UNITED STATES TAX COURT
WASHINGTON, DC 20217

JEFFREY J. MANQUEN & CAMILLE A. MANQUEN,	)	
Petitioner(s),	)	
v.	)	Docket No. 26666-12.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER

Currently before the Court is respondent's motion to compel responses to interrogatories filed March 27, 2014.

Background

On January 23, 2014, respondent served upon petitioners respondent's interrogatories. Respondent's interrogatories nos. 1 and 2 state:

> 1. Please provide educational and employment history of each of petitioners.
>
> 2. Please provide name, telephone number, and address of the following persons: (1) person(s) who provided any legal and/or tax advices concerning the creation or formation of Effortless Investment Management Company, LLC (a.k.a. Effortless Investment Management, LLC) and Limitless Living, LLC; (2) person(s) who drafted the world-wide exclusive intellectual property license agreement between Petitioner Camille A. Manquen ("Camille") and Limitless Living, LLC ("License Agreement"); (3) person(s) who provided any legal and/or tax advices concerning the License Agreement; (4) person(s) who provided any valuation or appraisal of the property listed in the License Agreement; and (5) person(s) who provided any legal and/or tax advices concerning petitioners'

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> Individual Retirement Accounts ("IRAs") (either traditional or Roth) with Charles Schwab or Entrust Administration, Inc. in 2005, 2006, and 2007.[1]

On March 7, 2014, petitioners served upon respondent their response to respondent's interrogatories. With respect to respondent's interrogatories nos. 1 and 2, petitioners declined to answer, invoking their Fifth Amendment privilege and stating in relevant part:

> Petitioners' education background and the name of Petitioners' advisors do not have any relevance to any 'tax issue' in this case, but may be relevant to some hypothetically possible criminal charges, e.g. "conspiracy", etc. Therefore, Petitioners respectfully decline to answer the foregoing questions in reliance on their 5th Amendment Right against 'self-incrimination'.

On March 27, 2014, respondent filed a motion to compel production of documents. On March 28, 2014, the Court held a conference call with the parties to discuss respondent's motion. During the conference call, petitioners stated that they did not object to interrogatory no. 1 standing alone, but objected to interrogatory no. 1 only when viewed in the light of interrogatory no. 2. That same day, the Court issued an order directing petitioners to answer respondent's interrogatories nos. 1 and 2, or to state a basis as to why they are entitled to protection under the Fifth Amendment. On March 31, 2014, petitioners filed a response and on April 1, 2014, petitioners filed a supplement to their response.

Discussion

The Fifth Amendment privilege extends to: (1) answers that would in themselves support a conviction under a criminal statute; and (2) answers that would furnish a link in the chain of evidence needed to prosecute the witness for violating a criminal statute. Maness v. Meyers, 419 U.S. 449, 461 (1975); Blau v. United States, 340 U.S. 159, 161 (1950). A witness who wishes to claim the Fifth Amendment privilege must be "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." Marchetti v. United States, 390 U.S. 39, 53 (1968).

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[1] On April 21, 2014, the Court held a conference call with the parties, during which respondent clarified that the "in 2005, 2006, and 2007" limitation applied to all five subparts of interrogatory no. 2.

"[T]he Fifth Amendment claim [must] be raised in response to specific questions * * *. This permits the reviewing court to determine whether a responsive answer might lead to injurious disclosures. Thus a blanket refusal to answer any question is unacceptable." United States v. Pierce, 561 F.2d 735, 741 (9th Cir. 1977) (citations omitted), cert. denied, 435 U.S. 923 (1978). It is the providence of the Court, not the witness, to determine whether a claim of the Fifth Amendment privilege is justified. Rechtzigel v. Commissioner, 79 T.C. 132, 137 (1982). "The trial judge in appraising the [Fifth Amendment] claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" Hoffman v. United States, 341 U.S. 479, 487 (1951) (quoting Ex parte Irvine, 74 F. 954, 960 (C.C.S.D. Ohio 1896)).

Invoking the Fifth Amendment privilege is not, however, without consequence in a civil proceeding. The Supreme Court "has recognized 'the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them'". Mitchell v. United States, 526 U.S. 314, 328 (1999) (quoting Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)); see also Sanders v. Commissioner, T.C. Memo. 1997-452. Moreover, we have held that where a party invokes the Fifth Amendment privilege in response to a request for interrogatories, we may place restrictions on the invoking party's ability to introduce evidence with respect to matters over which he has asserted the privilege to assure fairness to the other party. See e.g. Traficant v. Commissioner, 89 T.C. 501, 502-504 (1987). Finally, the Fifth Amendment privilege may also be waived. Where a party voluntarily testifies in a case, "the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination." Kansas v. Cheever, 134 S. Ct. 596, 601 (2013). This rule ensures that a party may not "'set forth * * * all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.'" Id. (quoting Fitzpatrick v. United States, 178 U.S. 304, 315 (1900)).

On April 11, 2014, the Court held a conference call with the parties, during which we alerted petitioners to these potential consequences and gave petitioners until April 16, 2014, to consider whether they wished to withdraw their Fifth Amendment claims. Petitioners did not withdraw their Fifth Amendment claims.

Petitioners argue that their Fifth Amendment privilege is implicated by interrogatory no. 1 because their education and employment history may show that they have the ability to influence people into believing things that are not factually

accurate; show that they intentionally participated in some less than reputable strategy, scam, or fraud; show that they promoted or conspired with others to commit tax fraud; or otherwise discredit them. However, during the conference call on March 28, 2014, petitioners conceded that they do not find interrogatory no. 1, standing alone, to be objectionable. Moreover, petitioners' fears are too remote and speculative. A person's education and employment history is general information found on his resume. We do not see how such general background information could possibly support a criminal conviction or lead to evidence that could support a criminal conviction.

Petitioners argue that their Fifth Amendment privilege is implicated by interrogatory no. 2 because it could lead to evidence that petitioners (with or aided by their advisors) committed criminal tax fraud. We agree with petitioners that disclosure of the identity and contact information of their advisors could: (1) support a conviction that they conspired with their advisors to commit criminal tax fraud; or (2) lead to the discovery of evidence from their advisors that they committed tax fraud. Accordingly, we sustain petitioners' claim of the Fifth Amendment privilege with respect to respondent's interrogatory no. 2.

Respondent argues that the possibility of criminal prosecution is too remote because he "neither has an open criminal case against petitioners nor contemplated a criminal tax prosecution against petitioners." A criminal case need not be pending to justify a claim of the Fifth Amendment privilege. Because a witness who fails to assert the privilege in a non-criminal case also forfeits the privilege in a subsequent criminal case, "it is necessary to allow assertion of the privilege prior to the commencement of a 'criminal case' to safeguard the core Fifth Amendment trial right." Chavez v. Martinez, 538 U.S. 760, 771 (2003). Moreover, it is likewise insufficient that respondent does not currently contemplate prosecuting a criminal tax case against petitioners. As long as there is a reasonable possibility of criminal prosecution, which petitioners have demonstrated, we must sustain petitioners' Fifth Amendment claim.

For the reasons set forth above, we deny petitioners' Fifth Amendment claim with respect to interrogatory no. 1 and sustain petitioners' Fifth Amendment claim with respect to interrogatory no. 2. Accordingly, it is

ORDERED that respondent's motion to compel responses to interrogatories is granted in part and denied in part, in that petitioners shall answer interrogatory no. 1 by April 25, 2014, but may decline to answer interrogatory no. 2 pursuant to their Constitutional Fifth Amendment privilege. It is further

ORDERED that, to ensure fairness to respondent, petitioners are barred from introducing evidence regarding their legal and tax advisors who are covered by interrogatory no. 2.

(Signed) David Laro
Judge

Dated: Washington, D.C.
April 21, 2014