

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

AD INVESTMENT 2000 FUND LLC,	)		
COMMUNITY MEDIA, INC., A PARTNER	)		
OTHER THAN THE TAX MATTERS	)		
PARTNER, ET AL.,	)		
	)		
Petitioners,	)		
	)		
v.	)	Docket No. 9177-08,	9178-08.
	)		
COMMISSIONER OF INTERNAL REVENUE,	)		
	)		
Respondent	)		

**ORDER**

Petitioners moved to shift the burden of proof (motion). Respondent objects.<sup>1</sup>

These consolidated cases are calendared for trial at a special session of the Court scheduled to commence on June 2, 2014, in New York City. The cases are TEFRA cases, in which petitioners seek a redetermination, pursuant to section 6226(b), of the partnership items of AD Investment 2000 Fund LLC and AD Global 2000 Fund LLC, as set forth in Notices of Final Partnership Administrative Adjustment (FPAAs). The issues in these consolidated cases include whether AD Investment or AD Global was an actual partnership, whether they were formed for purposes of tax avoidance, and whether certain transactions engaged in by AD Investment and AD Global lacked economic substance. Petitioners represent, and respondent does not contradict, that the principal witness having knowledge of these issues is James Haber, the President of The Diversified Group Incorporated. Diversified is the Tax Matters Partner of AD Investment and AD Global.

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<sup>1</sup>All section references are to the Internal Revenue Code of 1986, as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Following a hearing held on February 5, 2013, at which Mr. Haber testified (including testimony in camera), the Court ruled that Mr. Haber has a legitimate basis upon which to assert his constitutional privilege against self-incrimination. Mr. Haber has indicated, and confirmed at the February 5 hearing, that he will, on that basis, decline to testify at the trial of these cases.

Petitioners represent, and respondent does not contradict, that, in the absence of Mr. Haber's testimony, petitioners will find it difficult or impossible to carry their burden of proof at trial. Petitioners describe Mr. Haber's role in the transactions at issue; they list facts that they will be difficult or impossible to prove without his testimony.

Petitioners blame respondent for being unable to prosecute their case with the testimony of Mr. Haber. They point to an October 25, 2011, letter from the United States Attorney, Southern District of New York, stating that Mr. Haber had been the subject of criminal investigations by the United States Attorney's office and Internal Revenue Service's Criminal Investigation Division New York field office into his and his companies' tax shelter transactions. A letter of September 11, 2009, from the United States Attorney states that he has no present intention of seeking criminal charges against Mr. Haber. In our order dated November 20, 2012, we reported that, in response to the Court's suggestion, respondent's counsel had again inquired whether the United States Attorney would be willing to grant Mr. Haber immunity in connection with his tax shelter activities. Respondent's counsel was informed that the United States Attorney would not do so "and would not explain why."

Petitioners argue that the Internal Revenue Service and the United States Attorney's office are subdivisions of the executive branch of the United States government, under the common control of the President of the United States, not independent private actors. "[B]oth departments are agencies of one government, namely, the United States," McCarty v. United States, 437 F.2d 961, 973 (Ct. Cl. 1971) (IRS held estopped by conduct of another executive department). "The several departments are all agencies of one government, possessed, theoretically, at least, of a single will." Bank Line v. United States, 76 F. Supp. 801, 804 (S.D.N.Y. 1948) (in a lawsuit filed by Department of Justice, in name of United States but at request of the Treasury Department, the U.S. Navy was a "party" subject to discovery) .

Respondent argues that there is substantial authority against shifting the burden of proof to the Commissioner when a petitioner invokes his Fifth

Amendment rights against self-incrimination. That is true. Mr. Haber, however is not the petitioner, and the FPAAs concern AD Investment and AD Global, not just Mr. Haber. It may be true, as respondent argues, that, by invoking his Fifth Amendment privilege not to testify, Mr. Haber is unavailable to both sides. Yet, we cannot overcome the particular facts of this case. Apparently, Mr. Haber is no longer the subject of a criminal investigation by the Internal Revenue Service and the United States Attorney's office, and the transactions that may have given rise to the suspicion of criminal activities are long past, yet the United States Attorney's office will not categorically relieve Mr. Haber of his fear of prosecution and will not explain why.

Rule 142 addresses the burden of proof. In relevant part, Rule 142(a)(1) provides: "The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court" (emphasis added). We think that, given the central role that Mr. Haber played in the transactions in question and his importance to petitioners' case, the interests of justice will be served if we grant the motion.

It is, therefore,

ORDERED that petitioners' motion to shift the burden of proof is granted, and respondent shall in these consolidated cases bear the burden of proof.

**(Signed) James S. Halpern  
Judge**

Dated: Washington, D.C.  
September 19, 2013