UNITED STATES TAX COURT
WASHINGTON, DC 20217

DUANE PANKRATZ, ET AL.,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 21255-13, 27239-13.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	
	)	

O R D E R

These cases were on the Court's June 15, 2015 St. Paul, Minnesota trial calendar, and arise from the 2008 and 2009 tax years. We continued them on petitioner's motion because the cases presented a very large number of issues. The parties reasonably proposed to take some time to corral the relatively noncontroversial issues, and then identify the remaining issues that both thought had a reasonable probability of needing to be tried. The Court issued a pretrial order whose deadlines were extended when no St. Paul calendar was set until September of this year. These cases are set to be tried at that calendar.

On August 4, 2017 petitioner moved *in limine* to preclude new matters from being tried.[1] He lists three:

[1] What's a new matter? "[A] 'new matter' is one that reasonably would alter the evidence presented. A 'new theory' is just a new argument about the existing evidence." *Hurst v. Commissioner*, 124 T.C. 16, 30 (2005). Respondent thus errs when he asserts that a new position is not a new issue if it is not inconsistent with the original determination and does not result in an increased deficiency. We do not take seriously any assertion that these three issues would not require radically different evidence than the usual proof of substantiation of particular expenses that the notices of deficiency said was lacking.

whether he (and his wife) materially participated in his businesses
under I.R.C. § 469;

whether those businesses (there are many) should be regrouped from the three Schedules C petitioner reported to six Schedules C (plus a computational Schedule C7), as respondent urges; and

whether a loss from the sale of business property -- the All Decked Out building reported on petitioner's 2008 return on Form 4797 -- should be disallowed as a bargain sale.[2]

That the parties are fighting over what issues should be tried this late in the process in a case of this size is unusual.

One begins with the notices of deficiency. As petitioner skillfully established through interrogatories, respondent did not raise a single one of these issues in the notices of deficiency.[3] A check of the Court's dockets shows only a barebones answer and no amended answers at all.

Respondent first argues that he raised the issues in an information document request and a letter back in September 2015. This crashes right into as close to an airtight syllogism as one gets in law:

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[2] All Decked Out, Inc. barely made it into the notice of deficiency at all. In the notice for 2008 there is what seems to be a recharacterization on section 469 grounds of $33 in nonpassive income.

[3] With a few tiny exceptions -- Attachment A to the notice of deficiency for 2008 shows numerous disallowances or loss limitations in the form "passive loss limited by basis & 469." In a multimillion-dollar case, it is striking that these are all in the four- or five-figure range, with one exception. That exception is an entity called Grand Legacy LLP, but respondent in his pretrial memo admits this entity (apparently holding some kind of mining interest and not reported on petitioner's Schedules C) wasn't even the subject of an audit.

> Our Court refuses to consider issues which have not been pleaded. *See, e.g.*, *Foil v. Commissioner*, 92 T.C. 376, 418 (1989), *affd.* 920 F.2d 1196 (5th Cir. 1990); *Bell v. Commissioner*, 102 T.C.M. 609, 611 (2011); *Troutman v. Commissioner*, 87 T.C.M. 953, 955 (2006).
>
> "There shall be a petition and an answer, and, where required under these Rules, a reply. No other pleading shall be allowed, except that the Court may permit or direct some other responsive pleading." Rule 30.
>
> Information document requests and letters from counsel are not pleadings.

Respondent therefore has not properly pleaded the three issues petitioner has labeled "new matters."

But that may not be the end. Respondent next argues that there is an exception to the must-be-in-the-pleadings-to-be-tried rule: Rule 41(b)(1) tells us that when the parties expressly or impliedly try an issue by consent, it is treated as if it were in the pleadings. Respondent argues that he has been communicating with petitioner about these three issues, seeking discovery about them, and even traveling to remotest South Dakota to review evidence and listen to potential witnesses about them.

The problem here is that discovery isn't trial. Our Rule speaks in plain English on the point: "Discovery shall be completed and any motion to compel or any other motion with respect to such discovery shall be filed, unless otherwise authorized by the Court, no later than 45 days prior to the date set for call of the case from a trial calendar." Rule 70(a)(2). Motions *in limine* to preclude new matters are precisely what a party can use to overcome any unspoken urge to raise and try interesting new matters at trial.

In big cases like these, with a lot of potential issues, it is not at all unusual for the Court to entertain motions to amend pleadings after discovery shows something that gives one side or another hope on a previously unknown matter. But that simply didn't happen here, and the Court will proceed to trial on the issues as framed by the original notices of deficiency, limited to those assignments of error petitioner noted in his petition.

It is

ORDERED that petitioner's August 4, 2017 motion *in limine* is granted and respondent shall be precluded from offering evidence at trial of: (a) the Pankratzes' failure to materially participate in the family's businesses (except those listed in Attachment A to the notice of deficiency for 2008); (b) the Pankratzes' failure to group their businesses properly on their Schedules C; and (c) whether the sale of the All Decked Out building was properly reported on Mr. Pankratz's 2008 Form 4797.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
September 8, 2017