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

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| LEROY LOUDERMILK A.K.A. LEE LOUDERMILK, | ) | |
| Petitioner(s), | ) | |
| v. | ) | Docket No. 12054-11. |
| COMMISSIONER OF INTERNAL REVENUE, | ) | |
| Respondent | ) | |

**O R D E R**

This case involves respondent's efforts pursuant to section 6901 to collect from petitioner, as a transferee of property, a tax debt owed by Midwest Fastener Corporation (Midwest).[1] Presently, we have before us two motions: (1) petitioner's motion for summary judgment in his favor on the grounds that, since respondent did not make all reasonable efforts to collect the tax debt from a successor of Midwest, he may not utilize section 6901 to collect it from petitioner, and (2) respondent's motion in limine, to exclude from evidence a report from petitioner's proposed expert and any testimony from that expert concerning the reasonableness (or lack thereof) of respondent's collection efforts. Each party objects to the other's motion. We will deny the motion for summary judgment and grant the motion in limine. Our reasons follow.

Background

Petitioner owned a substantial portion of Midwest. Midwest owned highly appreciated assets, which it sold in January 2001. Around the same time, petitioner sold his interest in Midwest. Also around that time, Midwest changed its name to MWFI Corporation (MWFI). Midwest/MWFI claimed huge losses on its

[1]Unless otherwise indicated, all section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

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Form 1120, U.S. Corporation Income Tax Return, for its taxable year ended November 30, 2001. MWFI then merged into MWFI Delaware Corporation (MWFI Delaware) in 2003. In December 2007, respondent issued to MWFI Delaware a notice of deficiency, as successor in interest to MWFI, disallowing the losses claimed on the November 30, 2001, return. No petition was filed in response to the notice, and respondent assessed tax and penalties. Respondent now seeks to collect that tax and penalties from petitioner under section 6901.

Both of the motions involve the issue of respondent's collection efforts against MWFI Delaware and others.

Motion for Summary Judgment

The thrust of the motion for summary judgment is that section 6901 sets forth a procedural requirement that respondent first "make all reasonable efforts" to collect from a transferor before it can collect against a transferee. See Gumm v. Commissioner, 93 T.C. 475, 480 (1989), aff'd, 933 F.2d 1014 (9th Cir. 1991). Petitioner avers that respondent did not make all reasonable efforts to collect against MWFI Delaware and related parties, and therefore, he argues, respondent is barred from employing section 6901 to collect from him. Petitioner would have us disregard two recent opinions, Shockley v. Commissioner, T.C. Memo. 2015-113, and Kardash v. Commissioner, T.C. Memo. 2015-51, where we stated that whether respondent has an obligation to first make collection efforts against a transferor is a question of State law. Respondent believes that Shockley and Kardash were correctly decided and that respondent's obligation to pursue MWFI Delaware should be looked at under Illinois law. Under Illinois law, respondent argues, respondent's collection efforts against MWFI Delaware are not relevant to impose liability on petitioner.

We filed the petition on May 23, 2011. Petitioner moved for summary judgment on May 29, 2015, and we received and filed his reply to respondent's objection on July 7, 2015. Trial for this case is scheduled for September 1, 2015. Rule 121(a) provides that a motion for summary judgment shall be filed so as not to delay trial. The motion for summary judgment calls into error two Memorandum Opinions, the review of which cannot be accomplished without delaying trial. Petitioner's motion is thus not timely, and that is a sufficient basis for us to deny it.

Moreover, summary judgment is only appropriate "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials,

together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b). "The moving party bears the burden of proving that there is no genuine issue of material fact, and the Court will draw any factual inferences in the light most favorable to the nonmoving party." Anonymous v. Commissioner, 134 T.C. 13, 15 (2010). Respondent argues that "an inherent question of material fact exists with respect to the reasonableness of respondent's collection efforts." And while, in opposition to a motion for summary judgment, a party "may not rest upon mere allegations or denials", Rule121(d), respondent does detail his agent's collection activities. Petitioner has failed to convince us that further actions would have produced positive collection results for respondent. So, even if we were to agree with petitioner that we erred in Shockley and Kardash, we would deny petitioner's motion for summary judgment on account of a genuine dispute over a material fact.

Motion in Limine

Respondent moves to exclude from evidence the Expert Disclosure of Robert E. McKenzie (McKenzie report), and all of his related testimony at the trial of this case. Petitioner has provided to us an unsigned copy of the McKenzie report. Petitioner sets forth Mr. McKenzie's qualifications to be an expert witness as follows:

> Robert McKenzie spent six years working for the IRS as a revenue officer in the Collection Division, where his duties included investigating delinquent taxpayers and, when necessary, pursing [sic] collection measures against their assets. Mr. McKenzie also served as an instructor for revenue officers. Since leaving the IRS, Mr. McKenzie has concentrated his law practice in representing taxpayers before the IRS and state agencies. From 2009-2011, Mr. McKenzie was a member of the IRS Advisory Council, which advises IRS management. * * *
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> Mr. McKenzie has lectured extensively on the subject of taxation, and has made presentations before thousands of CPAs, attorneys, and enrolled IRS agents throughout the country. * * *

The McKenzie report states: "In this matter, Mr. McKenzie will present the opinion that the Internal Revenue Service did not take 'all reasonable efforts' to collect the tax liability against the transferor, before proceeding against the

transferee." The report continues that, specifically, Mr. McKenzie will testify that, before proceeding against petitioner, the IRS should have made additional collection efforts against Midwest and its successors. The McKenzie report is 23 pages long. Two plus pages recite his qualifications. Two pages recite the facts he relied on in forming his opinion and the documents he reviewed. Two plus pages list additional efforts that he believes the IRS should have taken to collect the debt from the transferor and others. Thirteen pages recite numerous cases, statutes, regulations and provisions of the Internal Revenue Manual as the basis of his opinions. Finally, two plus pages, under the heading "Conclusion/Summary of Opinion", express again all the things that the IRS should have done and express his opinion "that the IRS should have taken further steps to confirm the transferor's inability to pay before seeking transferee liability against Loudermilk."

Besides raising a relevancy objection, that respondent is not obligated to make reasonable collection efforts before pursuing petitioner under section 6901, respondent argues that Mr. McKenzie's conclusions are not reliable, since they are based on broad generalizations that "cannot be tested by or against any particular standards or controls." Respondent also questions the legality of many of Mr. McKenzie's collection alternatives. He also criticizes Mr. McKenzie for impermissible advocacy on petitioner's part, pointing out that a majority of the McKenzie report consists of the citation of authorities that are appropriate to a legal brief. Finally, he argues: "Mr. McKenzie not only instructs the Court on the law * * * but also resolves the ultimate legal issue by his opinion. Expert testimony that expresses a legal conclusion does not assist the court and is not admissible. Santa Monica Pictures, LLC v. Commissioner, T.C. Memo. 2005-104."

Tax Court proceedings are conducted in accordance with the Federal Rules of Evidence. See sec. 7453. Federal Rule of Evidence 702 governs the admissibility of expert testimony. It provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Principally, respondent argues that the McKenzie report will not assist the Court because, in the main, it does not help us to understand the evidence or determine a fact in issue, but, rather, it is a prohibited intervention into the function of the Court to draw legal conclusions; i.e., what are reasonable collection efforts. We agree. While perhaps the report contains a fine listing of collection efforts that the IRS could have taken, Mr. McKenzie's conclusion that the IRS's efforts "do not meet the standard of 'reasonable efforts'" seems to hinge on just that, what the IRS could have done. Whether what it did do is sufficient is (if relevant) another story. Respondent is right. Without reference to external standards of reasonableness for the sufficiency of collection actions, Mr. McKenzie's opinion is simply that, his opinion. As described below, based on his experience, we might receive his testimony as to industry practice, but, without more, we will not accept his testimony as to the reasonableness of the IRS's collection actions. That criticism implicates the second, third, and fourth criteria in Rule 702, Fed. R. Evid., also.

What is reasonable can be informed by what is customary or usual practice. See Texas & Pac. Ry. Co. v. Behymer, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done * * *"); Metavante Corp. v. Emigrant Savs. Bank, 619 F.3d 748, 761-762 (7th Cir. 2010) (evidence of usual business practice relevant in determining whether contract performance was commercially reasonable). And experts may testify to usual business practice based on their specialized experience. Metavante Corp., 619 F.3d at 761-762. Although we shall grant the motion in limine, there is still time pursuant to our standing pretrial order for petitioner, if he wishes, to submit Mr. McKenzie's report as to industry practice. Although our rules contemplate that, if the Court permits, a witness may testify as to industry practice without a written report, see Rule 143(g)(3), we think that here, in fairness to respondent, if Mr. McKenzie or any other witness is to testify as to industry practice, a written report complying with Rule 143 is required.

On the premises stated, it is

ORDERED that petitioner's motion for summary judgment is denied. It is further

ORDERED that respondent's motion in limine is granted, and the McKenzie report, if proffered as his direct testimony, shall be refused.

**(Signed) James S. Halpern**
**Judge**

Dated: Washington, D.C.
July 23, 2015