UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

MONEYGRAM INTERNATIONAL, INC. AND SUBSIDIARIES, ET AL.,	)	
Petitioner(s),	)	
v.	)	Docket No. 12231-12, 30309-12.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This case is on remand from the United States Court of Appeals for the Fifth Circuit for further proceedings pursuant to its mandate issued January 9, 2017. On May 5, 2017, the Internal Revenue Service (IRS or respondent) moved for leave to amend its answer and e-lodged a First Amendment to Answer. We shall grant the motion.

The central question in this case is whether petitioner is entitled to ordinary loss treatment with respect to certain securities losses on the theory that it is a "bank" within the meaning of I.R.C. § 581. We granted respondent's motion for summary judgment on this question, but the Fifth Circuit vacated our decision and remanded for further consideration. One issue we must address pursuant to the remand concerns the nature of certain "delayed remittances" that arise when customers purchase money orders from petitioner's agents and the agents hold on to the cash for a time before remitting the funds to petitioner. We must decide (among other things) whether such delayed remittances constitute "loans" from petitioner to its agents.

Respondent has moved to amend his answer to advance the contention that judicial estoppel bars petitioner from arguing that it has a debtor-credit relationship with its agents that is akin to how a bank interacts with its borrowers. Respondent contends that petitioner has successfully argued in other courts, including bankruptcy courts, that it has a fiduciary relationship, not a debtor-creditor

SERVED Jun 27 2017

relationship, with its agents. Respondent wishes to amend his answer to assert judicial estoppel as an affirmative defense.

Neither this Court nor the Fifth Circuit considered the application of judicial estoppel because respondent had not previously advanced this contention. However, in a summary judgment memorandum filed in April 2014, respondent cited prior litigation in which petitioner allegedly had taken the position that funds representing delayed remittances were held by its agents in a fiduciary capacity rather than in a debtor-creditor capacity. In that memorandum respondent noted that, "[i]n the event that the Court does not resolve these issues on summary judgment grounds, respondent anticipates filing a motion for leave to amend his Answer * * * to affirmatively allege that petitioner is prohibited, under the doctrine of judicial estoppel, from arguing before this Court that * * * [petitioner] has a debtor-creditor relationship with its agents."

Rule 41(a) of this Court's Rules, as applicable to this stage of the case, provides that "a party may amend a pleading only by leave of Court or by written consent of the adverse party, and leave shall be given freely when justice so requires." Rule 41(a) reflects "a liberal attitude toward amendment of pleadings." Stephens v. Commissioner, 60 T.C. 1089 (1974) (explanatory note accompanying promulgation of Rule 41). Whether leave to amend answer will be granted is a question falling within the sound discretion of the Court. Waterman v. Commissioner, 91 T.C. 344, 349-350 (1988). The most important factor in deciding whether leave will be granted is prejudice to the opposing party. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330-331 (1971). Prejudice can occur if the opposing party were required to engage in substantial new preparation at a late stage in the proceedings, necessitating added time and expense, or if the issues raised in the amendment are only tangentially related to the other issues in the case.

We conclude that justice requires that we grant respondent leave to amend his answer to plead judicial estoppel as an affirmative defense. Consideration of this argument will not violate the Fifth Court's mandate because whether petitioner has taken inconsistent positions may be relevant in determining whether it and its agents conducted themselves as if the "delayed remittances" were loans. The issue raised by respondent's proposed amendment is not tangential to this case, but is intertwined with a central question that we must decide on the merits.

Petitioner will not suffer prejudice if leave is granted. The evidence relevant to consideration of the "judicial estoppel" argument does not appear to be complex. Petitioner has been aware, for at least three years, of the possibility that respondent

might advance this argument at a later stage of the case, and it thus errs in contending that respondent has "unreasonably delayed" in making this defense known. The case has not been set for trial, and petitioner will have ample time to do any additional trial preparation that proves necessary.

In consideration of the foregoing, it is

ORDERED that respondent's Motion for Leave to File First Amendment to Answer, filed May 5, 2017, is granted, and the Clerk shall file the First Amendment to Answer that was e-lodged with the Motion. Because judicial estoppel is an "affirmative defense[] pleaded in the answer," respondent shall bear the burden of proof on this issue under Rule 142(a)(1).

(Signed) Albert G. Lauber
Judge

Dated: Washington, D.C.
June 23, 2017