

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 22 2017

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 16-30100

Plaintiff - Appellee,

D.C. No. 3:14-cr-00059-RRB-1

v.

MEMORANDUM*

PAUL STOCKLER,

Defendant - Appellant.

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Submitted August 15, 2017**
Anchorage, Alaska

Before: GRABER, CLIFTON, and M. SMITH, Circuit Judges.

Petitioner Paul Stockler pleaded guilty to willfully failing to file federal income tax returns for tax years 2006, 2008, and 2009. Under the United States Sentencing Guidelines, the sentencing range for this offense turns in part on the

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

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

amount of the tax loss attributable to Stockler's conduct. *See* U.S.S.G. § 2T1.1(a). Following Stockler's guilty plea, the district court held an evidentiary hearing to determine the relevant tax loss amount. Stockler argued at the hearing that he was entitled to retroactively seek mark-to-market treatment under 26 U.S.C. § 475(f), such that his trading losses could be treated as ordinary losses as opposed to capital losses and would therefore not be subject to the \$3,000 deduction cap contained in 26 U.S.C. § 1211(b). The district court found that Stockler was not entitled to retroactive mark-to-market election and calculated his loss amount accordingly. Stockler now appeals the sentence imposed upon him by the district court, arguing that he was entitled to mark-to-market treatment for the purpose of determining the tax loss amount. We hold that the district court did not clearly err in finding that Stockler failed to qualify for mark-to-market treatment. We therefore affirm.

We review the district court's factual findings for clear error. *United States v. Garcia*, 497 F.3d 964, 969 (9th Cir. 2007).

To qualify for mark-to-market election, a taxpayer must be in the business of trading securities. *See* 26 U.S.C. § 475(f)(1)(A). In *Purvis v. Commissioner*, 530 F.2d 1332 (9th Cir. 1976) (per curiam), we summarized the relevant considerations for finding that a taxpayer constitutes a trader of securities as whether "securities are bought and sold with reasonable frequency in an endeavor to catch the swings in the daily market movements and profit thereby on a short term basis." *Id.* at 1334

(quoting *Chiang Hsiao Liang v. Comm’r*, 23 T.C. 1040, 1043 (1955)). Internal Revenue Service (IRS) Publication 550 takes a similar approach, stating that, “[t]o be engaged in business as a trader in securities,” a taxpayer (1) “must seek to profit from daily market movements in the prices of securities,” (2) his “activity must be substantial,” and (3) he “must carry on the activity with continuity and regularity.” I.R.S. Pub. 550 (2005).

The district court applied the framework set forth in IRS Publication 550 and found, based on evidence presented at the hearing, that Stockler “did not have a business license for [his trading] activity; he did not file a schedule C for a trading business; he held the securities for relatively longer periods of time as compared to professional day traders; he did not produce any income from day trading to provide for a livelihood; he devoted the majority of his time to his law practice and not to day trading; and he held himself out as a lawyer, not a day trader.” We considered some of these same factors in *Purvis* to uphold a finding that the taxpayer was not in the business of trading: The taxpayer in that case held himself out as an attorney, failed to file a schedule C with respect to any business of trading, and did not maintain separate bank accounts to assist his trading activities. 530 F.2d at 1334.

Evidence at the hearing additionally showed that in 2005, Stockler traded on only approximately 59% of the open market days. Revenue Agent Peter Orth testified that professional traders ordinarily trade on a greater percentage of market

days. Furthermore, while the district court found that Stockler's trading was continuous in 2005, it found that his trading was not continuous in 2006: During that year, Stockler had a period of four-and-a-half months during which he did not engage in any day trading. Finally, Stockler expressly stated at the hearing that he did not consider himself to have a trading business.

In light of the evidence in the record, the district court did not clearly err in finding that Stockler was not in the business of trading securities. Because Stockler was not in the business of trading securities, he was not eligible for mark-to-market treatment under § 475(f). We therefore decline to reach the question whether, had Stockler qualified for mark-to-market treatment, his election of such treatment would have been timely.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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TOTAL:				\$ <input type="text"/>	TOTAL: \$ <input type="text"/>			

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk