Estate of Neil I. Haber, Deceased, Flora Jo Haber, Personal Representative, Petitioner v. Commissioner of Internal Revenue, Respondent, 91 T. C. 236 (1988)

A deposition to perpetuate testimony under Tax Court Rule 81 requires a showing of substantial risk that the witness will not be available at trial.

Summary

In Estate of Haber v. Commissioner, the petitioner sought to depose a CPA, Jon Manning, to perpetuate his testimony under Tax Court Rule 81, citing his participation in hazardous sports as a substantial risk to his availability at trial. The U. S. Tax Court denied the request, holding that Manning's engagement in skydiving, ultralight flying, and motocross did not constitute a sufficient risk of unavailability. The court emphasized the requirement of a "substantial risk" under Rule 81, rejecting the argument that participation in dangerous hobbies alone justifies a deposition.

Facts

The Estate of Neil I. Haber filed a petition in response to a notice of deficiency from the IRS, asserting a Federal estate tax deficiency and an addition for fraud. The estate sought to depose Jon Manning, a CPA who prepared the estate's tax return and was expected to testify about the personal representative's knowledge regarding the late filing. The estate argued that Manning's participation in skydiving, ultralight flying, and motocross posed a substantial risk to his availability at trial due to the dangerous nature of these sports.

Procedural History

The case was initiated with a petition filed on April 9, 1986, and assigned to a Special Trial Judge. The estate filed an application to take Manning's deposition on September 3, 1987, which was amended twice. A hearing was held on October 5, 1987, and the court issued its opinion on August 15, 1988, denying the application to depose Manning.

Issue(s)

1. Whether the estate's application to take the deposition of Jon Manning under Tax Court Rule 81 should be granted based on the argument that his participation in hazardous sports constitutes a substantial risk of unavailability at trial.

Holding

1. No, because the estate failed to demonstrate a substantial risk that Manning would not be available at trial. The court found that Manning's participation in hazardous sports did not meet the threshold required by Rule 81 for granting a

deposition to perpetuate testimony.

Court's Reasoning

The court applied Tax Court Rule 81, which allows depositions only where there is a "substantial risk" that the witness will not be available at trial. The court found that Manning's age, health, and lack of plans to leave the country did not suggest a substantial risk of unavailability. The court noted that Manning's participation in hazardous sports did not equate to the "substantial risk" required under Rule 81, as he appeared healthy and fit. The court distinguished this case from Texaco, Inc. v. Borda, where the deponent's age and the delay in the case justified a deposition. The court also cited Gauthier v. Commissioner, reinforcing the requirement of a substantial risk for a deposition to be granted under Rule 81. The court concluded that the estate's evidence of Manning's hobbies did not meet the necessary standard.

Practical Implications

This decision clarifies the stringent requirement of a "substantial risk" for depositions under Tax Court Rule 81. Practitioners must demonstrate more than mere participation in hazardous activities to justify a deposition; factors such as age, health, and plans to be absent from the jurisdiction are critical. The ruling impacts how attorneys approach requests for depositions in Tax Court, emphasizing the need for concrete evidence of unavailability. It also affects estate planning and tax litigation, where depositions may be sought to preserve testimony. Subsequent cases have upheld this standard, reinforcing the court's interpretation of Rule 81.

