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UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO

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ALAN PESKY and WENDY PESKY,

NO. CIV. 1:10-186 WBS

Plaintiffs,

v.

MEMORANDUM AND ORDER RE:  
MOTION FOR SUMMARY JUDGMENT ON  
MISCELLANEOUS DEDUCTIONS

UNITED STATES OF AMERICA,

Defendant.

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Plaintiffs Alan and Wendy Pesky brought suit against the United States of America seeking a refund for taxes, penalties, and interest assessed against them for the 2003 and 2004 tax years. Currently before the court are the parties' cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. (Docket Nos. 105, 106.)

The parties' dispute can generally be divided into two general topics: (1) deduction of the Conservation Easement, and (2) deduction of various other expenses. After carefully considering the parties' briefs, the court finds that these two

1 issues presented are best addressed in separate orders. This  
2 order addresses the parties' claims regarding the Peskys' various  
3 claims for reimbursement based on disallowance of deductions in  
4 the 2002, 2003 and 2004 tax years, excluding the deductions and  
5 penalties related to the Conservation Easement.

6 I. Factual and Procedural Background

7 In short, plaintiffs seek reimbursement for taxes paid  
8 to the IRS after the IRS disallowed certain deductions claimed by  
9 the Peskys in the 2002, 2003 and 2004 tax years. (First Am.  
10 Compl. ("FAC") (Docket No. 72).) Plaintiffs seek, in relevant  
11 part, reimbursements based upon total or partial disallowance of  
12 the following deductions: \$202,278.00 in stock donated to the  
13 Pesky Family Foundation, (id. ¶ 32); \$41,308.00, \$41,514.00, and  
14 \$86,155.00 in mortgage interest deductions, (id. ¶¶ 30-31, 44-45,  
15 68-69); \$47,892.00 and \$112,963.00 in miscellaneous itemized  
16 deductions after the two percent adjusted gross income  
17 limitation, including investment interest, foreign tax credits,  
18 and deductions passed through to the Peskys from partnerships in  
19 which they held an interest, (id. ¶¶ 34-35, 49-60). While the  
20 Peskys originally filed claims for reimbursement based on  
21 disallowance of Schedule C business deductions and various other  
22 charitable contributions, (Compl. ¶¶ 39-42, 55-58 (Docket No.  
23 1)), they do not pursue those claims in the FAC. The United  
24 States has filed a counterclaim for fraud penalties under 26  
25 U.S.C. § 6663 based upon Alan Pesky's allegedly fraudulent  
26 Schedule C business deductions. (Answer to FAC ¶¶ 157-175  
27 (Docket No. 90).)

28 The United States moves for summary judgment in its

1 favor on the Peskys' claims and related accuracy and filing  
2 penalties. (See generally U.S. Mot. for Summ. J. ("U.S. MSJ")  
3 (Docket No. 106).) The United States does not, however, seek  
4 summary judgment on its counterclaim for Schedule C fraud  
5 penalties. (See id. at 2.) The Peskys do not seek summary  
6 judgment on any of these issues. (See Peskys Mot. for Summ. J.  
7 ("Peskys MSJ") at 2 (Docket No. 106-1).)

## 8 II. Discussion

9 The court reviews the United States' motion for summary  
10 judgment based upon the standards set forth in Anderson v.  
11 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and Celotex Corp.  
12 v. Catrett, 477 U.S. 317, 322-23 (1986).

13 "Deductions are a matter of legislative grace, and  
14 taxpayers must prove they are entitled to the deductions  
15 claimed." Weatherly v. Comm'r, 102 T.C.M. (CCH) 199, 2011 WL  
16 3794241, at \*1 (2011). "Taxpayers are required to maintain  
17 records sufficient to establish the amounts of allowable  
18 deductions and to enable the Commissioner to determine the  
19 correct tax liability." Id. (citing 26 U.S.C. § 6001).

### 20 A. Schedule C Business Deductions and Various Charitable 21 Deductions

22 First, the United States seeks summary judgment in its  
23 favor on the validity of the Peskys' Schedule C business  
24 deductions and various charitable deductions claimed in the 2003  
25 and 2004 tax years. (U.S. MSJ at 18-20.) The United States has  
26 already assessed and collected the amounts owed on these  
27 deductions. The Peskys confirm that they no longer seek to  
28 recover the assessments, and the Peskys' pleadings have been

1 amended to exclude all reference to these assessments. The court  
2 will accordingly grant the United States' motion for summary  
3 judgment based on improper substantiation of the Peskys' Schedule  
4 C business deductions and various charitable deductions.<sup>1</sup>

5 B. Stock Contribution to the Family Foundation

6 The United States also seeks summary judgment on the  
7 issue of whether an allegedly charitable contribution of \$202,278  
8 in stock to the Pesky Family Foundation on July 7, 2003 was  
9 properly substantiated by a contemporaneous written  
10 acknowledgment. (Id. at 17-18.)

11 "Contributions of cash or property of \$250 or more  
12 require the donor to obtain contemporaneous written  
13 acknowledgment of the donation from the donee." Villareale v.  
14 Comm'r, 105 T.C.M. (CCH) 1464, 2013 WL 948473, at \*2 (citing 26  
15 U.S.C. § 170(f)(8)(A)). "At a minimum, the contemporaneous  
16 written acknowledgment must contain a description of any property  
17 contributed, a statement as to whether any goods or services were  
18 provided in consideration, and a description and good-faith  
19 estimate of the value of any goods or services provided in  
20 consideration." Id. (citing 26 U.S.C. § 170(f)(8)(B)). "A  
21 written acknowledgment is contemporaneous if it is obtained by  
22 the taxpayer on or before the earlier of (1) the date on which  
23 the taxpayer files a return for the taxable year in which the  
24 contribution was made, or (2) the due date (including extensions)

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26 <sup>1</sup> Because neither the United States nor the Peskys seek  
27 summary judgment on the United States' counterclaim for Schedule  
28 C fraud under 26 U.S.C. § 6663, the court makes no findings as to  
whether Alan Pesky fraudulently sought Schedule C business  
deductions.

1 for filing such return.” Id. (citing 26 U.S.C. § 170(f)(8)(C)).

2 “The contemporaneous written acknowledgment need not  
3 take any particular form.” Irby v. Comm’r, 139 T.C. No. 14, 2012  
4 WL 5273345, at \*11 (2012) (internal quotation marks omitted). In  
5 Irby, the court found that a series of documents, including  
6 Option Agreements, Forms 8283, letters to the taxpayer from the  
7 organization, settlement statements, and deeds of trust  
8 collectively constituted a contemporaneous written acknowledgment  
9 of charitable contributions of conservation easements. Id. at  
10 \*11-12. While Irby was a bargain-sale contribution and not one  
11 in which the taxpayer received no goods or services in exchange  
12 for the contribution, the court sees no reason why a comparable  
13 collection of documents could not similarly show that no goods or  
14 services were received in exchange for a contribution.<sup>2</sup>

15 Here, the letter from the Pesky Family Foundation does  
16 not satisfy the statutory requirements because it was written  
17 approximately six years after the alleged contribution and is  
18 therefore not contemporaneous. (See Yost Decl. Ex. 46.)  
19 However, in addition to that letter the Peskys also provide  
20 various financial documents, including the Pesky Family  
21 Foundation’s general ledger and bank statements, which they  
22 contend show that the Pesky Family Foundation received the  
23 contribution and that the Foundation provided nothing to the

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25 <sup>2</sup> The other case cited by the Peskys in support of their  
26 argument, Foxworth, Inc. v. Comm’r, 98 T.C.M. (CCH) 177, 2009 WL  
27 2877850 (2009), involved the use of financial documents to  
28 establish whether shares of stock were transferred to a  
charitable organization. Foxworth, 2009 WL 2877850, at \*26-27.  
Foxworth does not appear to involve the question of whether those  
documents established a statement that the taxpayer did not  
receive any goods or services in exchange for the contribution.

1 Peskys in return. (See Pesky Opp'n at 21-22 (Docket No. 110);  
2 Schwartzman Aff. in Opp'n to U.S. MSJ ("Schwartzman Aff.") Exs.  
3 12, 13, 14 (Docket Nos. 110-4, 110-5).) The documents appear to  
4 show the stock contributed by the Peskys as income and no expense  
5 to the Peskys or their business entities.

6 The United States does not argue that the Peskys were  
7 not entitled to claim a deduction for the contribution. Rather,  
8 the United States seeks summary judgment on the ground that  
9 plaintiffs did not submit adequate documentation to substantiate  
10 the deduction. Unlike the Tax Court, with its substantial  
11 expertise in tax matters and the benefit of a bench trial to seek  
12 clarification of complex financial documents, this court must  
13 apply the summary judgment standard to a set of documents with  
14 which it is unfamiliar. Because of the limited briefing and  
15 explanation of the documents at issue, it appears that a genuine  
16 issue of material fact exists as to whether the documents  
17 sufficiently establish that the Peskys received no goods or  
18 benefits in return for the contribution and therefore qualify as  
19 a contemporaneous written acknowledgment. The court will  
20 accordingly deny the United States' motion for summary judgment  
21 on the Peskys' claim for reimbursement based on disallowance of  
22 the deduction for stock contributed to the Pesky Family  
23 Foundation on July 7, 2003.

24 C. Mortgage Interest Deductions and Miscellaneous Expenses

25 Finally, the United States seeks summary judgment  
26 whether the Peskys have substantiated their mortgage interest  
27 deductions, (see FAC ¶¶ 30-31, 44-45), and whether plaintiffs  
28 have substantiated various other deductions, such as

1 miscellaneous itemized expenses, deductible investment expenses,  
2 and foreign tax credits, (see id. ¶¶ 34, 48-52, 54-56, 59-60).  
3 (U.S. MSJ at 22-23.) Again, as with the stock contribution to  
4 the Pesky Family Foundation, the dispute is not over plaintiffs  
5 were entitled to deduct their mortgage interest and the other  
6 miscellaneous expenses, but rather whether the plaintiffs  
7 submitted the right documentation, and in the right form, to  
8 substantiate the Peskys' claimed expenses. (See Schwartzman Aff.  
9 Exs. 17-19, 22, 26). Once again faced with raw financial data  
10 and little to no explanation of the documents at issue, the court  
11 cannot speculate as to meaning and importance of these documents.  
12 The court finds that, due to the short shrift these issues  
13 received in the parties' briefing and the difficulty of gleaning  
14 information from the financial documents provided, genuine issues  
15 of material fact remain on these issues.


16           The court will accordingly deny the United States'  
17 motion for summary judgment on the Peskys' claims for  
18 reimbursement based upon disallowance of mortgage interest  
19 deductions and miscellaneous itemized deductions.

20           Because the Peskys' overall tax liability is still  
21 uncertain, the court declines to address accuracy and failure to  
22 file penalties at this time. See 26 U.S.C. § 6662(d)(1)(A)  
23 (defining a "substantial underpayment" for the purposes of the  
24 twenty percent accuracy penalty as an understatement exceeding  
25 the greater of \$5,000 or ten percent of the tax due); Crocker v.  
26 Comm'r, 92 T.C. 899, 908 (1989) (explaining that a taxpayer may  
27 avoid failure to file penalties based upon invalid extensions if  
28 he "makes a bona fide and reasonable estimate of his tax

1 liability based on the information available to him at the time  
2 of extension").

3           IT IS THEREFORE ORDERED that the United States' motion  
4 for summary judgment on the Peskys' various claims for  
5 reimbursement that do not involve the Conservation Easement be,  
6 and the same hereby is, GRANTED with respect to the Schedule C  
7 business deductions and various charitable contributions, and  
8 DENIED with respect to reimbursement for contribution of stock to  
9 the Pesky Family Foundation, mortgage interest deductions, and  
10 miscellaneous itemized expenses.

11 DATED: July 8, 2013

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14 WILLIAM B. SHUBB  
15 UNITED STATES DISTRICT JUDGE  
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