

Docket Nos: 5989-11, et al.

On March 8, 2016, McCoy's counsel served respondent with McCoy's Objections to Deposition pursuant to Rule 74(c)(2).

Also on March 8, 2016, petitioner served respondent with petitioner's Objections to Deposition of McCoy pursuant to Rule 74(c)(2).

These consolidated cases involve proposed adjustments under section 482 for the taxable years 2001 through 2007 totaling over \$3 billion, alternative adjustments under sections 367(a) and 367(b), adjustments pertaining to the sale of certain business units to Abbott Laboratories, and accuracy-related penalty for substantial understatement of tax under section 6662(b)(b), and other adjustments.

As with other section 482 transfer pricing cases, this case is extremely large, complex, and fact-intensive. It involves highly sophisticated medical products, many of which include complicated electronic hardware, software and pharmaceutical components.

Respondent has numerous documents containing statements and representations made by McCoy (and other executives) in various contexts, including quarterly analyst meetings. To fully understand the functions, services and strategies of Guidant's CRM business unit, respondent seeks an opportunity to speak with McCoy to discuss his statements and representations and to fully explore details in the documents only a high-level executive can explain.

Respondent sought an informal, transcribed interview of McCoy. Before February 24, 2016, respondent informally consulted with McCoy's counsel regarding taking a deposition or conducting a transcribed interview of McCoy. McCoy's counsel initially informed respondent that McCoy would agree only to a 90 minute, unrecorded interview. McCoy later agreed to extend the interview time to 3 hours.

Petitioners, object to respondent's deposition for three reasons. First, the petitioners assert that a deposition is not available where, as here, the information sought is in respondent's possession or has been made available by another method. In this regard petitioners argue that respondent has failed to show that any information he seeks in a deposition of Mr. McCoy is not either already in his possession or obtainable by some other method. Second, petitioners argue that a

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deposition is not available because respondent has the opportunity to obtain the information sought from previous interviews. Petitioners state that the information respondent seeks is duplicative of documents produced in other litigation. Petitioners produced Mr. McCoy's testimony taken in product liability litigation during 2006-2007. Petitioners believe that those transcripts should be sufficient for respondent in this case. Petitioners also argue that respondent refused an informal interview with Mr. McCoy and thus has failed to make the necessary showing to obtain a deposition. Third, a deposition, petitioners assert would be unduly burdensome.

Regarding the first and second objections, that respondent has interviewed current and former employees with knowledge of the proposed deposition topics, none of the individuals respondent interviewed served as president of Guidant's CRM business. At best, the individuals were vice-president of a specific function within Guidant's CRM business and reported to McCoy. According to respondent none of the individuals interviewed can speak to the direction of the company or the reasons behind the directions of the company. Only the president of the company can provide the necessary knowledge of the relative economic contributions of the company's various functions.

Further, petitioner produced deposition testimony given by McCoy during the course of product liability litigation. Allegedly, the purpose of these prior depositions was to ascertain Guidant's liability for physical injuries resulting from defects in certain CRM devices. Thus, McCoy's prior depositions had a different focus from the deposition sought by respondent. Moreover, to the extent that respondent may ask questions regarding the events that precipitated the product liability litigation, the focus of respondent's questions assumedly will be different, as respondent seeks to understand the business evaluations, decisions and actions resulting from the product defects and ensuing litigation.

Regarding the third objection, the Court is satisfied that respondent has made sufficient effort to obtain information informally and has sought depositions only where necessary. Respondent's request to depose Mr. McCoy is reasonable in light of McCoy's unique position and the size and complexity of this case. The depositions sought by respondent are reasonable given the size and scope of these consolidated cases and their factual complexity.

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The information sought is reasonably calculated to lead to the discovery of admissible evidence and/or is relevant. See Tax Court Rule 70(b). The proposed deposition would further the basic purposes of discovery – to ascertain facts which have a bearing on the issues before the Court and minimize surprise by allowing the parties to obtain knowledge of all relevant facts. P.T. & L. Construction Co. v. Commissioner, 63 T.C. 404, 424 (1974).

Given due consideration to the foregoing, it is hereby

ORDERED that respondent's Motion to Compel the Taking of Deposition (Fred McCoy) filed April 7, 2016, is granted.

(Signed) David Laro
Judge

Dated: Washington, D.C.
April 26, 2016