

**UNITED STATES TAX COURT**  
**WASHINGTON, DC 20217**

VANCE FINANCE AND HOLDING	)	
CORPORATION AND SUBSIDIARIES,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 7245-08.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER AND DECISION**

This matter is before us to address three motions petitioner filed on February 18, 2014, Motion to Stay Proceedings, Motion to Shift the Burden of Proof, and Motion to Dismiss, to which respondent replied on April 1, 2014. For the reasons explained herein, we will deny the first two motions and grant the Motion to Dismiss.

This is one of a series of cases before this Court involving schemes designed and promoted by James Haber, the president of the principal petitioner. The tax shelter scheme of this and the other cases involves the contribution of paired foreign currency options to a partnership to generate an artificially high basis in property the partnership later distributes to the taxpayer. The taxpayer sells the high basis property to generate large artificial capital losses to offset legitimate capital gains. The nature of the present transaction is similar to that described in Humboldt Shelby Holding Corp. v. Commissioner, T.C. Memo 2014-47. See also United States v. Woods, 571 U.S. \_\_\_ (2013) (involving a similar transaction but not Haber).

As explained in Humboldt, Haber has been a witness in criminal proceedings in the Southern District of New York. The United States Attorney denied Haber's request for immunity, and petitioners claim he intends to invoke his Fifth Amendment privilege against self-incrimination if called in the present case. Based on these circumstances petitioners seek an indefinite stay or if the stay is denied, an order shifting the burden of proof to respondent under Rule 142(a) of

the Tax Court Rules of Practice and Procedure. If both of the referenced motions are denied petitioners move to have the case dismissed because they claim they cannot proceed without Haber's testimony.

Precedent of this Division of the Court controls the outcome of all three of these motions. In Ironbridge Corp. v. Commissioner, T. C. Memo 2012-158, aff'd 528 Fed. Appx. 43 (2d. Cir. 2013), we explained our decision to deny a nearly identical motion to stay, and we will not reiterate our rationale here. Suffice it to say that a stay in this case would be contrary to the interests of justice and established precedent involving the unavailability of testimony because of a potential witness' Fifth Amendment claims.

We addressed the question of the burden of proof in Humboldt:

Immunity is a statutory creation whose administration Congress bestowed on the executive branch. 18 U.S.C. secs. 6002 and 6003 (2012). Congress has given the Attorney General the authority to exchange the protection of immunity for otherwise incriminating testimony when, in his judgment, a witness' testimony may be in the public's interest. United States v. Quinn, 728 F.3d 243 (3d Cir. 2013). "There is \* \* \* overwhelming judicial and legislative authority for the proposition that review on the merits of a Federal prosecutor's decision to grant immunity is barred by statute." United States v. Herman, 589 F.2d 1191, 1201 (3d Cir. 1978). This bar extends to judicial review on the merits of a prosecutor's decision to withhold immunity. Id.

Rule 142 permits the Court to shift the burden of proof in its discretion under certain circumstances. Given the prosecutor's broad authority to make immunity decisions without judicial interference, we exercise[] this discretion cautiously \* \* \*. T.C. Memo. 2014-47, \*12-\*13.

After careful consideration of Mr. Haber's circumstances, we decline to shift the burden of proof in this case. Shifting the burden of proof would amount to sanctioning the government for the prosecutor's decision to deny immunity. The circumstances of this case do not warrant such interference with the prosecutor's immunity decision.

Respondent does not object to petitioner's Motion to Dismiss. That Motion will be granted and a decision for respondent will be entered.

Given due consideration to the foregoing, it is hereby

ORDERED that petitioner's motion to stay proceedings, filed February 18, 2014 is denied. It is further

ORDERED that petitioner's motion to shift the burden of proof, filed February 18, 2014 is denied. It is further

ORDERED that petitioner's motion to dismiss, filed February 18, 2014 is granted. It is further

ORDERED and DECIDED that there is a deficiency in income tax in the amount of \$16,940,362.00 and a penalty under I.R.C. section 6662(h) in the respective amount of \$6,776,144.80 due from petitioner for the taxable year 2002.

**(Signed) Joseph Robert Goeke  
Judge**

Entered: **APR 22 2014**