IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Case No. 16-cv-00258-RM-CBS

ALPENGLOW BOTANICALS, LLC, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER

On February 3, 2016, plaintiffs Alpenglow Botanicals, LLC ("Alpenglow"), Charles Williams, and Justin Williams (collectively, "plaintiffs") filed a Complaint against defendant the United States of America ("defendant"), seeking declaratory, injunctive, and monetary relief so as to overturn the Internal Revenue Service's ("IRS") decision to deny deductions to income obtained during the course of plaintiffs' business for the tax years 2010, 2011, and 2012. (ECF No. 1.) More specifically, plaintiffs raised the following claims: (1) the IRS went beyond its jurisdiction in administratively determining that plaintiffs were not entitled to certain deductions pursuant to 26 U.S.C. § 280E ("§ 280E"); (2) Congress exceeded its power under the Sixteenth Amendment in passing § 280E; (3) the IRS violated the Fifth Amendment in taking evidence from plaintiffs without informing them that they were under investigation for violating the Controlled Substances Act ("the CSA"); and (4) § 280E violates the Eighth Amendment's prohibition on excessive fines and penalties. (*Id.*)

On April 19, 2016, defendant filed a motion to dismiss the Complaint ("the motion to dismiss"), pursuant to Fed.R.Civ.P. 12(b)(1) ("Rule 12(b)(1)") and Fed.R.Civ.P. 12(b)(6) ("Rule 12(b)(6)"). (ECF No. 11.) Defendant asserts that the IRS properly determined that plaintiffs were not entitled to deductions pursuant to § 280E, plaintiffs' claims for relief are meritless, and this Court lacks subject matter jurisdiction to issue an injunction. (*Id*.) Plaintiffs have responded in opposition to the motion to dismiss (ECF No. 12), and defendant has filed a reply (ECF No. 17). Plaintiffs then requested oral argument as to the motion to dismiss (ECF No. 18), which the Court granted (ECF No. 23), holding a hearing on June 23, 2016, and taking the motion to dismiss under advisement (ECF No. 29).

Just prior to the oral argument hearing, plaintiffs filed a Motion for Order to Certify Question of Constitutionality of Colorado's Medical Marijuana Laws to Colorado State Attorney General Pursuant to 28 U.S.C. § 2403(b) ("the motion to certify") (ECF No. 26). Plaintiffs assert that this Court should certify to the Colorado State Attorney General that the constitutionality of Colorado's medical marijuana laws has been questioned. (*Id*.) Defendant has responded to the motion to certify (ECF No. 33), and plaintiffs have filed a reply (ECF No. 35). At the oral argument hearing, the Court also took under advisement the motion to certify. (ECF No. 29.)

Following the oral argument hearing, plaintiffs filed a Motion to Amend Complaint ("the motion to amend"), by which plaintiffs sought to allege further detail as to the specific deductions that the IRS denied. (*See* ECF No. 30; ECF No. 32-1 at ¶ 11.) Plaintiffs also sought to delete any suggestion that the IRS was required to provide plaintiffs with *Miranda* warnings prior to taking evidence from them. (ECF No. 32-1 at ¶ 22.) Defendant has filed a response to the motion to amend (ECF No. 34), and plaintiffs have filed a reply (ECF No. 37).

Finally, on August 25, 2016, plaintiffs filed a Motion for Partial Summary Judgment Refund Claim ("the motion for summary judgment"). (ECF No. 40.) Plaintiffs assert that they are entitled to summary judgment because the IRS has not produced any evidence that plaintiffs trafficked in a controlled substance, plaintiffs properly capitalized business expenses as costs of goods sold, the IRS does not have authority to investigate violations of criminal statutes, and the Sixteenth Amendment requires that plaintiffs' ordinary and necessary business expenses be removed from their income. (*Id*.) Defendant has filed a response to the motion for summary judgment, asking that the same be denied on the merits, denied without prejudice pending resolution of the motion to dismiss, or denied without prejudice so that defendant may engage in discovery. (ECF No. 42). Plaintiffs have filed a reply. (ECF No. 46.)

I. Legal Standard

Motions to dismiss for lack of subject matter jurisdiction take two principal forms: (1) a facial attack, or (2) a factual attack on the allegations in the complaint. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). Here, defendant facially attacks the sufficiency of the allegations in the Complaint. (*See* ECF No. 11 at 9-12.) As a result, this Court accepts the allegations in the Complaint as true for purposes of any jurisdictional analysis. *Holt*, 46 F.3d at 1002.

In evaluating a motion to dismiss under Rule 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the non-moving party, and draw all reasonable inferences in the plaintiff's favor. *Brokers' Choice of America, Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1135-36 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). In the complaint, the plaintiff must allege a "plausible" entitlement to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556, 127 S.Ct. 1955 (2007).

Conclusory allegations, however, are insufficient. *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009). A complaint warrants dismissal if it fails "*in toto* to render [plaintiff's] entitlement to relief plausible." *Twombly*, 550 U.S. at 569 n.14.

II. Factual Background

The facts as alleged in the Complaint are as follows. Alpenglow is a Colorado company that does business in the State. (ECF No. 1 at ¶ 1.) Charles Williams and Justin Williams are owner/operators of Alpenglow. (*Id*. at ¶¶ 2-3.) Alpenglow is a "pass through" entity, which means that income and tax liability pass through to its owners. (*Id*. at ¶ 7.) Alpenglow filed federal and State tax returns for the years 2010 through 2012. (*Id*. at ¶ 6.) Alpenglow's tax liability for the years 2010 through 2012 passed through to Charles Williams and Justin Williams. (*Id*. at ¶ 8.)

Alpenglow's tax returns for the years 2010 through 2012 were audited by the IRS. (*Id*. at ¶ 9.) As a result of the audit process, the IRS issued a Form 921 on December 21, 2014, denying deductions and increasing the income of Alpenglow. The deductions were denied because the IRS administratively determined that Alpenglow committed the crime of trafficking in a controlled substance in violation of the CSA. (*Id*.) Charles Williams and Justin Williams paid the increased tax liability under protest, and filed claims for refunds. (*Id*. at ¶¶ 12-13.) Thereafter, the IRS either denied the claims for refunds or did not respond to the claims within 180 days, which acted as a denial. (*Id*. at ¶ 13.)

In the Amended Complaint, plaintiffs allege that the deductions denied were: rent for where the business was conducted; costs of labor; compensation of officers; advertizing; taxes and licenses for doing business; depreciation; and other wages and salaries. (ECF No. 32-1 at ¶ 11.)

III. Discussion

As an initial matter, the Court explains the order in which it will address the pending motions. The motion to amend (ECF No. 30) is GRANTED. The changes made in the Amended Complaint provide greater detail on the type of expenses for which plaintiffs sought a deduction, as well as (sensibly) removing any suggestion that the IRS was required to read *Miranda* warnings to plaintiffs. There is no reason why the complaint should not be amended to make these changes. Whether the complaint as amended remains subject to dismissal is a matter that is best left while resolving the motion to dismiss, which the Court will not require defendant to re-file simply because the complaint has been amended.

In their reply in support of the motion for summary judgment, plaintiffs assert that resolution of the motion to dismiss should be subsumed into resolution of the motion for summary judgment because the two motions have the same subject matter. (ECF No. 46 at 1.) The Court does not entirely agree that the motion to dismiss and motion for summary judgment involve the same subject matter. The motion for summary judgment seeks summary judgment with respect to: (1) plaintiffs' Sixteenth Amendment claim that its business expense deductions are constitutionally required; (2) plaintiffs' claim that the IRS does not have authority to investigate whether a criminal statute has been violated; (3) plaintiffs' treatment of costs of goods sold under 26 U.S.C. § 263A being proper; and (4) defendant's failure to produce any evidence showing that § 280E applies to plaintiffs. (ECF No. 40 at 10-19.)

The first two matters are claims brought in the Complaint (and Amended Complaint) and were briefed in the motion to dismiss. Thus, that subject matter is the same. The latter two matters, though, were not mentioned in the Complaint (or Amended Complaint) and were not briefed in the

motion to dismiss. They are entirely new subjects. Thus, where necessary, the Court will address the latter two matters separately. As for the first two matters, they are legal questions, and the parties' arguments with respect thereto are largely the same. To the extent any additional arguments are raised in the motion for summary judgment, the Court will consider those arguments in ruling on the claims. As a result, the Court will address the motion to dismiss first, then any claims remaining from the motion for summary judgment, followed last by the motion to certify.

In the motion to dismiss, defendant seeks dismissal of all claims in this action, as well as plaintiffs' request for injunctive relief. The Court will address the substantive claims first.

A. Does the IRS Have Authority to Disallow Plaintiffs' Deductions?

Depending on the perspective of plaintiffs or defendant, this question could be re-phrased as either: does the IRS have authority to perform a criminal investigation, or does the IRS have authority to enforce the Internal Revenue Code? Perspective matters, and, in this case, defendant's perspective is more accurate of what has occurred.

In a nutshell, plaintiffs' claim with respect to the IRS' authority is premised upon plaintiffs belief that the IRS, when applying § 280E to a business allegedly engaged in selling medical marijuana, is conducting a criminal investigation of that business. (*See* ECF No. 12 at 8-11.) In the motion for summary judgment, plaintiffs even go as far as asserting that using § 280E against them amounts to a criminal prosecution. (*See* ECF No. 40 at 18 n.1.) This is simply not what has occurred.

Section 280E provides, in pertinent part, as follows: "[n]o deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business … consists of trafficking in controlled substances (within the meaning of

schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted." 26 U.S.C. § 280E. Thus, in order to disallow a deduction, the IRS must determine that a taxpayer carries on a trade or business, and the trade or business trafficks in a controlled substance. Here, it is undisputed that plaintiffs carry on a trade or business. (ECF No. 32-1 at ¶¶ 1, 6.) It can also not be disputed that marijuana is a controlled substance for purposes of the CSA. *See* 21 U.S.C. §§ 802(6), 812. The only bone of contention is whether plaintiffs' business trafficks in marijuana.

Trafficking as used in § 280E means to buy or sell regularly. *Californians Helping to Alleviate Med. Problems v. C.I.R.*, 128 T.C. 173, 182 (T.C. 2007). As such, the real issue here is whether the IRS has authority to determine if, in the course of plaintiffs' business, they regularly bought or sold marijuana. The Court cannot understand why not. Such a determination does not require any great skill or knowledge, certainly not skill or knowledge of a criminal investigatory bent. It does not require detectives, agents, or any other form of law enforcement personnel to carry out. It should simply require a perusal of plaintiffs' receipts, or even a visit to plaintiffs' business establishment. It is not as if plaintiffs are some underground drug conspiracy, perhaps needing law enforcement investigation to unearth the criminal underbelly of their operation. According to defendant, they are simply a medical marijuana dispensary, dispensing medical marijuana to the public. No great investigation, criminal or otherwise, should be required to determine whether plaintiffs are indeed, in fact, buying or selling on a regular basis marijuana.

In any event, even if a business' operations were of a more secretive nature, there is nothing in the language of § 280E that requires a criminal investigatory entity to delve into any such secretive business practices. Section 280E is placed in the *Internal Revenue* Code, and instructs that

deductions should be disallowed if certain circumstances exist in a taxpayer's business. It would certainly be strange if the *Internal Revenue* Service was not charged with enforcing that provision. The fact that selling marijuana may also constitute a violation of the CSA is simply a byproduct of § 280E using the CSA's definition of "controlled substances." Section 280E does not require that a criminal investigation be pursued against a taxpayer, or even that § 280E only applies if a criminal conviction under the CSA has been obtained. If Congress had wanted such an investigation to be carried out or conviction to be obtained, then it could easily have placed such language in § 280E. It did not, however.

Plaintiffs assert repeatedly that § 280E requires the IRS to find that a crime has been committed and/or that a taxpayer has engaged in illegal activity. (*See* ECF No. 12 at 8-11; ECF No. 40 at 16-19.) Even if these assertions are accurate, this does not transform the IRS' determination that § 280E applies into a criminal investigation, a criminal prosecution, or somehow the rendering of a criminal verdict. There is absolutely no plausible allegation in the Amended Complaint that plaintiffs have been investigated, charged, or prosecuted criminally for their alleged business activities in 2010, 2011, or 2012. By *criminal*, the Court means a criminal case or prosecution being prepared or filed against plaintiffs.

In their motion for summary judgment, plaintiffs attempt to manufacture a criminal prosecution against themselves, asserting that enforcement of § 280E amounts to such a prosecution, citing *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S., 767, 114 S.Ct. 1937 (1994). (*See* ECF No. 40 at 8-9, 18 n.1.) To whatever extent *Kurth Ranch* is relevant here, it is notable that the Supreme Court stated that "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense." *Kurth Ranch*, 511

U.S. at 778. Here, as discussed, there is no plausible allegation that plaintiffs have been punished previously for allegedly selling marijuana in 2010, 2011, and 2012.[1]

Ultimately, although some taxes may be considered punishment for purposes of double jeopardy, there is no double jeopardy concern plausibly alleged here. Moreover, § 280E does not require that the IRS wait for another governmental unit to investigate a taxpayer's trade or business before the IRS can disallow a deduction. Therefore, the Court finds that § 280E provides the IRS with the authority to make the factual determinations necessary to decide whether that provision applies to a taxpayer's trade or business.

B. Does Section 280E Violate the Sixteenth Amendment?

With respect to this claim, plaintiffs effectively argue that the manner in which the IRS applies § 280E is unconstitutional because, in applying the provision, the IRS prevents a taxpayer from deducting business expenses. (ECF No. 12 at 12-13.) In the motion for summary judgment, plaintiffs go as far to assert that the business expenses disallowed in this case are "constitutionally mandated." (ECF No. 40 at 12.) For this proposition, plaintiffs rely upon *Davis v. United States*, 87 F.2d 323 (2d Cir. 1937) (*see* ECF No. 12 at 13; ECF No. 40 at 12), which, itself, relies upon *Eisner v. Macomber*, 252 U.S. 189, 40 S.Ct. 189 (1920). *See Davis*, 87 F.2d at 324. In *Eisner*, the Supreme Court described income "as the gain derived from capital, from labor, or from both combined." *Eisner*, 252 U.S. at 207 (quotation omitted). Relying upon *Eisner*, in *Davis*, the Second Circuit Court of Appeals concluded that taxable income equaled gross income minus, *inter alia*,

[1] In fact, as plaintiffs go to great pains to point out (*see* ECF No. 40 at 5, 18), it would be very difficult for defendant to prosecute plaintiffs. *See United States v. McIntosh*, 833 F.3d 1163, 1177-78 (9th Cir. 2016) (holding that Congress has prohibited the Department of Justice from prosecuting individuals who are engaged in conduct permitted by State medical marijuana laws and who fully complied with those laws).

"ordinary and necessary expenses incurred in getting the so-called gross income." *Davis*, 87 F.2d at 324.

However, the Second Circuit's explanation of taxable income is dicta, *see id*. at 325, and the Supreme Court itself has placed its decision in *Eisner* into context. Notably, in *C.I.R. v. Glenshaw Glass Co.*, 348 U.S. 426, 430-431, 75 S.Ct. 473 (1955), the Supreme Court explained that the characterization of income in *Eisner* served a useful purpose for distinguishing gain from capital, "[b]ut it was not meant to provide a touchstone to all future gross income questions." Moreover, as plaintiffs acknowledge, the business expenses at issue here are deductions. (ECF No. 32-1 at ¶¶ 9-11.) This means that Congress allows a taxpayer to deduct those expenses from his or her gross income. As such, deductions "depend[] upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *C.I.R. v. Nat'l Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 149, 94 S.Ct. 2129 (1974).

In this light, it is clear that what plaintiffs really seek with respect to this claim is for this Court to find that, constitutionally, gross income cannot include the cost of ordinary and necessary business expenses. Apart from the perhaps more philosophical question of whether expenses incurred in carrying on a business allegedly engaged in an enterprise illegal under federal law can ever be described as 'ordinary' or 'necessary,'[2] plaintiffs point to no case law holding this

[2] In that regard, an interesting case is *C.I.R. v. Heininger*, 320 U.S. 467, 64 S.Ct. 249 (1943). In *Heininger*, the Commissioner of Internal Revenue denied a taxpayer's litigation expenses as deductible on the ground that they were not ordinary and necessary. *Id*. at 470. The litigation expenses had been incurred in the taxpayer's attempt to challenge the issuance of a fraud order against it, which would have resulted in the destruction of its business. *Id*. at 469. The Supreme Court concluded that the litigation expenses were both ordinary and necessary, and that, for the expenses to be denied deduction, "it must be because allowance of the deduction would frustrate the sharply defined policies of [the relevant statute]." *Id*. at 471-474. The Supreme Court noted that the purpose of the relevant statute was to protect the public from fraudulent practices, and then concluded that the litigation expenses did not frustrate this policy because they were incurred in order to present a bone fide defense to a proposed fraud order. *Id*. at 474. Here, the

proposition to be true. Instead, the only item that must be excluded in order to produce gross income is the cost of goods sold. *See Anderson Oldsmobile v. Hofferbert*, 102 F. Supp. 902, 905-906 (D. Md. 1952) (explaining that "the cost of goods sold must be deducted from gross receipts in order to arrive at gross income.").

In the motion to dismiss, defendant asserted that it disallowed Alpenglow's deductions "except for cost of goods sold." (ECF No. 11 at 7.) In their response, plaintiffs did not challenge this statement (*see generally* ECF No. 12), and defendant reiterated it in reply (ECF No. 17 at 9-11). However, in the motion for summary judgment, plaintiffs asserted, for the first time and in unexplained fashion, that the IRS denied the cost of goods sold. (*See* ECF No. 40 at 12.) In turn, defendant did not respond to this new assertion (*see generally* ECF No. 42), and plaintiffs reiterated it in their reply (ECF No. 46 at 6). Evidently burying one's head in the sand is not a characteristic unique to either side in this case. Ultimately, however, the fault here falls on plaintiffs' side because there are absolutely no allegations in the Amended Complaint that the IRS disallowed the cost of goods sold in disallowing plaintiffs' alleged business expenses. Notably, the Amended Complaint characterizes the expenses as "business deductions," rather than the cost of goods sold. (*See* ECF No. 32-1 at ¶¶ 9-11.) Therefore, the Court cannot find that plaintiffs have plausibly alleged a claim that the IRS improperly disallowed the cost of goods sold when the Amended Complaint neither raises such a claim nor alleges any facts in that regard.

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purpose and policy of the CSA is to protect the public from various drugs, including marijuana. It is at least arguable whether allowing a taxpayer to deduct from its gross income expenses incurred in allegedly selling marijuana to the public frustrates the policy of the CSA. This is especially so here where Congress has specifically legislated that such amounts should not be allowed. *Cf. id*. at 474-475 (noting that Congress had not "expressly or impliedly indicated" that the punitive consequences of denying the deduction should result).

As a result, because the Amended Complaint fails to plausibly allege that the IRS disallowed any expenses or costs that the Sixteenth Amendment, or the Constitution generally, requires be allowed, plaintiffs have failed to allege a plausible Sixteenth Amendment claim.

C. Did the IRS' Application of Section 280E Violate the Fifth Amendment?

This claim, much like the claim that the IRS does not have authority to apply § 280E, is premised upon plaintiffs' belief that, in applying that provision, the IRS is performing a criminal investigation of plaintiffs. Specifically, plaintiffs allege that the IRS should have informed plaintiffs that they were under investigation for violating the CSA, citing *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977). (ECF No. 32-1 at ¶ 22.) Apart from the fact that *Tweel* is a Fourth Amendment case, rather than a Fifth Amendment one, *see Tweel*, 550 F.2d at 299, the decision was based upon an IRS agent's "sneaky deliberate deception," which vitiated the defendant's consent to search, *id* at 299-300. This is not the issue here, and thus, *Tweel* in not applicable. In their response to the motion to dismiss, plaintiffs assert that the information obtained from them "was being used to develop findings of criminal wrongdoing." (ECF No. 12 at 12.) As an initial matter, the Court, even at this stage, is entirely unaware of what "information" the IRS has obtained in this case. In any event, whatever information has been obtained was not acquired in order to make findings of criminal wrongdoing. As the Court found *supra*, here, the IRS determined that § 280E applied, which is a purely tax-based determination.

As a result, plaintiffs have failed to allege a plausible Fifth Amendment claim.

D. Did Application of Section 280E Violate the Eighth Amendment?

Plaintiffs allege that § 280E is disguised as a forfeiture provision in that it requires the forfeiture of a taxpayer's entire income and capital. (ECF No. 32-1 at ¶ 24.) In their response to the

motion to dismiss, plaintiffs explain further that application of § 280E "will deal a fatal blow to their business," will "make it impossible" to continue their business, and "will quickly stamp out all of Colorado's legalized marijuana industry." (ECF No. 12 at 16-18.) Plaintiffs assert that such an "industry-ending effect" constitutes a penalty and an excessive fine for purposes of the Eighth Amendment. (*Id*.) Simply put, despite plaintiffs' assertions in their response about the crippling nature of § 280E, no such assertions are made in the Amended Complaint. The Amended Complaint is entirely devoid of any allegations pertaining to the effect that § 280E has had on plaintiffs' ability to do business, or whether, as the plaintiffs suggest, doing their business is now impossible. (*See generally* ECF No. 32-1.) Thus, even if the Court were inclined to consider that application of § 280E amounted to a "penalty," it is entirely unable to assess whether such a penalty would be excessive for purposes of the Eighth Amendment.

As a result, plaintiffs have failed to allege a plausible Eighth Amendment claim.[3]

E. The Motion for Summary Judgment

In light of the findings *supra*, the Court denies the motion for summary judgment with respect to whether the IRS improperly denied the cost of goods sold, whether the IRS has authority to apply § 280E, and whether the application of § 280E violates the Sixteenth Amendment.

The only argument the Court can discern remaining in the motion for summary judgment is whether the IRS has failed to produce sufficient evidence that plaintiffs trafficked in a controlled substance. In part, plaintiffs frame this issue as a burden of proof question. In other words, according to plaintiffs, because § 280E is a penalty, the Internal Revenue Code places the burden of production upon the IRS to establish that a taxpayer is liable for the penalty. (*See* ECF No. 40 at 8-

[3] Because the Court finds that none of the claims raised in the Amended Complaint are plausible, plaintiffs' request for injunctive relief is DENIED.

10, 12-15.) Plaintiffs assert that the evidence the IRS will use to establish that they trafficked in a controlled substance is "entirely mysterious," as the IRS' Notice of Deficiency had no findings of fact establishing trafficking. (*Id*. at 15.)

Under other circumstances the Court might be inclined to agree with at least some of the assertions plaintiffs proffer.[4] However, the Amended Complaint contains no allegations related to the IRS' lack of evidence for disallowing plaintiffs' business expenses. The Amended Complaint is entirely premised upon the IRS' alleged *lack of authority* to disallow plaintiffs' business expenses, as well as the alleged constitutional violations resulting from doing so. There are no allegations that

[4] It is notable that, in its response to the motion for summary judgment, defendant does not dispute the lack of evidence argument from plaintiffs. Instead, defendant asserts that it "needs additional discovery from Plaintiffs and third parties to bolster its evidentiary support showing that Plaintiffs[] trafficked in marijuana during 2010, 2011 and 2012." (ECF No. 42 at 4.) Defendant fails, though, to explain precisely what evidentiary support it already has, i.e., the evidence that needs to be bolstered. All defendant has pointed to so far is plaintiffs' website (*id.*), which is a dubious bases at best to conclude that plaintiffs' trafficked in a controlled substance years ago. Based upon defendant's assertions in response to the motion for summary judgment, it would appear that the IRS has no evidence (other than plaintiffs' website) to support its determination that § 280E applies to plaintiffs' business. A pertinent case in this regard is *Franklin v. C.I.R.*, 65 T.C.M. (CCH) 2497 (T.C. 1993). In *Franklin*, the Commissioner of Internal Revenue issued a notice of deficiency with respect to the taxpayer's failure to report income from alleged sales of heroin. *Id*. at *3. The notice of deficiency provided no information about the items of income (other than the amount), and no basis for determining how the amounts were calculated. *Id*. The Tax Court explained that, although a presumption of correctness attaches to the Commissioner's determination, the presumption fails if a taxpayer can show that the Commissioner did not link him to an illegal tax-generating act. *Id*. at *4. The taxpayer makes an insufficient showing "if it is established that his involvement with an unlawful activity is direct enough to support the inference that he received or used funds in the course of his engagement in that activity." *Id*. The Tax Court found that there was sufficient evidence from which to infer the taxpayer's engagement in unlawful activities in light of the taxpayer having pled guilty to specific acts of heroin distribution during the years in question. *Id*. at *4-5. In addition, the Tax Court found that the taxpayer failed to establish the Commissioner's determination was arbitrary based solely on the Commissioner's failure to demonstrate a rational basis for the same. *Id*. at 5-6. Here, unlike the taxpayer in *Franklin*, plaintiffs have not pled guilty to trafficking in a controlled substance. Instead, as defendant notes, plaintiffs have refused to admit or deny whether they sold medical marijuana between 2010 and 2012. (*See* ECF No. 42 at 10.) As discussed, the only evidence in the record is plaintiffs' website, which hardly seems to provide the necessary inference of illegal activity, at least not with respect to sales up to six years ago. Thus, if plaintiffs' website is the sole basis upon which the IRS issued the Notice of Deficiency in this case, it very well could have been issued arbitrarily. But, as discussed *infra*, that issue is not properly before the Court.

the IRS had a *lack of evidence* to apply § 280E. (*See generally* ECF No. 32-1.) Given that plaintiffs assert that the Notice of Deficiency contained no factual findings of trafficking, plaintiffs could have easily alleged in the Amended Complaint the same issue. Plaintiffs chose not to do so though, and the Court cannot assess a claim that is not even alleged in the Amended Complaint. As a result, the Court denies the motion for summary judgment with respect to plaintiffs' assertion that the IRS has failed to meet its burden of proof in applying § 280E.

F. The Motion to Certify

The motion to certify is premised upon plaintiffs' belief that "the only way that the Court can determine that Colorado's Medical Marijuana Laws must give way to the federal law is to determine that the State of Colorado violated the Supremacy Clause in adopting the laws." (ECF No. 26 at 2-3.) This statement is based upon a faulty premise, however, as it is not necessary for this Court to determine whether Colorado's medical marijuana laws must give way to federal law in order to resolve the claims raised in the Amended Complaint. The issues here concern the applicability and effect of applying § 280E to plaintiffs' business. Section 280E, in turn, can be applied if the trafficking activity is prohibited by *either* federal or state law. *See* 26 U.S.C. § 280E. Therefore, whether or not federal and state law are in conflict is not relevant here.

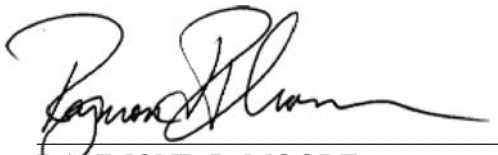
IV. Conclusion

For the reasons discussed herein, the Court GRANTS the motion to dismiss (ECF No. 11.) As a result, this case is DISMISSED. The Clerk is instructed to enter judgment in defendant's favor, and CLOSE this case. The Motion to certify (ECF No. 26) and the motion for summary judgment (ECF No. 40) are DENIED. The motion to amend (ECF No. 30) is GRANTED.

SO ORDERED.

DATED this 1st day of December, 2016.

BY THE COURT:



RAYMOND P. MOORE
United States District Judge