



# United States Tax Court

Washington, DC 20217

Michael R. Lowe,	)	
	)	
Petitioner	)	
	)	
v.	)	Docket No. 10954-20.
	)	
Commissioner of Internal Revenue,	)	
	)	
Respondent	)	

## **ORDER**

A trial in this case occurred on November 2, 2021, before Judge Elizabeth A. Copeland during the Court's remote trial session in which Houston, Texas was the designated place of trial. Thereafter, on November 5, 2021, she rendered her oral findings of fact and opinion.

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit with this Order to petitioner and to respondent a copy of the pages of the transcript of the November 5, 2021, rendition of Judge Elizabeth A. Copeland's oral findings of fact and opinion, which opinion was rendered during the Court's remote trial session in which Houston, Texas was the designated place of trial.

In accordance with the Oral Findings of Fact and Opinion, the Court will issue an Order and Decision for respondent as to the deficiency and for petitioner as to the penalty.

**(Signed) Elizabeth A. Copeland**  
**Judge**

**Served 12/30/21**

1 Bench Opinion by Judge Elizabeth A. Copeland  
2 November 5, 2021  
3 Michael R. Lowe v. Commissioner  
4 Docket No. 10954-20

5 THE COURT: This case tried on November 2, 2021.  
6 Petitioner, Michael R. Lowe, appeared on that date pro se.  
7 Daniel C. Brauweiler appeared on behalf of Respondent.

8 The Court has decided to render the following as  
9 its oral findings of fact and opinion in this case. This  
10 bench opinion is made pursuant to the authority granted by  
11 section 7459(b) of the Internal Revenue Code and Tax Court  
12 Rule 152; and it shall not be relied upon as precedent in  
13 any other case. Section references in this opinion are  
14 to the Internal Revenue Code, in effect for the taxable  
15 year at issue; and Rule References are to the Tax Court  
16 Rules of Practice and Procedure.

17 Petitioner, Michael R. Lowe, seeks review of a  
18 determination by the Internal Revenue Service (IRS)  
19 related to his 2017 tax year. In a notice of deficiency  
20 dated March 4, 2020, the IRS determined an income tax  
21 deficiency of \$44,129 and a section 6662(a) accuracy  
22 related penalty of \$7,880. Respondent conceded the  
23 accuracy related penalty at trial. The sole issue for  
24 decision is whether the petitioner is liable for a \$44,129,  
25 Federal income tax deficiency.



1           On the evidence before us, and using the burden-  
2   of-proof principles explained below, the Court finds the  
3   following facts:

4                               FINDINGS OF FACT

5           Mr. Lowe resided in Texas when he timely filed  
6   his petition. Mr. Lowe is married and has one child.  
7   Since 2010 he has worked for AltairStrickland, LLC. In  
8   2017, that company paid him \$193,068.81 for services in  
9   his position as a "Site Quality Manager." He received  
10   health care benefits from AltairStrickland, LLC and began  
11   participating in the company's 401(k) plan at some  
12   unspecified point in time. Mr. Lowe used the payments he  
13   received in tax year 2017 to pay for his family's living  
14   expenses such as his mortgage, utilities, groceries, and  
15   automobile expenses.

16           On February 3, 2017, he signed a Form W-4,  
17   Employee's Withholding Allowance Certificate, claiming 99  
18   exemptions and provided that form to AltairStrickland, LLC  
19   to adjust his Federal tax withholding. In due course, Mr.  
20   Lowe received a 2017 Form W-2, Wage and Tax Statement,  
21   from Altairstrickland, LLC, which reflected the 2017  
22   "Wages, tips or other comp" payments he received of  
23   \$193,068.81 and the tax related withholding from his  
24   paychecks. Disagreeing with the characterization of the  
25   payments as "wages" he contacted the "HR Department" of



1 the company to have his Form W-2 corrected, but they  
2 refused.

3 Mr. Lowe filed his 2017 return using a Form  
4 1040EZ, Income Tax Return for Single and Joint Filers With  
5 No Dependents, filing it with the IRS on or around April 7,  
6 2018. On his Form 1040EZ, Mr. Lowe listed \$0 for his  
7 wages and attached a Form 4852, Substitute for Form W-2,  
8 Wage and Tax Statement, or Form 1099-R, Distributions From  
9 Pensions, Annuities, Retirement or Profit-Sharing Plans,  
10 IRAs, Insurance Contracts, etc. On line 4 of that Form  
11 4852, Mr. Lowe checked the box for "I have been unable to  
12 obtain (or have received an incorrect) Form W-2." On Line  
13 7 he listed \$0 as wages and put \$4,731 for Federal income  
14 tax withheld, \$7,886 for Social security tax withheld, and  
15 \$2,800 for Medicare tax withheld. On line 9 Mr. Lowe  
16 wrote "[t]here was no activity qualified as 'trade or  
17 business,' and no payments qualified as 'wages' per the  
18 terms defined in 26 USC 7701(a)(26), 3401(a) & 3121(a).  
19 Note: total amounts of 'Social Security Tax' & 'Medicare  
20 Tax' withheld are correct per Payer data." Mr. Lowe  
21 attached a statement to his Form 4852, which also  
22 reiterated the above, not arguing that he did not receive  
23 payment from his employer, but that the payments should  
24 not be characterized as "wages."

25 On March 4, 2020, the IRS issued a notice of



1 deficiency determining that Mr. Lowe failed to include his  
2 wages of \$193,068 on his 2017 Federal income tax return  
3 despite having received a Form W-2. Therefore, the IRS  
4 determined an income tax deficiency of \$44,129 and a  
5 section 6662(a) accuracy related penalty of \$7,880.

6 OPINION

7 I. Burden of Proof

8 Generally, a taxpayer bears the burden of  
9 proving, by a preponderance of the evidence, that the  
10 Commissioner of the IRS' determinations in a notice of  
11 deficiency are incorrect. Rule 142(a); Welch v.  
12 Helvering, 290 U.S. 111, 115 (1933); Worsham v.  
13 Commissioner, T.C. Memo. 2012-219, 2012 WL 3101491, at \*3,  
14 aff'd, 531 F. App'x 310 (4th Cir. 2013). However, an  
15 exception to this general rule is recognized by several  
16 courts of appeals for situations where the Commissioner  
17 determines that a taxpayer received income that was not  
18 reported on his or her return. In the Court of Appeals for  
19 the Fifth Circuit, the circuit in which an appeal in this  
20 case would normally lie, see section 7482(b), in a  
21 deficiency determination involving unreported income, the  
22 Commissioner must establish some evidentiary foundation  
23 connecting the taxpayer with the income-producing activity  
24 or demonstrating that the taxpayer actually received  
25 unreported income. See Sealy Power, Ltd. v. Commissioner,

1     46 F.3d 382, 386 (5th Cir. 1995), aff'g in part, rev'g in  
2     part and remanding T.C. Memo. 1992-168.     If the  
3     Commissioner introduces some evidence that the taxpayer  
4     received unreported income, the burden shifts to the  
5     taxpayer, who must establish by a preponderance of the  
6     evidence that the deficiency was arbitrary or erroneous.  
7     See Portillo v. Commissioner, 932 F.2d 1128, 1133-1134  
8     (5th Cir. 1991), aff'g in part, rev'g in part and  
9     remanding T.C. Memo. 1990-68.

10                 Mr. Lowe argues that the Commissioner has not  
11     met his burden to establish that he received wage or other  
12     taxable payments from AltairStrickland, LLC because he  
13     asserts his employer's records are hearsay and do not fall  
14     under the business record exception to the rule against  
15     hearsay. Business records that are accompanied by a  
16     certification, from the custodian of records for the  
17     business providing them, are an exception to the rule  
18     against hearsay. See Fed. R. Evid. 803(6)(D). Also, in  
19     order to constitute a business record admissible under  
20     Federal Rule of Evidence 803(6) without the declarant  
21     available at trial as a witness, the record must be "kept  
22     in the course of a regularly conducted business activity,"  
23     and it must be "the regular practice" of that business  
24     activity to make that report. Fed. R. Evid. 803(6).  
25     Respondent in this case has established that the

1 AltairStrickland, LLC's record's, including the 2017 Form  
2 W-2 issued to Mr. Lowe and payroll hours/dollar history,  
3 were kept in the course of its regularly conducted  
4 business activity, as so certified by the custodian of  
5 records for that entity who responded to a subpoena of  
6 records issued by Respondent. Consequently, through  
7 information returns, supporting documents, and the record,  
8 Respondent has established that Mr. Lowe received the  
9 respective payments from his employer during 2017. More  
10 importantly, Mr. Lowe admitted at trial to receiving  
11 payments and admitted that AltairStrickland, LLC was his  
12 employer.

13 Mr. Lowe's position is that the payments he  
14 received were not taxable. We find that these documents,  
15 coupled with Mr. Lowe's admission that he received  
16 payments from his employer, sufficient to established an  
17 adequate evidentiary foundation to shift the burden of  
18 proof to Mr. Lowe on this issue.

19 II. Tax Deficiency

20 Mr. Lowe has made arguments that are similar to  
21 a multitude of cases where we have found a taxpayer's  
22 argument that wages are not taxable to be frivolous.

23 For example, he suggests that income tax is an  
24 excise tax, it cannot be imposed as a non-apportioned  
25 direct tax under the 16th Amendment, and liability can





1     only arise only upon the happening of distinct taxable  
2     events, not the mere receipt of money, or being paid for  
3     work.     That is a tired argument.     Coleman v.  
4     Commissioner, 791 F.2d 68, 70 (7th Cir. 1986).     In an  
5     attempt to bolster his argument Mr. Lowe suggests that the  
6     Congressional Record and the courts, particularly the  
7     United States Supreme Court in Brushaber v. Union Pac.  
8     R.R. Co., 240 U.S. 1 (1916), supports his argument.     He  
9     goes on to cite various several other cases and materials  
10    pulling out seemingly random strings of quotes.

11                 The U.S. Court of Appeals for the Sixth Circuit  
12    succinctly addressed this issue in Martin v. Commissioner,  
13    756 F.2d 38, 40 (6th Cir. 1985), aff'g T.C.  
14    Memo. 1983-473:

15                 In Brushaber, the Court found the 1913 income  
16    tax law to be constitutional.     The Court also  
17    noted that in Pollock [v. Farmer's Loan and Trust  
18    Co.], 158 U.S. 601 (1895), a case that pre dated  
19    the establishment of the federal income tax in  
20    1913], it had previously found the taxing of  
21    income from professions, trades, employments or  
22    vocations to be constitutional in the form of an  
23    excise tax.     In light of the sixteenth amendment  
24    however, all taxation of income, "from whatever  
25    source derived," was found to be constitutional



1 in Brushaber. A multitude of cases following  
2 Brushaber have held that the type of revenues  
3 and receipts earned by appellant [the taxpayer]  
4 \* \* \* constitute taxable income under the  
5 Internal Revenue Code. \* \* \* [additional  
6 citations omitted]

7 Furthermore, this Court has noted:

8 Brushaber merits special mention, because  
9 Cracking the Code [a book by Peter Hendrickson  
10 published in 2007] misleadingly cites that case.  
11 [In Brushaber, a] stockholder brought suit  
12 against a corporation to prevent the corporation  
13 from paying taxes imposed by the Tariff Act of  
14 1913. The Supreme Court summarized the  
15 stockholder's arguments, stating: "The various  
16 propositions are so intermingled as to cause it  
17 to be difficult to classify them." Brushaber,  
18 240 U.S. at 10. The Supreme Court then proceeded  
19 to untangle the stockholder's arguments, which  
20 ultimately proved to be losing arguments. Yet  
21 Cracking the Code cites the Supreme Court's  
22 summary of the losing arguments as though it were  
23 the Supreme Court's analysis of the underlying  
24 constitutional issues.

25 Waltner v. Commissioner, T.C. Memo. 2014-35, at \*45 n. 38.

1 Overall, Mr. Lowe raises the same types of  
2 frivolous arguments regarding wages that we shall not  
3 painstakingly address. Crain v. Commissioner, 737 F.2d  
4 1417, 1417 (5th Cir. 1984); see also Delgado v.  
5 Commissioner, T.C. Memo. 2021-84 (where we explained the  
6 petitioner's argument was frivolous and as such we declined  
7 to address the petitioner's position further); Leyshon v.  
8 Commissioner, T.C. Memo. 2015-104 (where we explained we  
9 would not address a petitioner's frivolous arguments except  
10 to explain a genuine misunderstanding of the law), aff'd,  
11 649 F. App'x 299 (4th Cir. 2016).

12 Gross income includes "all income from whatever  
13 source derived," including compensation for services.  
14 Sec. 61(a). Payments that are "undeniable accessions to  
15 wealth, clearly realized, and over which the taxpayers  
16 have complete dominion" are taxable income unless an  
17 exclusion applies. See Commissioner v. Glenshaw Glass  
18 Co., 348 U.S. 426, 431 (1955); Sewards v. Commissioner,  
19 785 F.3d 1331, 1334 (9th Cir. 2015) (citing Hawkins v.  
20 United States, 30 F.3d 1077, 1079 (9th Cir. 1994)), aff'g  
21 138 T.C. 320 (2012). Section 61(a) broadly applies to  
22 any accession to wealth; whereas, statutory exceptions  
23 from gross income are narrowly construed. See  
24 Commissioner v. Schleier, 515 U.S. 323, 328 (1995).

25 The taxpayers must bring themselves within the



1 clear scope of a statutory exclusion. Id. Mr. Lowe does  
2 not point to any legitimate exception.

3 Mr. Lowe admits to receiving payments from his  
4 employer, which is an accession to wealth. Sec. 61(a);  
5 see Commissioner v. Glenshaw Glass Co., 348 U.S. at 431.

6 In addition, because he was an employee of  
7 AltairStrickland, LLC, Mr. Lowe was able to participate in  
8 the company's health care and 401(k) plans; benefits not  
9 available unless wages were paid to him as an employee.  
10 Mr. Lowe has not pointed to any exception in the Code that  
11 would make payments from his employer not taxable;  
12 therefore, Mr. Lowe has not met his burden of proof to  
13 show that the payments he received for services were  
14 anything else but taxable income.

15 Finally, Mr. Lowe has asserted many frivolous  
16 arguments as to why he does not have to report his wages as  
17 income for tax year 2017. The Court takes this  
18 opportunity to inform him that we may impose a penalty of  
19 up to \$25,000 if a taxpayer institutes or maintains a  
20 frivolous or groundless position or institutes or  
21 maintains a proceeding primarily for delay. Sec.  
22 6673(a)(1). Although the Court will not impose such a  
23 penalty at this time, Mr. Lowe is warned that the Court  
24 may not be so forgiving if he continues to advance  
25 frivolous and groundless arguments.



1     III. Conclusion

2                     We conclude that Mr. Lowe received taxable  
3     payments from his employer in the amount of \$193,068.81,  
4     which were not reported, resulting in a tax deficiency of  
5     \$44,129.

6             To reflect the forgoing,

7                             Decision will be entered for  
8             Respondent as to the deficiency and Petitioner  
9             as to the penalty.

10             (Whereupon, at 10:36 a.m., the above-entitled  
11     matter was concluded.)

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