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

UNITED STATES TAX COURT

WASHINGTON, DC 20217

Cm51

JOHN W. HARRIS & DELILAH E. HARRIS,	)	
Petitioners	)	Docket No. 20421-10.
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER AND DECISION

On March 31, 2014, respondent moved for entry of decision based upon (1) a stipulation of settled issues (written stipulation) initially lodged with the Court on September 16, 2013, and filed during the trial calendar call on December 27, 2013, and (2) an oral stipulation of settlement (oral stipulation) made on the record on the morning of the day of trial that addressed the issues left open by the written stipulation.

Petitioners John W. and Delilah E. Harris oppose the motion and filed a response at the Court's request. During a conference call on June 2, 2014, the Court indicated its inclination to grant the motion but, before making a final ruling, allowed petitioners additional time to supplement their opposition or dispute respondent's computations.[1] Petitioners filed a Notice of Objection

---

[1]From their supplemental opposition, in which petitioners assert that the Court orally granted respondent's motion during the call, it is evident that petitioners' counsel misunderstood what actually transpired. Had we granted the motion, we would not have invited petitioners' counsel to submit a supplemental opposition brief. And had we granted a pending motion in an informal conference call, we would have provided written notice of our ruling to the parties. This Order and Decision contains the Court's first and only ruling on the motion.

SERVED JUL 25 2014

to Motion for Entry of Decision on June 14, 2014. In aggregate, petitioners present three arguments as to why a decision should not be entered as respondent requests.[2]

Missing Signature

First, petitioners claim that the written stipulation is unenforceable because neither petitioner signed it. They acknowledge that their then-counsel, Alvin B. Sherron, did sign the written stipulation, but they assert that nothing indicates he purported to sign on petitioners' behalf, and that respondent has failed to prove petitioners authorized Mr. Sherron to sign for them.

Rule 24(a)(2) recognizes Mr. Sherron, who signed the petition, as petitioners' representative.[3] Rule 23(a)(3) requires that original documents filed with the Court bear a party's or counsel's signature, not both, and Mr. Sherron signed the written stipulation as "Counsel for Petitioners". Hence, Mr. Sherron did purport to sign the document on petitioners' behalf.

Relevant circumstances indicate that he acted with authority. See Dorchester Indus. Inc. v. Commissioner, 108 T.C. 320, 330-331 (1997) ("[w]hether an attorney has authority to act on behalf of a taxpayer is a factual question to be decided according to the common law principles of agency, under which authority "may be derived by implication from the principal's words or deeds" (internal quotation marks omitted)), aff'd without published opinion, 208 F.3d 205 (3d Cir. 2000).[4] Although the written stipulation was first lodged in

---

[2]Petitioners also contend they never conceded that the $61,750 earned by Mrs. Harris and reported on their 2006 federal income tax return as qualified dividend income, should be treated as ordinary income or subject to self-employment tax. Because petitioners did, in fact, make these concessions in the written stipulation of settled issues, we find it unnecessary to further address this argument.

[3]All Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

[4]We note that Dorchester rejects the reasoning underlying petitioners' sole cited authority for this first argument, Estate of Jones v. Commissioner, 795 F.2d 566 (6th Cir. 1986), aff'g T.C. Memo. 1984-53. See Dorchester Indus. Inc. v.

September 2013, the original was filed with the Court at the time of the scheduled trial on December 27, 2013, where Mr. and Mrs. Harris were both present. Neither voiced any objection when, in their presence, respondent's counsel filed this document with the Court. In their briefs, innuendo aside, petitioners do not actually claim that Mr. Sherron lacked authority to sign on their behalf. Indeed, although both petitioners submitted declarations, neither even mentions the written stipulation, let alone contends that Mr. Sherron signed it without their approval. Under these circumstances, we cannot conclude that the omission of Mr. Harris's signature invalidates the written stipulation.

Secret Agreement

Second, petitioners assert that both stipulations are unenforceable because respondent has failed to abide by a secret side agreement reached during the morning of trial on December 27, 2013.[5] That day, on the record and in lieu of the scheduled trial, petitioners conceded both issues remaining in dispute: (1) a $25,000 deduction claimed in 2006 for expenses incurred in a settlement with Golden Eagle Insurance Company, and (2) their alleged overstatement of gross proceeds from Mr. Harris's law practice on their 2006 federal income tax return. Petitioners now claim they made these concessions only because, during a brief recess, respondent's counsel, Michael W. Berwind, assured them he would "accept and consider" any evidence they could offer to substantiate their claimed over-reporting and would adjust the 2006 deficiency determination accordingly. Mr.

Commissioner, 108 T.C. 320, 337-338 (1997).

[5]Petitioners contend that the written stipulation was signed in reliance on respondent's adherence to this secret agreement and was rendered voidable by respondent's counsel's breach. Mr. Sherron's declaration states that he signed the written stipulation on January 27, 2013. A faxed, almost identical copy, bearing an earlier date, without a signature line for Mr. Harris, and containing his signature, was lodged with the Court on September 16, 2013. The secret agreement was allegedly reached months afterward, during the trial call on December 27, 2013. Petitioners do not explain, and we cannot divine, how the faxed copy of the written stipulation could have been signed in reliance on a promise not yet made. The Court notes, however, that the parties' representation that they had resolved all but two issues may have been important to the Court in making its decision to grant the sixth continuance. See infra p.8.

Berwind acknowledges offering to review any substantiation evidence petitioners could muster but denies that the oral stipulation was contingent upon this review.

Neither party advised the Court of any such condition or contingency when the oral stipulation was made.[6] On the record, petitioners, through Mr. Sherron, expressly conceded each issue, and the Court specifically sought clarification as to the amount of allegedly overstated income petitioners had conceded. The Court also specifically sought–and obtained–affirmative assent from Mr. Sherron and from Mr. Harris, who is himself an attorney, to the over-reporting concession. Under our rules, "[a] stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties." Rule 91(e). We apply this proposition equally to oral stipulations as to written ones. See, e.g., Olsen v. Commissioner, T.C. Memo. 1999-331, aff'd without published opinion, 2 Fed. App'x 795 (9th Cir. 2001); Lee v. Commissioner, T.C. Memo. 1993-254. Here, petitioners unambiguously conceded the two remaining issues in the case. We must treat these concessions as conclusive to the extent of the terms agreed in open court.

Petitioners may escape the consequences of their concessions in either of two, related ways. They may prove the settlement voidable under contract principles. See Dorchester Indus., Inc. v. Commissioner, 108 T.C. at 330 ("general principles of contract law" apply to settlement agreements, and the Court has consequently "declined to set aside a settlement * * * in the absence of fraud or mutual mistake"); Saigh v. Commissioner, 26 T.C. 171, 180 (1956) ("[e]xcusable damaging reliance upon a false or untrue representation of the other party * * * is a recognized ground for relief from a settlement stipulation"). Or they may demonstrate that "justice requires" relief from the oral stipulation. Rule 91(e); see also Dorchester Indus. Inc. v. Commissioner, 108 T.C. at 334-335 (identifying possible injustice to the moving party as the principal consideration in deciding whether to enforce a stipulation according to its terms).

---

[6]Had the Court been informed that the settlement was contingent, it would have advised the parties that the case would be tried that day as scheduled unless the settlement contingency was resolved and eliminated from the parties' agreement. The Court had no other scheduled cases for that day and was ready to proceed.

To support relief from the oral stipulation, petitioners contend that Mr. Berwind reneged on the alleged secret deal because, within mere days of receiving petitioners' substantiation evidence, he advised Mr. Sherron the evidence could not, as a logical matter, substantiate over-reporting. According to Mr. Berwind, petitioners' bank deposit analysis and other financial records could substantiate that the law practice had earned gross receipts of $321,510; it could not prove a negative by showing that the practice had not earned an additional $114,943 not documented in the proffered bank and financial statements. Unless petitioners could point to contrary legal authority or present probative evidence, respondent would hold them to the gross receipts they reported and conceded in the oral stipulation.[7] Petitioners describe Mr. Berwind's conduct as, variously, misrepresentation, misconduct, and fraud, and they assert that respondent's counsel induced them to enter into the oral stipulation in bad faith. These are serious charges and should not be made lightly or if untrue.

As an initial matter, petitioners' characterization of the parties' *ex parte* discussion and secret agreement during the morning of the scheduled trial strikes us as implausible. Petitioners allege they were prepared to present evidence substantiating their over-reporting claim but, rather than present that evidence to the Court, they conceded the claim on the record and forwent a trial.[8] If they

---

[7]Respondent made this point in his pretrial memorandum, citing Lare v. Commissioner, 62 T.C. 739, 750 (1974) ("Statements made in a tax return signed by a taxpayer may be treated as admissions."), aff'd without published opinion, 521 F.2d 1399 (3d Cir. 1975), and Pratt v. Commissioner, T.C. Memo. 2002-279, slip op. at 13 (statements in tax return "are binding on the taxpayer, absent cogent evidence indicating they are wrong"). We note that neither of the two decisions upon which petitioners now rely would appear to contradict respondent's conclusion. See A.J. Concrete Pumping, Inc. v. Commissioner, T.C. Memo. 2001-42, slip op. at 6 (noting that respondent had "used a generalized bank deposits analysis to conclude that petitioner had overreported its income" and that petitioner did not contest the downward adjustment in its gross receipts); Rutana v. Commissioner, 88 T.C. 1329, 1336 (1987) (in evaluating whether to impose fraud penalty, observing that petitioner had "overreported income" by recording checks received in December as gross receipts in January of the following year).

[8]Petitioners claim their CFO brought this evidence to the scheduled trial, and that only Mr. Berwind's alleged misrepresentation during the recess prevented

expected respondent would credit their evidence and accede to their over-reporting claim, why would they stipulate to a directly contrary result? Petitioners were represented by counsel, and Mr. Harris is himself an attorney. Why would any reasonable attorney permit a client to formally stipulate to terms more stringent than those informally agreed, placing the client at obvious risk in the event of default and misleading the Court in the process? Moreover, in a September 12, 2013, exchange of correspondence with Mr. Sherron, Mr. Berwind advised that "where * * * a bank deposits analysis * * * [comes] up short of the taxpayer's reported income[,] * * * we go with the amount reported and not the amount we found through the BDA."[9] Why would petitioners thereafter expect Mr. Berwind to accept a bank deposits analysis as proof that their reported gross receipts were erroneously high?

Even assuming, *arguendo*, that petitioners have accurately depicted the nature and content of the parties' off-the-record discussion, they have not alleged any misrepresentation or bad faith by respondent's counsel that would render voidable or justify relief from the oral stipulation. As contemporaneously memorialized by Mr. Sherron, Mr. Berwind agreed as follows: "Petitioners will be allowed two weeks from December 27, 2013, to substantiate the over payment [sic] of income as reported on their 2006 Form 1040 income tax return." After receiving petitioners' proffered evidence, Mr. Berwind responded by letter with

---

them from trying the case. Yet, petitioners also allege they released Revenue Agent Frances Chow from a subpoena and advised her that she need not appear in reliance upon "settlement discussions." Given that petitioners acknowledge they released Agent Chow before the case was called for trial, we question how they could have done so in reliance on statements allegedly made the morning of the trial, as theirs was the only case that day. Moreover, if petitioners otherwise arrived on December 27 prepared to try the case, we question why they would have released a witness they felt sufficiently essential to warrant a subpoena. Because petitioners' allegations concerning Agent Chow are in tension with one another, we find them unpersuasive.

[9]Numerous exhibits accompany respondent's motion for entry of decision, including correspondence between counsel. Petitioners do not object to our consideration of these exhibits, and we also consider the declarations petitioners submitted with their first opposition brief.

his conclusions on January 15, 2014.[10] Petitioners now cry foul because respondent found their evidence wanting. But by their own allegations, Mr. Berwind promised only to consider their evidence, not to find it dispositive. (Had he agreed that petitioners' then-unseen evidence would be dispositive, there would have been no need for petitioners to concede the issue on the record). He also offered petitioners the opportunity to provide alternative substantiation evidence, which option petitioners have apparently declined to exercise in favor of their present allegations. The Court takes misconduct and fraudulent misrepresentation by counsel very seriously. On the evidence and argument petitioners have presented, however, we find that petitioners have proven at most a misunderstanding (their own), not an intentional (or negligent) misrepresentation by Mr. Berwind. Petitioners have not shown that they are entitled to relief from the oral stipulation based upon the alleged secret agreement, either as a matter of contract law or under Rule 91(e).

Bias Allegations

Finally, petitioners both implicitly and expressly accuse the Court of bias against them. They allege that the Court's "only possible reason" for declining to continue the June 2, 2014, conference call to permit their current counsel to prepare argument on the instant motion "would be that Petitioners would be at a grave disadvantage." And they contend that during the call, the Court "expressed * * * personal contempt for having to 'accommodate' Petitioners in scheduling their trial around the holidays" and "admonished" petitioners' counsel for "inconvenienc[ing]" the Court and trial clerk.

We acknowledge that, at the time of the conference call, petitioners' current

---

[10]Petitioners allege that Mr. Sherron provided their bank deposits analysis and other financial documents to Mr. Berwind on December 27, 2013, and that Mr. Berwind counsel misleadingly failed to advise on the spot that the evidence would not suffice. They go on to criticize Mr. Berwind for an overly-rapid response to their January 10, 2014, resubmission of the same documents, which they contend he could not have comprehensively reviewed in three business days. We find these arguments inherently contradictory. If Mr. Berwind received the documents on December 27, he had ample time to review them before sending his January 15 letter, and his rejecting the documents upon first receiving them would hardly have satisfied petitioners' desire for a comprehensive review.

counsel, the third attorney to represent them in this four year-old case, may not have been completely familiar with its procedural history. That history is replete with delays. Petitioners filed their petition on September 13, 2010. Trial was originally scheduled for September 12, 2011. On the parties' joint motion, it was continued and thereafter reset for January 23, 2012. A second continuance (to May 29, 2012), a third (to September 10, 2012), a fourth (to February 11, 2013), a fifth (to September 16, 2013), and a sixth (to December 9, 2013), followed. As the Court observed at the trial call on December 27, 2013, the parties had "gone through almost every judge of the Tax Court with a continuance in this case."

The Court made that observation after having agreed, at the calendar call on December 9, to recall the case later in its three-week calendar because Mr. Sherron was not present.[11] When the Court recalled the case on December 16, the parties advised they had made substantial progress toward a Rule 122 submission and asked the Court to retain jurisdiction and continue the trial (again) to its next Los Angeles trial calendar. Rather than delay proceedings further, the Court offered to schedule trial on December 27, 2013, the last day of its then-current calendar, and the parties agreed they could submit under Rule 122 or be prepared for trial by that date. At the time for trial, the parties informally requested, via the trial clerk, a delay of one hour to address various matters between themselves. When the case was recalled on the morning of December 27, 2013, the parties announced they had reached a basis of settlement. The Court proceeded with the colloquy described above and allowed the parties 60 days to submit stipulated decision documents.

Six months later, rather than a stipulated decision, the Court found itself confronting efforts to unwind the settlement. Given this tortured history of delays, the Court afforded petitioners' newest counsel the opportunity to supplement the briefing filed by her predecessor but declined to reschedule the call.[12] This

---

[11]The Court was advised by petitioner Mr. Harris that Mr. Sherron was out of town due to his elderly father's serious medical condition. Mr. Sherron later told the Court that he had missed the calendar call because he had fallen from a ladder and broken two ribs.

[12]Because of Mr. Harris's personal knowledge of the events of December 27, 2013, and Mr. Sherron's withdrawal from the case, the Court sought Mr. Harris's personal participation in the conference call. Although the Court's

approach seemed eminently reasonable to the Court.

Also understandable was the Court's frustration with petitioners' attempt to extract themselves from a settlement to which they had, on the record and under questioning from the Court, unequivocally agreed. Petitioners' counsel evidently misunderstood the basis for the Court's concern in this regard. The Court acknowledges that this basis may not have been well-articulated, so we take this opportunity to clarify. The Court was not upset because it and the trial clerk were "inconvenienced" by the trial date; that is part of their job. Indeed, the Court, not the parties, proposed December 27, recognizing at the time that both the Court and trial clerk would be spending Christmas elsewhere and would be obliged to travel back to Los Angeles specifically for the trial. The Court's displeasure had a different source: Having elected on December 27, 2013, to forgo a trial and settle the case, petitioners now insist a trial is necessary based upon an alleged settlement contingency kept secret from the Court. Either petitioners were less than candid at the time of the scheduled trial, or their current allegations are intended to force yet another trial date and further delay. Six times, judges of this Court have traveled over 2,300 miles from Washington, D.C., to offer petitioners a trial in their location of choice. The Court's expression of its exasperation with these circumstances reflects its concern for the integrity of the court system and scarce judicial resources, not bias against petitioners. See Noli v. Commissioner, 860 F.2d 1521, 1524, 1527-28 (9th Cir. 1988) (finding no bias where Tax Court judge was "appropriately upset with petitioners' conduct aimed at further stalling the trial").

The Court has duly considered the arguments in the parties' briefs and their supporting exhibits, and pursuant to the written and oral stipulations of the parties hereto, and incorporating herein the facts so stipulated, it is hereby

ORDERED: That respondent's motion for entry of decision is granted; it is further

ORDERED AND DECIDED: That there is a deficiency in income tax due from petitioners for the taxable year 2006 in the amount of $30,027.32;

---

chambers administrator understood Mr. Harris to have agreed, he was apparently unavailable at the time of the call and did not join it.

That there is no deficiency in income tax due from the petitioners for the taxable year 2007 and that there is an overpayment in income tax for that year in the amount of $429.00, which amount was paid on October 17, 2008, and for which amount a claim for refund could have been filed, under section 6511(b)(2), on July 20, 2010, the mailing date of the notice of deficiency;

That there is a penalty due from petitioners for the taxable year 2006, under section 6662(a) and (b)(2), in the amount of $6,005.46; and

That there is no penalty due under section 6662(a) from petitioners for the taxable year 2007.

(Signed) Robert A. Wherry
Judge

ENTERED: JUL 25 2014