Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided. RS

UNITED STATES TAX COURT
WASHINGTON, DC 20217

WILLIAM P. TERHUNE & JENNIFER S. TERHUNE,	)	
Petitioners,	)	
v.	)	Docket No. 11768-13.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This case was calendared for trial at the San Francisco, California trial session commencing June 9, 2014. By Order dated June 2, 2014, this case was stricken from the trial calendar and continued, with jurisdiction retained by the undersigned to address an unresolved sanctions request. Pending before the Court is respondent's request for sanctions arising with respect to petitioners' failure to comply fully with a request for production of documents pursuant to Rule 72.[1]

Background

On March 21, 2014, respondent served Interrogatories and a Request for Production of Documents on petitioners. Upon petitioners' failure to timely respond, see Rules 71(c) and 72(b)(2), respondent filed motions to compel, see Rule 104(b), and requested sanctions in the event of petitioners' failure to comply with any orders issued with respect to the motions to compel. The requested sanctions included a prohibition on the introduction into evidence of any information or testimony related to the issues for which respondent sought interrogatory answers or documents. By Order dated April 24, 2014, the Court granted the motions in part, in that petitioners were directed to answer the Interrogatories, and to produce the documents requested in the Request for Production of Documents, on or before May 8, 2014. The Order further directed respondent to advise the Court by May 15, 2014, whether in respondent's view

[1]Rule references are to the Tax Court Rules of Practice and Procedure.

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petitioners had satisfactorily complied with the Order, and withheld action on the requests for sanctions until after that date.

On May 15, 2014, respondent filed a Status Report advising that petitioners had belatedly, on May 14, 2014, submitted materials that responded to the Interrogatories satisfactorily but that failed to respond completely to the Request for Production of Documents. Respondent renewed his request for sanctions with respect to petitioners' failure to comply with our Order granting respondent's Motion to Compel Production of Documents.

In response, by Order dated May 20, 2014, the Court set respondent's request for sanctions with respect to document production for a hearing at the San Francisco Trial Session on June 9, 2014. On the same day, respondent filed an unopposed Motion for Continuance, on the grounds that additional time was needed for respondent to evaluate petitioner Jennifer S. Terhune's request for spousal relief pursuant to I.R.C. section 6015. Because respondent's Motion for Continuance was silent with respect to disposition of the pending sanctions, the Court directed respondent to file a supplement to his Motion for Continuance advising of his position in that regard.

In his Supplement to the Motion for Continuance, respondent modified his request for sanctions as follows. Respondent requested that, in the event the case were continued, (1) no sanctions be imposed with respect to the motion to compel responses to respondent's Interrogatories, and (2) the sanctions requested with respect to respondent's Motion to Compel Production of Documents be modified in that (a) petitioner Jennifer S. Terhune be allowed to introduce documents regarding her request for spousal relief under I.R.C. section 6015, (b) petitioners be allowed to introduce records that were provided to respondent by May 14, 2014,[2] and (c) that petitioners be prohibited from introducing "any materials, information, or testimony related to the issues for which respondent sought documents and not previously provided to respondent by * * * [May 14, 2014], except for Jennifer S. Terhune's request for innocent spouse relief."

By Order dated June 2, 2014, the Court granted respondent's Motion for Continuance and retained jurisdiction to consider respondent's request for

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[2]While the Supplement refers to this date as "April 14, 2014", the record elsewhere indicates and the parties have confirmed in a conference call, that the correct date for this purpose is May 14, 2014.

sanctions (as modified in his Supplement) at the hearing previously scheduled for June 9, 2014. The parties were advised in the Order that at the hearing they "should be prepared to offer argument concerning respondent's pending request for sanctions".

When this case was called for a hearing on June 9, 2014, respondent appeared but there was no appearance by or on behalf of petitioners.

Analysis

In failing to appear for the hearing or to otherwise respond to our orders or respondent's representations, petitioners have not disputed their failure to comply fully with respondent's Request for Production of Documents served on them on March 21, 2014. They have not claimed that responsive documents were outside their possession, custody or control, or otherwise offered grounds for objection to their production. See Rule 72. Respondent is entitled to a response under the Rules, and petitioners' failure to give one frustrates the preparation of this case for trial or other disposition. Petitioners have had ample opportunity to respond with respect to the documents that have not been produced, and instead they have disregarded respondent's Request, this Court's April 24, 2014 Order, and their obligation to appear at the June 9, 2014 hearing. We accordingly conclude that sanctions are appropriate and will serve to advance the orderly disposition of this case.

Rule 104(c) provides that "[i]f a party * * * fails to obey an order made by the Court with respect to the provisions of * * * [Rule 72], then the Court may make such orders as to the failure as are just". Under Rule 104(c)(2), the Court may sanction a disobedient party by, for example, prohibiting the party from introducing into evidence documents and materials responsive to a formal request for production of documents under Rule 72 with which the party failed to comply despite an Order from the Court directing the party to do so. See Zaklama v. Commissioner, T.C. Memo. 2012-346, at *33-34; McCanless v. Commissioner, T.C. Memo. 1987-573, 54 T.C.M. (CCH) 1111, 1114 (1987).

In respondent's Supplement, he modified his request for sanctions as described above. The modified request would prohibit petitioners' introduction into evidence of any materials, information, or testimony "related to the issues for which respondent sought documents and not previously provided to respondent" by May 14, 2014, except in the case of items related to petitioner Jennifer S. Terhune's request for spousal relief.

We believe that respondent's modified request sweeps too broadly, given that it would likely exclude documents or materials that were not sought in the Request for Production of Documents, as well as any relevant testimony. This would potentially put respondent in a better position in this litigation than if petitioners had promptly and fully complied with the document production request.[3] Instead, we conclude that a narrower sanction is appropriate: petitioners should be precluded from introducing into evidence any documents or materials that would have been responsive to respondent's Request for Production of Documents, except in the case of items related to petitioner Jennifer S. Terhune's request for spousal relief.

The foregoing considered, it is

ORDERED that so much of respondent's Motion to Compel Production of Documents, filed April 22, 2014, as moves for sanctions is granted in that petitioners are prohibited from introducing into evidence documents or materials that would have been responsive to respondent's Request for Production of Documents that were not submitted to respondent on or before May 14, 2014, except for documents or materials regarding petitioner Jennifer S. Terhune's request for spousal relief under I.R.C. section 6015. It is further

ORDERED that so much of respondent's Motion to Compel Responses to Respondent's Interrogatories, filed April 22, 2014, as moves for sanctions is denied as moot. It is further

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[3]While the Court recognizes that petitioners' timely compliance with the Request for Production of Documents might have revealed the existence of other discoverable materials or information, we anticipate that the requirement in the Court's Standard Pretrial Order that documents to be used at trial be exchanged 14 days before the first day of the trial session will operate to mitigate any prejudice to respondent.

ORDERED that jurisdiction is no longer retained by the undersigned and this case is returned to the general docket for trial in due course.

(Signed) Joseph H. Gale
Judge

Dated: Washington, D.C.
June 26, 2014