

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 3 2015

FOR THE NINTH CIRCUIT

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

BROADWOOD INVESTMENT FUND
LLC, by and through Broadwood
Investment Holdings LP, its Tax Matters
Partner; DRAGON COEUR LLC I-B;
MOSMAN INVESTMENT FUND LLC;
HAN KOOK LLC I; HAN KOOK LLC 1-
A,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 13-55626

D.C. No. 8:08-cv-00295-DOC-AN

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted May 5, 2015
Pasadena, California

Before: FISHER, BEA, and FRIEDLAND, Circuit Judges.

Broadwood Investment Fund LLC, Dragon Coeur LLC I-B, Mosman
Investment Fund LLC, Han Kook LLC I, and Han Kook LLC I-A (“Petitioners”)

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

challenged the Internal Revenue Service’s disallowance of tax losses they reported. The district court granted summary judgment in favor of the government, holding that Petitioners were sham partnerships formed for the purpose of creating tax losses for Henry Nicholas, who was one of the partners in each of the Petitioner entities. We reverse and remand for further proceedings.

“In a case . . . in which the Commissioner has made a deficiency determination, the taxpayer has the burden of producing enough evidence to rebut the deficiency determination and the burden of persuasion in substantiating a claimed deduction.” *Goldberg v. United States*, 789 F.2d 1341, 1343 (9th Cir. 1986).

A partnership may be disregarded for federal tax purposes when it is determined that the partners did not “really and truly intend[] to join together for the purpose of carrying on [a] business and sharing in the profits or losses or both.” *Comm’r v. Culbertson*, 337 U.S. 733, 741 (1949). That is, the question is whether

considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.

Id. at 742. The partners' intent is "a question of fact, to be determined from testimony disclosed by their agreement, considered as a whole, and by their conduct in execution of its provisions." *Id.* at 741-42.

The district court erred in granting summary judgment in favor of the government. Petitioners have presented sufficient evidence to raise a genuine issue of material fact as to the partners' intent. In particular, Petitioners presented evidence that some of the investment materials projected that the partnerships could be profitable, and that the partners performed due diligence on the assets before acquiring them. Petitioners also presented evidence of efforts made to collect on the debts owned by the partnerships. And there is no dispute that the partnerships allocated distributions, profits, and losses to partners *pro rata*. The government also presented substantial evidence in support of its determination that the partnerships were shams, and we express no opinion on how this issue ultimately should be resolved on the merits. But the genuine factual dispute as to the partners' intent precludes summary judgment on the issue.

The district court's reliance on the Welcome Letter was misplaced. The letter merely stated that Nicholas was allowed to change the initial allocation of each Petitioner's investment during a three-week window. The letter does not disclaim Nicholas' intent to act with a purpose of sharing profits and losses.

Although the government argued that Nicholas suffered no risk of loss in the district court, it abandoned that position on appeal.

Accordingly, we **REVERSE** the district court's grant of summary in favor of the government and **REMAND** for further proceedings.