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UNITED STATES TAX COURT
WASHINGTON, DC 20217

ESTATE OF BLANCHE L. HOWARD, DECEASED, MARY L. HOWARD, EXECUTOR,	)	
Petitioner,	)	
v.	)	Docket No. 30306-13.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

On May 19, 2015, the Court served notice that this case will be tried at the session in Chicago beginning October 19, 2015. On September 18, 2015, petitioner filed a motion for a continuance; and on September 22, 2015, respondent filed an objection.

There are two principal reasons that petitioner seeks a continuance: First, criminal grand jury proceedings have allegedly been instituted in which the targets include the executor of the petitioner estate and Nu-Way, the entity whose note is the subject of the valuation issue in this case. The parties' experts used financial information about Nu-Way (including its gross revenues) to value the Nu-Way note; but now the grand jury is investigating whether Nu-Way hid revenues in excess of those that it reported. Second, petitioner's expert witness has allegedly "terminat[ed] its relationship with Petitioner". On the one hand, it is sometimes inappropriate to require a taxpayer to proceed with a case challenging the Government's civil tax determination (in which case the taxpayer must shoulder the burden of proof) while he also defends himself against a criminal prosecution involving the same subject matter that is brought by a different arm of the same Government. Certainly, the Government could not use the threat of a criminal conviction to hobble civil litigation. On the other hand, a taxpayer-litigant may not

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manipulate proceedings to contrive delay. The Court will conduct a telephone conference with counsel for both parties, at which counsel are invited to respond to and/or to correct the following tentative observations:

Apparent facts

The following apparent facts seem relevant to us in deciding whether to continue the case:

- In December 2014 respondent filed two motions to compel discovery. Petitioner did nothing. The motions were granted. Thus, even before the executor was advised (in March 2015) of the grand jury proceedings, petitioner was not prosecuting this case conscientiously.

- The executor (petitioner's decision-maker in this case, possible witness here on some issues, and target in the grand jury proceedings) has known about the grand jury proceedings since March 10, 2015, and has known about the trial date in this case since May 19, 2015. The executor is herself an attorney, and she has counsel both for the criminal investigation and for this case. Any overlap between the criminal and civil proceedings should have been apparent to her and her counsel no later than March 2015.

- On September 3, 2011, respondent filed another motion to compel; and the Court ordered petitioner to respond. A response to the motion to compel would have been a natural occasion to advise the Court of the grand jury proceedings and the supposed need for a continuance. Petitioner filed no response.

- Petitioner had apparently retained its current counsel, Mr. Kaye, no later than September 9, 2015 (and he provided a Form 2848 to respondent's counsel); but he did not file an entry of appearance with the Court until September 17, and Mr. Rappis did not move to withdraw until September 18.

- The Court conducted a telephone conference that took place with counsel for both parties on September 15, 2015. At that conference petitioner was represented by its then-counsel, the out-going Mr. Rappis, who works at Clifton Larson Allen LLP, the same firm that employs petitioner's expert witnesses. On that date--September 15--Mr. Rappis stated that petitioner would be ready to submit its expert witness report by September 18, 2015.

(He evidently did submit the report, though late, on September 21, 2015, but the undersigned judge has not yet seen it.)

- On September 18, 2015--31 days before trial, and the date that expert reports were due to be exchanged—petitioner filed its motion for a continuanc, through its new counsel.

- The motion for continuance filed by the in-coming Mr. Kaye contradicts the out-going Mr. Rappis and states that "CLA informed the Executor on or about September 4, 2015, that it was formally terminating its relationship with Petitioner and withdrawing its representation of Petitioner from the above-captioned civil matter" and that "because of CLA's withdrawal, Petitioner has not had the opportunity to retain a different expert witness and therefore is unable to submit an updated expert report at this time".

Tentative discussion

The September 18 motion for a continuance was filed 31 days before our October 19 calendar call. Such a motion filed 30 days ahead would be presumptively dilatory, since Rule 133 provides--

> A motion for continuance, filed 30 days or less prior to the date to which it is directed, ... ordinarily will be deemed dilatory and will be denied unless the ground therefor arose during that period or there was good reason for not making the motion sooner.

--but of course it does not follow that a motion filed at least 31 days prior will necessarily be deemed not dilatory. We do not yet perceive here any "good reason for [petitioner's] not making the motion sooner" than September 18. On the contrary, the actions and inactions of petitioner's counsel described above, and especially those in September 2015, are of the sort that one might deliberately employ in order to attempt to tie the Court's hands and make a continuance seem to be a fait accompli. Obviously, we would not indulge such a tactic.

The 14-page motion for continuance is replete with sometimes controversial factual assertions, but it neither cites nor provides any substantiation. It is true that, by signing as an officer of the Court, counsel has certified that, "to the best of [his] knowledge, information, and belief formed after reasonable inquiry, [the motion] is well grounded in fact", Rule 33(a), incorporated by reference in 53(b), and this certification often carries the day. But especially where the alleged facts

seem to contradict his predecessor's assertions or prompt unanswered questions, we may not be persuaded. For example, if it were true that CLA stated by September 4 that it was no longer willing to provide expert testimony, then it would seem Mr. Rappis of CLA should certainly have said so at the telephone conference on September 15. Instead, he assured the Court that the expert witness situation was in order. We take Mr. Rappis—the person who works at CLA and to whom we spoke by phone—at his word.

As to the existence of "parallel" issues prompting the difficulties of simultaneous civil and criminal proceedings, it is unclear whether the executor's testimony is important to the principal issue in the case--the value of the Nu-Way note. Respondent specifically disclaims any intention of proving that Nu-Way's gross receipts were greater than what it had reported:

> [U]nder the willing-buyer and seller test, the Court should not consider new information regarding Nu-Way's financial health. Property is valued "on the basis of market conditions and facts available on . . . [the valuation date] without regard to hindsight." Ames v. Commissioner, T.C. Memo. 1990-87, 1990 WL 163543, *24. A willing buyer of the promissory note, considering purchasing in 2009, would not have facts available to them that have only started to come to light six years later as the result of a grand jury probe. [Objection at 5.]

In addition, even as to respondent's alternative theory (i.e., that the executor, acting as a Nu-Way officer, took actions that diminished the value of the note and/or constituted taxable gifts), respondent assures us that the theory involves "questions that depend heavily on documentary evidence" and "'will necessarily be reflected in transactional documentation'" (Objection at 14, citing Ironbridge Corp. v. Commissioner, T.C. Memo. 2012-158.

From our current perspective, necessarily unaware of the factual details of the case and of the possible testimony, we agree as a general matter that these issues would seem to depend not on the subjective intentions or beliefs of the actor but rather on the objective transactional facts. If the executor subjectively intended a gift but none was objectively accomplished, then there was no gift. In this circumstance, it is possible that petitioner could prevail on this theory even if the Court assumes a donative intent.

The Court would expect to hold the respondent to its representations quoted above. Moreover, given these representations, if respondent were to attempt to call

the executor (or any other grand jury target) as witness at the trial, the Court would not expect to draw any negative inferences from an invocation of the Fifth Amendment unless respondent had first given to petitioner a detailed statement of the facts that respondent expects to elicit during testimony. This either would make it possible for the parties to stipulate those facts (rendering testimony unnecessary) or would disclose the subjects (if any) as to which it is not true that (as respondent has asserted) the facts "will necessarily be reflected in transactional documentation". To the extent the executor's testimony might be helpful simply "to give context to documents" (Obj. at 14), the Court would expect respondent to be especially cooperative in the stipulation process in order to enter those contextual facts into the record without testimony, wherever that is possible. Respondent may include this detailed statement in its pretrial memorandum or, if that is not expedient, then in a draft stipulation served on petitioner no later than October 5, 2015 (the date pretrial memoranda are due to be filed). Of course, petitioner should likewise propose stipulations of fact with a view toward making unnecessary the testimony of any target.

It is

ORDERED that the parties shall take note of the foregoing tentative conclusions. The parties shall give special attention to the Court's comments about using the stipulation process to avoid difficulties of "parallel proceedings". It is further

ORDERED that counsel for both parties shall cooperate with the Chambers Administrator of the undersigned judge (available at 202-521-0850) to schedule a telephone conference to take place Friday, September 25, 2015. It is further

ORDERED that if, in light of the foregoing, petitioner wishes to file a supplement to its motion or respondent wishes to file a supplement to its objection, then either or both of them may make such filings electronically before the time of the telephone conference on September 25, 2015.

(Signed) David Gustafson
Judge

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