

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOHN V. BLACK,)	
)	
Petitioner,)	
)	
v.)	Docket No. 2260-12.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

On July 3, 2013, respondent filed a Motion for Leave To File Amendment to Answer, lodging the corresponding Amendment to Answer. Respondent's motion states that the notice of deficiency that forms the basis of this case was prepared using information returns provided by third parties. Thereafter, respondent performed a bank deposit analysis and determined that, during tax year 2008, petitioner received additional unreported taxable income from his business activity, which was not reported by third parties and therefore was not included in the original notice of deficiency. Respondent's Amendment to Answer seeks an increased deficiency of \$11,683 and additions to tax resulting from this alleged additional unreported income.

On August 1, 2013, petitioner filed an Objection to respondent's motion for leave. In that objection, petitioner alleges that he wants to settle his case and allowing respondent to amend his answer will result in "added costs, hassles and delay."

Rule 41 of the Tax Court Rules of Practice and Procedure governs amended and supplemental pleadings. Rule 41(a) covers amendments generally and provides in effect that after a responsive pleading is served or 30 days if no responsive pleading is permitted, "a party may amend a pleading only by leave of Court or by written consent of the adverse party, and leave shall be given freely when justice so requires." Like Rule 15(a) of the Federal Rules of Civil Procedure, from which it was derived, Rule 41(a) reflects "a liberal attitude toward amendment of pleadings." 60 T.C. 1089 (explanatory note accompanying promulgation of Rule 41). As such, it tempers Rules 34(b) and 39, which in essence deem waived any issue or affirmative defense not pleaded. The U.S. Supreme Court has interpreted the "freely given" language of Rule 15(a) of the F.R.C.P. follows:

In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by

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virtue of allowance of the amendment, futility of amendment, etc--the leave sought should, as the rules require, be "freely given." * * * [Foman v. Davis, 371 U. S. 178, 182 (1962).]

Whether to permit such an amendment is a matter within the sound discretion of the Court. See Estate of Quick v. Commissioner, 110 T.C. 172, 178 (1998); Law v. Commissioner, 84 T.C. 985, 990 (1985). The touchstone in evaluating whether to allow an amendment is the existence of unfair surprise or prejudice to the nonmoving party. See Foman v. Davis, supra at 182; Estate of Quick v. Commissioner, supra at 178-180; Law v. Commissioner, supra at 990. Such surprise or prejudice, in turn, rests largely on evidentiary and other considerations bearing on the nonmovant's opportunity to respond. For instance, this and other courts may take into account whether the nonmovant would be prevented from presenting evidence that might have been introduced if the matter had been raised earlier and whether the movant delayed unduly in raising the matter. See Foman v. Davis, supra at 182; Estate of Quick v. Commissioner, supra at 178-180; Law v. Commissioner, supra at 990.

Given the liberality of the just-described standard, the circumstances of the instant proceeding fall short of establishing the requisite prejudice to justify denial of respondent's motion. Petitioner's generalized allegations of hassles and delays lack persuasive specifics or value. Furthermore, we cannot find any undue delay, bad faith or dilatory motive on the part of respondent when the existence of this alleged additional unreported income was not known to respondent until respondent obtained petitioner's bank records on or around April 23, 2013, in preparation for trial. To the contrary, shortly after obtaining these records, respondent moved, on May 10, 2013, to continue this case for trial. We note that this alleged additional income provided the basis for respondent's motion to continue, which was granted on June 3, 2013.

While we understand petitioner's desire to settle this case based on the notice of deficiency as issued, Tax Court precedent is clear that "[w]e acquire jurisdiction when a taxpayer files with the Court and that jurisdiction extends to the entire subject matter of the correct tax for the taxable year." Naftel v. Commissioner, 85 T.C. 527, 533 (1985). As a result, we will allow respondent to amend his answer to assert an increased deficiency given that trial in this case has not begun and petitioner will have ample time and fair opportunity to answer and defend against the increased deficiency and additions to tax before they are considered by the Court. Sundstrand Corp. v. Commissioner, T.C. Memo. 1986-531. Additionally, the Court would emphasize that respondent will bear the burden of proof as to this increased deficiency, pursuant to Rule 142, thus further ameliorating any potential prejudice.

Accordingly and upon due consideration, it is

ORDERED that respondent's Motion for Leave To File Amendment to Answer, filed July 3, 2013, is granted. It is further

ORDERED that the Clerk of the Court is directed to file respondent's Amendment To Answer, lodged July 3, 2013, as of the date of this Order. It is further

ORDERED that, on or before October 4, 2013, petitioner shall file a Reply to Amendment to Answer.


(Signed) Peter J. Panuthos
Special Trial Judge

Dated: Washington, D.C.
August 23, 2013