UNITED STATES TAX COURT
WASHINGTON, DC 20217

CAYLOR LAND & DEVELOPMENT, INC., ET AL.,		
Petitioner(s),		
v.	Docket No.	17204-13, 17205-13, 17223-13, 19238-13, 23921-13, 23922-13, 23931-13.
COMMISSIONER OF INTERNAL REVENUE,		
Respondent		

O R D E R

These cases are on the Court's September 22, 2014 trial calendar for Phoenix, Arizona. There are a number of pretrial motions pending, even though the stakes involved (even when the asserted deficiencies in the seven consolidated cases are added) are not that great. They do arise from an issue – captive insurers somehow related to private businesses and somehow involved in estate planning – that has caught the Commissioner's eye in many more cases. But even though the issue may be large, the Court is reluctant to have the major costs of extensive discovery and pretrial-motion practice borne by the petitioners in relatively small cases. *See* Rule 70(c)(1)(C).

The first seven of these motions are by petitioner and ask for judgment on the pleadings. In each, petitioner objects to the Commissioner's amended answers that raise the economic-substance doctrine (as well as a couple other now-standard nontextualist doctrines) as additional grounds for disallowing petitioner's deduction for alleged insurance payments. Petitioners complain that the barebones invocation "lack economic substance," "substance . . . does not comport with their form," etc. fails to meet the requirement under Tax Court Rule 36(b) that an answer raising a new issue "shall contain a clear and concise statement of every

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ground, together with the facts in support thereof on which the Commissioner relies . . . ."

Just mentioning the doctrines isn't enough, say the petitioners.

But this is not the right standard for a judgment on the pleadings, which asks not for more specific information but for judgment as a matter of law. *See NIS Family Trust v. Commissioner,* 115 T.C. 523, 537 (2000). And if these deductions in fact lack economic substance, or have a substance different from their form, etc. then *the Commissioner*, not petitioners, deserve to win decisions in his favor.

Next up are two motions by the Commissioner to take party depositions. Rule 74(c)(3)(B) tells us to issue an order giving petitioners the chance to object. We shall do so.

On July 31, 2014 the Commissioner moved to compel the production of documents. This is not the typical motion where a taxpayer has completely failed to engage in discovery, but is instead an example where both sides have responded to the need to exchange documents relevant to case preparation with a spirit less cooperative than the Court's customs and rules expect. Both have acted in ways that sometimes seem a parody of civil discovery. Under Rule 70(f)(1), for example, the signature of respondent's counsel on these document requests is a certification that they are "not unreasonable or unduly burdensome or expensive, given the needs of the case . . . ." Yet his requests cast such wide nets as "all documents showing the business purposes and activities of the entity or individual," Doc. Req. 2, and "Books and records from 2005 through 2011 for each entity," Doc. Req. 7 (note that the tax years before the Court are 2009-2011).

Petitioners followed up by apparently responding with at least one disk consisting of largely empty subfolders and another protected by a password their counsel didn't supply until asked. Plus photocopied pages from old dictionaries to show that respondent's use of the computerese "deduped" made no sense to their counsel, even though it has become a commonplace bit of jargon in the age of electronic discovery.[1]

These are cases with less than $450,000 in total deficiencies at stake. The Court will do its best to get them tried at some reasonable cost: It will deny the Commissioner's motion to compel production of documents, and it will look with favor on any motion by respondent to deny the admission of any evidence not voluntarily produced by petitioners by a date sufficiently far in advance of trial to prevent any last-minute data drop from overwhelming the capacity of his lawyers to prepare for trial. Petitioners, in their objection to respondent's motion, state that respondent has declined an invitation "to review all of petitioners' materials maintained in our office." Respondent is urged to take up that offer.[2]

Respondent also moved to compel responses to interrogatories. These are in proper form and request discoverable information. But respondent served them by mail on July 9, and gave petitioners 30 days to respond. He filed his motion to compel, however, on August 8 – the thirtieth day after mailing. Petitioners state in their objection to this motion that they mailed their answers to these interrogatories by that deadline. Neither respondent in his motion, nor petitioners in their response, attached a copy of these answers. With nothing to show a Court order is required, the Court will deny this motion as well.

The last pending motion is respondent's July 31, 2014 motion to review the sufficiency of petitioners' answers or objections to respondent's requests for

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[1] For fogeys reading this: "Deduped" and related terms like "deduplication" mean the removal of the vast quantities of redundant images in electronic recordkeeping systems, such as the original email in an email stream that gets attached to the bottom of every follow-up email, or the 100-page attachment that is sent in identical form to 50 different emails with the press of a cc button. The term has its own Wikipedia entry *Data Deduplication*, WIKIPEDIA (Aug. 12, 2014, 4:44 PM), en.wikipedia.org/wiki/Data_deduplication; and there have been law-review articles written about it Ralph C. Losey, "Hash: The New Bates Stamp", 12 J. Tech. L. & Pol'y 1 (2007). This subsubsubdispute could have been resolved with a google search.

[2] And the Court notes that any ambiguity – is there a hoard of petitioners' documents "not maintained in [petitioners' counsel's] office?" – will not be construed in petitioners' favor.

admissions. A review of those answers shows that petitioners answered almost all with concise "admits" or "denies", though with a few answers that were qualified a bit. Respondent's objections stem from his belief that the answers aren't true. But that's what a trial – including the ripe possibility of impeachment on cross-examination, if respondent wishes – is for.

Summing up, it is

ORDERED that petitioners' April 21, 2014 motions for judgments on the pleadings are denied. It is also

ORDERED that on or before August 21, 2014, petitioners file their responses to respondent's motion under Rule 74 to take the Caylors' depositions. It is also

ORDERED that respondent's July 31, 2014 motion to compel the production of documents is denied. It is also

ORDERED that respondent's August 8, 2014 motion to compel responses to interrogatories is denied. It is also

ORDERED that respondent's July 31, 2014 motion to review the sufficiency of petitioners' responses and objections to respondent's requests for admissions is denied.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
August 13, 2014