

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JONATHAN ZUHOVITZKY & ESTHER)	
ZUHOVITZKY,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 3489-16.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case was calendared for trial during the Court’s trial session in New York, New York, commencing on September 25, 2017. On September 12, 2017, petitioners filed a Motion to Allow Testimony by Contemporaneous Transmission from a Different Location. Therein petitioners Jonathan Zuhovitzky and Esther Zuhovitzky sought leave to testify remotely from Berlin, Germany, via live video transmission or similar technology. After respondent objected to petitioners’ motion, the Court held conference calls with the parties on September 20, 2017, and September 21, 2017.

By order dated September 21, 2017, the Court continued the case, took petitioners’ motion under advisement, and ordered the parties to meet and confer “regarding conditions that would address the concerns raised by petitioners’ testimony by contemporaneous transmission from Germany.” The Court also ordered the parties to file a status report “proposing an arrangement that is satisfactory to the parties, the Court, relevant foreign government entities, and relevant domestic government entities.” The parties each filed timely status reports expressing disagreement about the propriety and logistics of allowing petitioners to testify remotely from Germany.

Tax Court Rule 143(b) permits the Court to hear testimony by contemporaneous transmission from a different location “for good cause in compelling circumstances and with appropriate safeguards”. See also Fed. R. Civ. P. 43(a). Petitioners have shown that their request to testify remotely from

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Germany is “for good cause in compelling circumstances”. In their motion papers petitioners’ counsel state that: (1) petitioners have resided in Germany since 2010; (2) petitioners are elderly; (3) Mr. Zuhovitzky has serious spinal issues resulting from severe scoliosis, nerve root compression syndrome, herniated discs, osteochondrosis, and sciatica; (4) Mr. Zuhovitzky’s physician advised him not to travel long distances on account of his spinal issues; (5) Mrs. Zuhovitzky, while in good health herself, is Mr. Zuhovitzky’s sole caretaker; and (6) petitioners’ adult children reside in Israel. Petitioners attached to their motion a corroborating medical report from Mr. Zuhovitzky’s physician.

Furthermore, petitioners state that they are willing to retain a company in Germany that has the technological capabilities to transmit their testimony to the place of trial. Petitioners are also willing to engage a company in the United States to provide technical support and equipment, including video monitors, at the place of trial. Petitioners recognize that they must bear all costs involved in arranging for and securing their testimony via live video transmission.

With respect to the issue of “appropriate safeguards”, respondent contends that a representative of the Internal Revenue Service (IRS) or the U.S. Government should be present with petitioners. Petitioners do not object to this request in their status report. We find that petitioners’ proposed arrangement, coupled with the presence of a U.S. Government representative at the location where petitioners will testify, satisfies the “appropriate safeguards” requirement of Tax Court Rule 143(b).

In his objection and status report respondent questions whether the Court can administer oaths to petitioners outside of the United States. Federal Rules of Evidence (“FRE”) 603, Oath or Affirmation to Testify Truthfully, requires that “[b]efore testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness’s conscience.” The Court is satisfied that administering the oath to petitioners via contemporaneous video transmission will impress on petitioners’ consciences the duty to testify truthfully.

Respondent also suggests that the Hague Evidence Convention may require petitioners to give testimony before a diplomatic agent or consular officer in Germany. However, respondent has failed to cite a specific rule of domestic or international law prohibiting petitioners from voluntarily testifying in this proceeding via live video transmission from Germany. We note that the Court previously received testimony from Germany via contemporaneous video

transmission without incident. See Slaughter v. Commissioner, Docket No. 13256-14. Accordingly, upon due consideration and for cause, it is

ORDERED that this case is calendared for trial at the Trial Session of the Court scheduled to commence at 10:00 a.m., on April 9, 2018, Room 206, Jacob K. Javits Federal Building, 26 Federal Plaza, New York, NY 10278. It is further

ORDERED that petitioners' Motion to Permit Witness Testimony of Jonathan Zuhovitzky and Esther Zuhovitzky by Contemporaneous Transmission from a Different Location, filed September 12, 2017, is granted. It is further

ORDERED that pursuant to Tax Court Rule 143(b), petitioners are responsible for ensuring that the testimony of petitioners is received by video transmission, using the appropriate electronic equipment. Petitioners' testimony will not be received telephonically. It is further

ORDERED that petitioners shall bear all costs pertaining to their testimony by video transmission. It is further

ORDERED that a representative of the IRS may be present at the location at which petitioners testify via live video transmission. It is further

ORDERED that the parties continue to confer with respect to the logistics of securing petitioners' testimony via live video transmission from Germany. It is further

ORDERED that, on or before January 12, 2018, the parties shall file with the Court a status report addressing any outstanding logistical issues and their progress in reaching mutually agreeable solutions thereto.

(Signed) Juan F. Vasquez
Judge

Dated: Washington, D.C.
November 15, 2017