

MAR 17 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILA ALEMASOV,

Petitioner,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

No. 07-73968

Tax Ct. No. 11223-05

MEMORANDUM*

Appeal from a Decision of the
United States Tax Court

Submitted March 12, 2009**
San Francisco, California

Before: McKEOWN and IKUTA, Circuit Judges, and WALTER, *** Senior
District Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without
oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Donald E. Walter, Senior United States District Judge
for the Western District of Louisiana, sitting by designation.

Even assuming this court can review pretrial motions after a trial on the merits, *cf. Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987), Alemasov's pretrial motions to exclude evidence and for summary adjudication were properly denied. Rather than presume Alemasov was engaged in business, the Notice of Deficiency made Alemasov's engagement in business a predicate issue on which her deductions depended. *Indep. Elec. Supply, Inc. v. Comm'r.*, 781 F.2d 724, 726 (9th Cir. 1986) (stating that, "for a deduction to be taken under [26 U.S.C. § 162] . . . the expense must arise in or in connection with a 'trade or business'"). In addition, because there was a genuine issue of material fact whether Alemasov had substantiated her expenses as required under 26 U.S.C. § 274, there was no error in the Tax Court's denial of Alemasov's motion for summary adjudication. *See* Tax Ct. R. 121(b).

The Tax Court did not err in denying Alemasov's motion to shift the burden of proof to the government under 26 U.S.C. § 7491, because Alemasov did not proffer evidence "which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted." *Griffin v. Comm'r.*, 315 F.3d 1017, 1021 (8th Cir. 2003) (internal quotation marks and emphasis omitted). Contrary to Alemasov's argument, *Griffin* does not stand for the proposition that any testimony offered by the taxpayer is

sufficient to shift the burden of proof to the government. *Id.* A tax court “is not compelled to believe evidence which to it seems improbable, or to accept as true uncorroborated evidence of interested witnesses even though uncontradicted.”

Blodgett v. Comm’r., 394 F.3d 1030, 1035–36 (8th Cir. 2005) (citing *Marcella v. Comm’r.*, 222 F.2d 878, 883 (8th Cir. 1955)).

Finally, the Tax Court did not err in allowing the Commissioner to argue that Alemasov’s claimed business expenses failed to meet the requirements of 26 U.S.C § 274(d). The Notice of Deficiency expressly raised the issue of substantiation, and Alemasov’s substantiation did not meet the statutory requirements of section 274(d).

DISMISSED.