UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

EDWARD FRANCIS BACHNER, IV & REBECCA GAY BACHNER,	)	
Petitioners	)	
v.	)	Docket No. 23219-15.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER TO SHOW CAUSE

All section references, unless otherwise specified, are to the Internal Revenue Code of 1986, as amended. All Rule references are to the Tax Court Rules of Practice & Procedure.

Background

The material in this Background section is based on the court papers, the stipulation of facts proposed by the IRS, and the exhibits attached to the proposed stipulation of facts. When referring to facts in the proposed stipulation of facts, this Order refers to "Prop. Stip. ¶ ____". When referring to an exhibit attached to the proposed stipulation of facts, this Order refers to "Ex. ___".

Mr. and Ms. Bachner, the petitioners in this case, filed federal income tax returns for the years 2005, 2006, and 2007. Prop. Stip. ¶¶ 6, 7, 8; Ex. 2-J, 3-J, 4-J.

In June 2009 Mr. Bachner was indicted by a federal grand jury on various counts of violations of federal criminal law, including knowingly filing false claims with the IRS for tax years 2005, 2006, and 2007 under 18 U.S.C. § 287. Prop. Stip. ¶ 10. 18 U.S.C. § 287 makes it a crime, punishable by up to five years in prison, to make a false claim on the federal government. The crime is a felony. Eastman v. Marine Mech. Corp., 438 F.3d 544, 551 (6th Cir. 2006). A person cannot be brought to trial for a federal felony unless a grand jury indicts that person. U.S. Const. amend. V; Fed. R. Crim. P. 7(a)(1).

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In August 2011 Mr. Bachner signed a plea agreement, which was filed with the U.S. District Court for the Northern District of Illinois. Prop. Stip. ¶¶ 11-12; Ex. 5-J. In the plea agreement, he pleaded guilty to knowingly presenting a false claim to the IRS in violation of 18 U.S.C. § 287 by filing his 2005 income tax return claiming false refunds of withholding tax. Prop. Stip. ¶¶ 11-12; Ex. 5-J. Although Mr. Bachner did not plead guilty to the charges related to the tax years 2006 and 2007 in the plea agreement, he acknowledged in the plea agreement that he knowingly presented claims that were false to the IRS by filing his income tax returns for tax years 2006 and 2007 that falsely claimed refunds of withholding tax. Prop. Stip. ¶ 13; Ex. 5-J.

In June 2015 the IRS issued a notice of deficiency to the Bachners determining that they were liable for fraud penalties under section 6663 for the tax years 2005, 2006, and 2007. Notice of deficiency at 1. Under section 6663, a penalty is imposed on the fraudulent part of an underpayment of tax. Sec. 6663(a). The underpayments calculated by the IRS related to the claims on the Bachners' returns about tax withholding. Notice of deficiency at 14, 25, 36. See Treas. Reg. § 1.6664-2(c)(1).

In September 2015 the Bachners filed a petition challenging the notice of deficiency.

The IRS has conceded that, under the provisions of section 6015, Ms. Bachner is relieved of joint and several liability for the fraud penalties.

On August 10, 2016, the IRS moved for an order to show cause why its proposed stipulation of facts should not be deemed admitted under Rule 91(f). Rule 91(f) provides that if one party refuses to stipulate to the facts in a case, the adversary may file a motion with the Court for an order directing the delinquent party to show cause why the matters covered in the motion should not be deemed admitted.

The proposed stipulation of facts contains more detail about Mr. Bachner's misconduct than does the plea agreement. For example, in the plea agreement Mr. Bachner agreed that he submitted an income tax return for 2006 falsely claiming a refund of withholding tax of $224,377. Ex. 5-J at ¶ 7.a. The proposed stipulation of facts states more specifically that:

- Mr. Bachner's actual wages during 2006 were $9,230, paid by New England Life Insurance Company. Prop. Stip. ¶ 35.

- Mr. Bachner's actual wage withholding during 2006 was $712. Prop. Stip. ¶ 36.

- The Bachners reported on their 2006 tax return they received wages of $1,053,828. Prop. Stip. ¶ 37.

- Mr. Bachner attached to the return a fake Form W-2 stating that he was paid $1 million in wages from EB Strategic Research, LLC, and that it withheld $500,000 from his wages for federal income taxes. Prop. Stip. ¶¶ 38, 41.

- The Bachners received a refund from the IRS of $218,166.79. Prop. Stip. ¶ 42.

By order dated September 2, 2016, the Court granted the IRS's motion and required the Bachners to show cause in writing why the IRS's proposed stipulation of facts should not be deemed admitted under Rule 91(f).

On September 6, 2016, the Bachners filed a response to the September 2, 2016 order requiring them to show cause. On September 16, 2016, the Bachners supplemented this response. Rule 91(f)(2) requires such a response to state the party's views on the proposed stipulation of facts in question. Specifically, the party must identify each matter on which there is no dispute, and for each matter for which there is a dispute, the sources, reasons, and basis for the dispute. In the Bachners' response to our order to show cause, the Bachners gave various reasons that they should not be required to address the proposed stipulation of facts.

On October 24, 2016, the Court held a hearing regarding its order to show cause. Rule 91(f)(2) permits the Court to hold such a hearing.

At the hearing Mr. Bachner explained further the reasons he contends he should not be required to address the proposed stipulation of facts. Thus, we have two sources of the reasons for the Bachners' refusal to address the proposed stipulation: (1) the Bachners' September 2, 2016 response to our order to show cause (and the supplement to the response) and (2) the explanation given by Mr. Bachner at the October 24, 2016 hearing. What follows is a partial list of these reasons:

1. To respond to the statements in the proposed stipulation would be self incriminatory. In particular, by responding to the proposed stipulation, Mr. Bachner would prejudice his effort to vacate his plea agreement and to appeal the criminal sentence resulting from his plea agreement.

2. The Bachners' documents related to portions of the proposed stipulation of facts were seized by the Department of Justice.

3. The IRS has provided no means for the Bachners to independently and objectively verify the claims in the stipulation of facts.

4. The notice of deficiency is invalid because it determines joint liabilities of Mr. and Ms. Bachner even though the IRS concedes that Ms. Bachner is entitled to relief under section 6015.

5. The IRS had closed its examination of the 2005, 2006, and 2007 years and therefore is barred from determining fraud penalties for those years.

6. The prior criminal proceeding resolved the IRS's need for stipulations.

7. Some material in the proposed stipulation is inadmissable because it stems from a criminal plea agreement.

8. The IRS cannot assert a fraud penalty because it never conducted an audit of the 2005, 2006, and 2007 tax returns.

9. The IRS has failed to meet its burden of proving fraud.

10. The period for assessing the fraud penalty is six years; this six-year period has expired.

11. The material in the stipulation of facts is irrelevant to the fraud penalty.

12. The proposed stipulation of facts was already resolved in the criminal proceeding.

13. The federal government has defrauded the Bachners.

14. The Bachners have not had time to engage in discovery.

15. The IRS has already agreed to another stipulation that is contrary to the stipulation of facts it proposed.

16. The IRS employee who signed the notice of deficiency was an Appeals Officer and therefore had a conflict of interest.

Discussion

The first reason given by the Bachners is self-incrimination. The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." This privilege can justify a person refusing to answer questions in discovery in a civil proceeding such as a Tax Court deficiency case. See Traficant v. Commissioner, 89 T.C. 501, 502 (1987). The privilege extends to answers that would in themselves support a conviction under a federal criminal statute but also those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. Hoffman v. United States, 341 U.S. 479, 486 (1951). The privilege can be invoked only when an answer would expose the person to a real danger of criminal prosecution. McCoy v. Commissioner, 76 T.C. 1027, 1029 (1981), aff'd, 696 F.2d 1234, 1236 (9th Cir. 1983). There is no privilege when criminal prosecution is unlikely. Wilkinson v. Commissioner, 71 T.C. 633, 638 (1979). It is for the Court to determine whether the privilege justifies a refusal to answer questions. Hoffman v. United States, 341 U.S. at 487. In making the determination the trial judge "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." Id.

We thus consider whether it would be self-incriminatory for the Bachners to address, under Rule 91(f)(2), the proposed stipulation of facts. See Durovic v. Commissioner, 84 T.C. 101, 109 (1985) ("The petitioner claimed his Fifth Amendment privilege in refusing to respond to the interrogatories and the request for production of documents. After oral argument on the motions, we, by order dated October 26, 1982, found, among other things, that the petitioner was entitled to claim the privilege against self-incrimination."). If we determine that it would be self-incriminatory, we could relieve them of the obligation to address the proposed stipulation of facts. See Rule 70(b) ("The information or response sought through discovery may concern any matter not privileged and which is relevant to the subject matter involved in the pending case.") See also Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice and Procedure § 2018 (2010) ("Since [Federal Rule of Civil Procedure] 26(b)(1) provides that discovery may only be had of "nonprivileged matter, the discovery rules cannot reach information that is protected by the privilege against self-incrimination . . . . Courts have repeatedly held that the privilege against self-incrimination justified a person in refusing to answer questions at a deposition, or to respond to interrogatories or requests for admissions, or to produce documents." However, we find that addressing the proposed stipulation of facts would not expose the Bachners to a real danger of prosecution. Mr. Bachner has already been indicted for, and has pled guilty to, filing a false claim for the 2005 tax year. U.S. Const. amend. V; United States ex. rel. Stevens v. Circuit Ct. of Milwaukee County, Wis., Branch VIII, 675 F.2d 946, 948 (7th Cir. 1982). The

question becomes whether he faces a real danger of being prosecuted for the other two years, 2006 and 2007. In his agreement to plead guilty for the 2005 year, Mr. Bachner admitted that he filed false claims against the government for the 2006 and 2007 years. Despite this admission, the government did not prosecute Mr. Bachner for the 2006 and 2007 years. We find the possibility remote that the government will later prosecute Mr. Bachner for the 2006 and 2007 years based upon his statements regarding the proposed stipulation of facts. We therefore hold that the Bachners may not claim privilege in this Rule 91(f) matter.[1]

We now discuss reasons 2 and 3. In some circumstances, a party might be legitimately excused from addressing a proposed stipulation on the grounds that the party cannot verify whether the proposed stipulation is correct. After all, the party proposing the stipulation (here, the IRS) is required by Rule 91(f)(1) to set forth the sources, reasons, and basis for each of the statements in the proposed stipulation. If the proposed stipulation is not so supported by the proposing party, then the adversary might be entitled to demonstrate this failure. In this instance, however, we observe that each of the points in the proposed stipulation of facts is supported in the IRS's motion for order to show cause. The Bachners' assertion that the proposed stipulation of facts is unsupported is unpersuasive.

We now address reasons 4 through 16 (and all other reasons given by the Bachners that are not enumerated in the 16-point list). We determine that none of these reasons justify the Bachners' refusal to give their reasons for addressing the proposed stipulation of facts.

Because the Bachners asserted the privilege of self-incrimination in response to our show-cause order, and because we have overruled that claim of privilege, we again order the Bachners to address the IRS's proposed stipulation of facts. Their response should comply with Rule 91(f)(2). They should give none of the reasons for

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[1]In making our determination that the Bachners may not claim the self-incrimination privilege, we have assumed that (1) the proposed stipulation of facts correctly describes the indictment and (2) the plea agreement attached to the stipulation is authentic (as is claimed in the proposed stipulation of facts). Although we have not yet decided whether the proposed stipulation should be deemed admitted, Bachner has himself provided no details about his prior prosecution, such as the indictment and the plea agreement. Thus, if we were to avoid making the two assumptions referred to above, we would still find unpersuasive his claim that he would be exposed to a real danger of prosecution by addressing the proposed stipulation of facts under Rule 91(f)(2). Acock, Schlegel Architects, Inc. v. Commissioner, 97 T.C. 339, 358 (1991) (the person claiming the privilege has the burden of establishing the existence of a real danger of self-incrimination when the danger is not readily apparent from the implications of the question asked or the circumstances surrounding the inquiry).

noncompliance addressed in this Order. If they do give such reasons, an order will be issued deeming the matters in the proposed stipulation admitted under Rule 91(f)(3).

Conclusion

Given the foregoing, it is

ORDERED that petitioners' September 16, 2016 response to the Court's September 2, 2016 Order to Show Cause is recharacterized as petitioners' supplement to response to Order dated September 2, 2016 Order. It is further

ORDERED that petitioners shall, on or before March 27, 2017, file responses in compliance with the provisions of Rule 91(f)(2), with proof of service of a copy thereof on opposing counsel, showing why the facts and evidence set forth in respondent's proposed stipulation of facts, marked as Exhibit A to respondent's August 10, 2016 motion for order to show cause why proposed facts and evidence should not be deemed admitted for the purposes of this case. If no response is filed within the period specified above with respect to any matter or portion thereof, or if the response is evasive or not fairly directed to the proposed stipulation or portion thereof, the matter or portion thereof will be deemed stipulated for the purposes of the pending case, and an order will be entered, accordingly, pursuant to Rule 91(f)(3).

(Signed) Richard T. Morrison
Judge

Dated: Washington, D.C.
February 17, 2017