into any system that provided commercial electricity or commercial heat.

Neither petitioners nor the promoters of the solar energy tax shelter ever entered into any Power Purchase Agreement, End User Agreement, or Connection Agreement with any electric utility, other entity, or individual for the transmission or sale of any power. At no time did any of the entities commercially produce power or heat with the petitioners' or any other tax avoidance scheme participants' solar lenses.

On July 30, 2014, respondent issued a notice of deficiency to petitioners for tax years 2010, 2011, and 2012. Petitioners timely petitioned this Court from July 30, 2014 notice of deficiency. On July 1, 2016, respondent issued to petitioners a notice of deficiency for tax years 2013 and 2014. Petitioners timely petitioned this Court from the July 1, 2016 notice of deficiency. The Court granted the parties' motion to consolidate the two cases.

BRIEF SYNOPSIS OF LEGAL AUTHORITIES:

A. Deductions, generally

Deductions are a matter of legislative grace, and petitioners must prove entitlement to any deductions claimed. INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992). Petitioners bear the burden of proving that they are entitled to any deduction or credit claimed. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934); T.C. Rule 142(a). This includes the burden of substantiation. Hradesky v. Commissioner, 65 T.C. 87, 90 (1975), aff'd per curiam, 540 F.2d 821 (5th Cir. 1976).

B. Petitioners were not engaged in a for profit trade or business

A taxpayer must be engaged in an activity for profit to claim as a deduction the expenses incurred in the that activity. I.R.C. § 183(a). Even if the taxpayer may claim a deduction, the amount is limited to the gross income earned from the for profit activity. I.R.C. § 183(b). The regulations provide a non-exhaustive list of nine factors used to determine if a taxpayer had a profit motive:

> (1) The manner in which the taxpayer carries on the activity;
> (2) The expertise of the taxpayer or his advisors;
> (3) The time and effort expended by the taxpayer in carrying on the activity;
> (4) The expectation that assets used in the activity may appreciate in value;
> (5) The success of the taxpayer in carrying on other similar or dissimilar activities;
> (6) The taxpayer's history of income and losses with respect to the activity;
> (7) The amount of occasional profits, if any;
> (8) The financial status of the taxpayer; and
> (9) Any element indicating personal pleasure or recreation.

Treas. Reg. § 1.183-2(b).

Section 162 allows for the deduction of business expenses. Petitioners, however, must prove that an expense was: (1) actually paid during the tax year; (2) for carrying on petitioner's trade or business; (3) necessary to the ongoing conduct of the business; and (4) ordinary. See Commissioner v. Lincoln Savings and Loan Association, 403 U.S. 345, 352 (1971).

An expense is necessary if it is appropriate and helpful to the taxpayer's business. Commissioner v. Tellier, 383 U.S. 687, 689 (1966); Welch v. Helvering, 290 U.S. 111, 113 (1933). An expense is ordinary if it is one that is common and accepted in the particular business activity. Id. at 114.

Petitioners in this case were not engaged in a for profit trade or business for the tax years at issue. They never gained a profit or even generated a single dollar of income. Rather,

the sole benefit they received was the elimination[7] of their federal income tax liabilities even though they received wages in excess of $[redacted] for each of the tax years at issue.

As a busy attorney trying to make partner in his firm, petitioner Preston Olsen expended little time and effort in petitioners' "solar energy business." Petitioner Elizabeth Olsen was not involved at all. For the tax years at issue, petitioners claimed substantial losses from their "solar energy business" mostly in the form of depreciation.[8] Petitioners had no experience or expertise in the production of solar energy.

Further, petitioners paid only a small down payment of the full "purchase price" of each lens they purchased. And they paid an even smaller portion of that down payment during the tax year in which they allegedly purchased the solar lenses. They would pay the remainder of the down payment amount during the next tax year after receiving their income tax refund. But petitioners claimed depreciation using the full purchase price of the solar lenses.

Petitioners were not engaged in a for profit trade or business, but instead invested in an abusive tax scheme designed to generate tax losses. As an experienced lawyer, petitioner Preston Olsen should have noticed several red flags associated with this scheme, including: (1) continued failure of a purported "business" to earn income; (2) control of the purported business remaining with the promoter, rather than the customer; (3) illusory contract documents with little cash outlay by the customer and substantial debt that the customer is unlikely to pay; and (4) the promoter's heavy emphasis on greatly reducing or eliminating a customer's tax liability by buying in to the plan. See e.g., Nickeson v. Commissioner, 962 F.2d 973, 976-77 (10th Cir. 1992); Diamond v. Commissioner, 930 F.2d 372, 376 (4th Cir. 1991) (lack of control over activities indicates taxpayers were at best investors and not engaged in a

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[7] For tax year 2014, petitioners did not purchase enough solar lenses to eliminate their federal income tax liability, but they did reduce that liability to only $1,538.00.

[8] Petitioners claimed as a deduction expenses for legal and professional services in the amounts of $425 and $325 for tax years 2010 and 2011, respectively.

trade or business); United States v. Music Masters, Ltd., 621 F. Supp. 1046, 1049-50 (W.D. N.C. 1985).

Beginning with tax year 2013, petitioners changed, on their Federal income tax forms, their "solar energy business" to an "equipment rental services" company. Courts have rejected abusive tax schemes using this concept of "leasing". See Rose v. Commissioner, 88 T.C. 386, 413 (1987), aff'd, 868 F.2d 851 (6th Cir. 1989) (collecting cases); United States v. Philatelic Leasing, 794 F.2d 781, 782-85 (2d Cir. 1986); United States v. Petrelli, 704 F. Supp. 122, 124 (N.D. Ohio 1986) (concluding that defendants violated section 6700 when they "entered into lease agreements with investors who leased master photographs and plates from the defendants. Defendants advised the lessees of the master photographs and plates to claim investment tax credits and deductions for the leased art work and plates allegedly made therefrom, some of which never existed.").

Since petitioners were not engaged in a for profit trade or business or holding property for the production of income, they cannot claim a deduction for depreciation on that property. If depreciation is *not* allowed for a piece of tangible property, the taxpayer may *not* claim the solar energy tax credit under section 48. Accordingly, petitioners are not entitled to deduct any expenses of their solar lens business for either depreciation or legal and professional services, and petitioners are not entitled to claim any credits related to their purchase of solar lenses.

C. Petitioners are not entitled to claim as deductions any business expenses for depreciation of the solar lenses they purchased during the tax years at issue because the solar lenses were never placed in service.

Under the proper circumstances, the Code allows a taxpayer engaged in a trade or business certain tax deductions for expenses the taxpayer incurs while generating income. One "business" deduction is for depreciation, the "wear and tear" on property either used in the taxpayer's "trade or business" or held by the taxpayer "for the production of income." I.R.C. § 167(a).

Solar energy property may qualify for depreciation under the Accelerated Cost Recovery System ("ACRS") and is depreciable over a five-year life. I.R.C. § 168(e)(3)(B)(vi)(I). For

purposes of the rules provided by sections 167 and 168, an asset is "first placed in service" when it is first "placed in a condition or state of readiness and availability for a specifically assigned function" by the taxpayer. Treas. Reg. § 1.167(a)-11(e)(1)(i).

Petitioners have not demonstrated that the lenses they purchased existed beyond the illusory contracts they signed. Neither the petitioners nor the promoters of this solar energy tax shelter ever built a solar energy power plant. They never obtained proper licenses, permits, authorizations, or other necessary permissions to build such a plant. They never entered into any Power Purchase Agreements, End User Agreements, or Connection Agreements with any electric utility, other entity, or individual. Because no solar energy power plant ever existed, the solar lenses petitioners purchased were never installed or "placed in a condition or state of readiness and availability for a specifically assigned function." Even if their specific solar lenses existed, the only function they served was to collect dust in a warehouse in Delta, Utah.[9]

Because petitioners never "placed in service" the solar lenses they purchased, they cannot claim as a deduction any depreciation associated with those solar lenses. Even if the Court determines that petitioners "placed in service" their solar lenses, petitioners have not substantiated the actual cost of the solar lenses they purchased.

D. Petitioners are not entitled to claim a General Business Credit (or Energy Credit) for the solar lenses they purchased during the tax years at issue because the solar lenses were never placed in service.

The credits petitioners claimed in each of the tax years at issue implicate several statutes. Section 38(a) provides for investment and energy tax credits; section 46 describes how to calculate the amount of the investment tax credit; and section 48 defines property eligible for the credits. A taxpayer may be allowed an "energy credit" that reduces his income tax liability

[9] The promoters did not specifically identify the lenses purchased by the petitioners or any other tax avoidance scheme participants, and failed to have any means of accounting to show who owned which, if any, lenses.

in a given year for "each energy property placed in service during such taxable year." I.R.C. § 48(a)(1).

"Energy property" means equipment with respect to which depreciation is allowed, and "which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat . . ." I.R.C. § 48(a)(3)(A)(i) & (C). The taxpayer must either construct, reconstruct, or erect the "energy property" or acquire the "energy property" if the original use of such property commences with the taxpayer. I.R.C. § 48(a)(3)(B).

"Energy property" includes "solar energy property", which includes:

> equipment and materials (and parts related to the functioning of such equipment) that use solar energy directly to (i) generate electricity, (ii) heat or cool a building or structure, or (iii) provide hot water for use within a building or structure. Generally, those functions are accomplished through the use of equipment such as collectors (to absorb sunlight and create hot liquids or air), storage tanks (to store hot liquids), rockbeds (to store hot air), thermostats (to activate pumps or fans which circulate the hot liquids or air), and heat exchangers (to utilize hot liquids or air to create hot air or water).

Treas. Reg. § 1.48-9(d)(1). "Solar energy property includes equipment that uses solar energy to generate electricity, and includes storage devices, power conditioning equipment, transfer equipment, and parts related to the functioning of those items." Treas. Reg. § 1.48-9(d)(3).

Similar to the rules for depreciation, to be "placed in service" for purposes of any general business credit allowed by section 38, the property must be in a condition or state of readiness and available for a specifically designed function, whether in a trade or business, in the production of income, in a tax-exempt activity, or in a personal activity." Treas. Reg. § 1.46-3(d)(1)(ii).

Components, like the solar lenses purchased by petitioners, should not be considered placed in service separately from the

system of which they are an essential part.[10] For purposes of determining whether energy property is "placed in service", several courts have adopted the approach of examining property in a project as a whole when a number of interdependent components are designed to operate as a system.[11] These courts have weighed five factors[12] to determine whether and when energy property used to generate electricity may be considered "placed in service":

> (1) whether the necessary permits and licenses for operation have been obtained;

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[10] See Rev. Rul. 76-238, 1976-1 C.B. 55 (noting that individual units of production machinery and equipment acquired for use in a factory were not placed in service until they were installed in the production line and the entire production line had been completed); Rev. Rul. 73-518, 1973-2 C.B. 54 (ruling that a major electrical transmission line was not placed in service until the substations at the end of the line were completed and the line could be energized).

[11] See, e.g., Sealy Power, Ltd. v. Commissioner, 46 F.3d 382, 395-97 (5th Cir. 1995) (holding that the taxpayer's property was "placed in service" in the first year in which the entire facility was operational and generating electricity); Public Service Co. v. United States, 431 F.2d 980, 983-84 (10th Cir. 1970) (holding that components of an electric power plant could not be considered separately because no one of them would serve any useful purpose until fitted together to constitute a complete unit); Green Gas Delaware Statutory Trust v. Commissioner, 147 T.C. 1, 50-54 (2016); Consumers Power Co. v. Commissioner, 89 T.C. 710, 725-26 (1987) (finding that a component of a hydroelectric plant was not placed in service until the entire plant was operating to produce electrical power). But see Armstrong World Industries, Inc. v. Commissioner, 974 F.2d 422, 432-35 (3d Cir. 1992) (concluding that each completed train track segment had independent utility and was placed in service prior to the time the entire project was completed and ready for use).

[12] See Rev. Rul. 84-85, 1984-1 C.B. 10; Rev. Rul. 79-203, 1979-2 C.B. 94; Rev. Rul. 79-98, 1979-1 C.B. 103; rev. Rul. 79-40, 1979-1 C.B. 13; Rev. Rul. 76-428, 1976-2 C.V. 47; Rev. Rul. 76-256, 1976-2 C.B. 46.

(2) whether critical preoperational testing has been completed;
(3) whether the taxpayer has control of the facility;
(4) whether the unit has been synchronized[13] with the transmission or power grid; and
(5) whether daily or regular operation has begun.

Neither petitioners nor IAS, RaPower3, or any other related entity or individual has obtained the necessary permits and licenses for operation of a solar energy plant. Petitioners have provided no evidence of critical preoperational testing being completed by an independent entity, electric utility, or government agency. Petitioners have no control of any aspect of the purported solar energy plant. Petitioners' solar lenses have not been used in any system that has been synchronized with the transmission or power grid. Finally, no daily or regular operation of the purported solar energy plant ever began, and it never will begin since a federally appointed Receiver now has ownership of the assets of IAS, RaPower3, and the related promoter entities and individuals.

Since the solar lenses petitioners purchased were never and never will be placed in service, petitioners cannot claim any credit based on the purchase of the solar lenses.

E. If the Court finds petitioners' solar lenses were "placed in service", then petitioners' deductions should be limited to the extent of their purchase was at risk.

Section 465 limits deductions a taxpayer may claim to the amount "at risk". This applies to each activity engaged in by the taxpayer in carrying on a trade or business or for the production of income. I.R.C. § 465(c)(3). For purposes of the at risk rules, however, amounts borrowed from any person having an interest in the activity (other than an interest as a creditor) are not considered to be at risk. I.R.C. § 465(b)(3). Further, taxpayers shall not be considered at risk for liabilities for

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[13] "Synchronization of an electric generating facility refers to the stage at which alternating current systems, generating units, or a combination thereof are connected and operate at the same frequency so that the voltages between the systems remain constant." Sealy Power, Ltd. V. Commissioner, 46 F.3d 382, 396 (5th Cir. 1995) (citing Oglethorpe Power Corp. v. Commissioner, T.C. Memo. 1990-505).

which the lender does not have recourse against the borrower/taxpayer. I.R.C. § 465(b)(4).

Petitioners financed with the promoter entities a majority of the purchase price of the solar lenses they purchased in the tax years at issue. Pursuant to section 465(b)(3), the amount borrowed by petitioners is not considered at risk. The equipment purchase agreements petitioners signed provided for a minimal down payment, which petitioners paid in two payments—a small amount on the date they signed the equipment purchase agreements and the second at some point in the tax year following the tax year in which they signed the equipment purchase agreements. The equipment purchase agreements required the remainder of the purchase price to be paid via installments beginning five years after the date the lenses were installed in an operating system commercially producing electricity and generating income to the operating entity. Since petitioners' solar lenses were never installed, they never paid any other amount for the solar lenses. The seller of the solar lenses has no recourse against the petitioners for the unpaid purchase price. Accordingly, if the Court holds petitioners are entitled to any deduction, petitioners' deduction should be limited to the amount of the down payment they paid.

F. If the Court finds petitioners' solar lenses were "placed in service", then the losses claimed should be considered passive losses that can offset only passive income.

Section 469 disallows the loss of an individual taxpayer who does not materially participate in the conduct of their trade or business. I.R.C. § 469(c)(1). Beyond signing the illusory equipment purchase agreements and operation and maintenance agreements, writing checks for the down payment of the solar lenses, and sending emails requesting status updates, petitioners did little, if anything, to operate their solar energy business. Further, if petitioners argue that they were in the business of leasing solar lenses, such rental activities are considered *per se* passive regardless of the level of participation. I.R.C. § 469(b)(2).

EVIDENTIARY PROBLEMS:

Respondent does not anticipate any evidentiary problems. Nevertheless, respondent reserves the right to object to petitioners introducing at trial evidence that respondent has

had no previous opportunity to examine or that does not meet the normal evidentiary requirements of foundation, relevancy, authenticity, non-hearsay, etc.

Date: January 6, 2020

/s/ Skyler K. Bradbury

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