

UNITED STATES TAX COURT
WASHINGTON, DC 20217

BENJAMIN SOLEIMANI & SHARYN)	SD
SOLEIMANI,)	
)	
Petitioners,)	
)	
v.)	Docket No. 8884-13.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

On October 3, 2017, respondent filed a Motion for Leave to Conform the Pleadings to the Evidence Presented at Trial, and Memorandum in Support thereof, and lodged respondent’s First Amendment to Answer. Respondent therein seeks leave to amend his pleadings to assert a fraud penalty pursuant to section 6663(a).¹ On October 20, 2017, petitioners filed an Opposition to Motion for Leave to Conform the Pleadings to the Evidence Presented at Trial.

For the reasons set forth below, we shall deny respondent’s Motion.

Background

Initial trial proceedings were conducted in this case on December 9, 2014, in New York, New York. At trial petitioners introduced two documents into evidence to substantiate a \$5,579,708 long-term capital loss claimed for 2007 that had been disallowed by respondent:² (1) Exhibit 5-P, a Registration of Deeds and

¹All section references are to the Internal Revenue Code of 1986, as amended and in effect for the year at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

²Petitioners claimed a long-term capital loss carryover of \$2,725,000 on their timely filed return for 2007. However, petitioners subsequently filed an amended return for 2007 claiming three long-term capital losses of \$2,608,695, \$1,594,202,

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Real Estates, dated September 24, 2008 (Registration); and (2) Exhibit 6-P, a Declaration Sheet from the Justice Administration of the Islamic Republic of Iran, dated October 16, 2008 (Declaration) (collectively, Iranian Documents). Petitioners also introduced Exhibit 8-P, a letter purportedly from Mohammadali Soltanpour, dated September 25, 2012, and addressed to the attention of “Mr. Gulant, New York, U.S.A.” (Soltanpour Letter).³ Petitioner Benjamin Soleimani testified that Mr. Soltanpour was an Iranian attorney responsible for procuring the Iranian Documents. The Iranian Documents and Soltanpour Letter were offered to substantiate petitioners’ contention that three parcels of land in Iran that Mr. Soleimani owned were confiscated in 2007 by the Islamic Republic of Iran.

The Court’s subsequent review of the Iranian Documents revealed apparent significant discrepancies therein. In an Order dated July 11, 2016, the Court directed petitioners to file a report addressing those discrepancies. In response, on August 10, 2016, petitioners--without leave of Court or compliance with Rule 143(g)--submitted a supplemental expert report prepared by their expert, Seyed Amin Alemohammad,⁴ in which he offered explanations for the apparent discrepancies.

Given the prejudice to respondent of admitting the additional expert testimony in petitioners’ supplemental expert report without cross-examination or any other opportunity for rebuttal, the Court conducted two conference calls with the parties to consider these issues, as well as the changed circumstances arising from the identification of the discrepancies in the Iranian Documents that had not

²(...continued)

and \$1,376,811, which they allege resulted from the expropriation by the Iranian government of three parcels of land in Iran in 2007. In their petition, petitioners state that the \$2,725,000 capital loss carryover claimed on the original 2007 return was an initial estimate of these alleged expropriation losses. In his notice of deficiency, respondent determined that petitioners had not established that they were entitled to the carryover loss claimed on the 2007 return and disallowed the losses claimed on the amended return as well.

³At trial petitioners’ counsel Carlos Ortiz identified Mr. Gulant as an attorney at his law firm.

⁴Mr. Alemohammad’s qualifications as an expert had been accepted, and his original expert report had been admitted, at the trial on December 9, 2014.

been identified at the trial. In those conference calls, the Court proposed and the parties agreed that respondent would be permitted to engage his own expert to assist in any cross-examination and rebuttal of petitioners' expert's testimony and his reports--both the original report and, if admitted, the supplemental report.

On March 28, 2017, respondent submitted to the Court and served on petitioners the report of respondent's expert, Abbas Hadjian. Mr. Hadjian's report concluded, inter alia, that: (1) Mr. Soltanpour does not and never did exist;⁵ (2) the Registration is a product of fraud and forgery;⁶ and (3) the Declaration is a product of fraud and forgery.⁷

⁵According to Mr. Hadjian, Mr. Soltanpour purportedly authenticated the Registration and is directly referenced several times in the text of the Declaration, including reference to his Iranian bar number. However, Mr. Hadjian alleges that the listed bar number does not exist and has never been issued. Mr. Hadjian also alleges that records of the Iranian Bar Association do not include Mr. Soltanpour's name and that exhaustive attempts to locate or contact him at the address or telephone number listed in the Iranian Documents and Soltanpour Letter were unsuccessful.

⁶According to Mr. Hadjian, the Registration is deficient in the following respects: (1) It is a handwritten draft (and is clearly labeled as such) and not a final official communication; (2) it inaccurately claims that the three parcels of land were confiscated by the Iranian government; (3) it fails to properly identify the three parcels of land in that it does not provide metes and bounds; (4) it does not identify which branch (of 16) of the Registration Office authorized it, nor does it identify the receiving officer who should receive it; (5) it does not meet the criteria necessary to constitute an official/self-authenticating document in Iranian courts; and (6) it is not a declaration under oath nor is it supported by any document verifying the accuracy of the statements made therein. Mr. Hadjian also alleges that the Registration has noticeable discrepancies in its translation from Farsi to English.

⁷According to Mr. Hadjian, the Declaration is deficient in the following respects: (1) Rather than a summary of the judgment of an Iranian court--as petitioners claimed--it is a prelitigation statement-of-claim form that is completed by a claimant, filed with the court, and served on the opposing party; (2) it is printed on an obsolete form that has been altered and is missing certain official markings; (3) it states that it was prepared on October 16, 2008, but has a

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By Order dated June 2, 2017,⁸ the Court directed the parties to:
(1) immediately confer regarding stipulations covering the admissibility of petitioners' expert's supplemental report and respondent's expert's report, and/or mutually agreeable dates for additional trial proceedings in Washington, D.C.; and
(2) file stipulations on or before June 30, 2017, providing for the admissibility of petitioners' expert's supplemental report and respondent's expert's report, or a joint status report advising the Court of mutually agreeable dates for further trial proceedings in Washington, D.C.

On June 30, 2017, respondent filed a status report advising that the parties had been unable to agree to a stipulation covering the admissibility of petitioners' expert's supplemental report or respondent's expert's report. The report further advised that August 2 and 3, 2017, were mutually agreeable dates for further trial proceedings in Washington, D.C. That same day, petitioners' counsel submitted a letter to the Court, stating in part, "On or about May 9th, our firm received information, for the first time, that the name Soltanpour was not associated with an attorney in Iran." In a subsequent recorded conference call between the parties and the Court, petitioners' counsel conceded that, as alleged in Mr. Hadjian's report, Mr. Soltanpour does not and never did exist.

⁷(...continued)

date/code/payment stamp of August 26, 2005, which was a Friday and therefore the Iranian weekend when all government offices are closed; (5) it features inconsistencies in the listed amounts of recording charges; (6) it provides an unidentifiable address for Mr. Soltanpour; (7) it is an unlawful certification; (8) it provides 1977 values in U.S. currency for the Iranian properties with no supporting documents or basis for the valuation (and Mr. Hadjian has never seen any judgment attach any value to confiscated property, let alone in U.S. currency); and (9) it alleges that the confiscation caused damages to petitioners, but such damages would be inconsistent with an Iranian constitutional provision limiting such confiscations to illegitimate property of the public treasury. Mr. Hadjian also alleges that the Declaration has noticeable discrepancies in its translation from Farsi to English.

⁸Following respondent's submission of Mr. Hadjian's report, petitioners' counsel submitted two requests (which the Court granted in Orders dated April 11, 2017, and May 12, 2017, respectively) for additional time to review the report and advise the Court of petitioners' response.

Pursuant to the Court's Order dated July 3, 2017, additional trial proceedings were conducted at a special trial session on August 2 and 3, 2017, in Washington, D.C. Mr. Hadjian was qualified by the Court as an expert, and his report was received into evidence, as was the supplemental report of Mr. Alemohammad. Fact testimony was provided by Mr. Soleimani and an additional witness for petitioners. At the conclusion of the proceedings, respondent orally moved for leave to amend the pleadings to assert a fraud penalty under section 6663(a). By Order dated August 3, 2017, respondent was directed to file with the Court and serve on petitioners a written motion to that effect which, as previously noted, was filed on October 3, 2017.

Discussion

I. Respondent's Motion

Pending before us is respondent's Motion for Leave to Conform the Pleadings to the Evidence Presented at Trial. Respondent's Motion is made pursuant to Rule 41(b)(1), which provides:

(b) Amendments To Conform to the Evidence: (1) Issues Tried by Consent: When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. The Court, upon motion of any party at any time, may allow such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues, but failure to amend does not affect the result of the trial of these issues.

The granting of a motion to conform the pleadings to the evidence is within the discretion of the Court. Commissioner v. Estate of Long, 304 F.2d 136, 142-144 (9th Cir. 1962); Estate of Quick v. Commissioner, 110 T.C. 172, 178 (1998); Law v. Commissioner, 84 T.C. 985, 989-990 (1985). In determining the merits of such a motion, we consider, inter alia, whether an excuse for the delay exists and whether the opposing party would suffer unfair surprise, disadvantage, or prejudice if the motion were granted. Estate of Quick, 110 T.C. at 178; Law v. Commissioner, 84 T.C. at 990; Arberg v. Commissioner, T.C. Memo. 2007-244, slip op. at 16-17.

In his Motion, respondent argues that the issue of fraud, as it relates to the Iranian Documents and the Soltanpour Letter, was tried by implied consent of the parties on the basis that “the crux of the evidence and testimony” in this case concerned the authenticity, credibility, and reliability of the Iranian Documents and the credibility of petitioners and their witnesses. Respondent argues that petitioners’ liability for the section 6663 fraud penalty arises from their continued reliance on the Iranian Documents after conceding that Soltanpour did not exist and their introduction of incredible testimony during the August 2 and 3 trial proceedings.

Respondent argues that the granting of his Motion will not result in unfair prejudice to petitioners because the Motion is premised on testimony and evidence submitted by petitioners at the August 2 and 3 trial proceedings, which respondent characterizes as “in essence * * * an effort to stave off the assertion of the civil fraud penalty.” Respondent further argues that petitioners have been aware of his position that the Iranian Documents are not authentic, credible, or reliable since the submission of Mr. Hadjian’s report in March 2017. Finally, respondent argues that many of the badges of fraud he maintains were present upon the filing of petitioners’ original and amended returns for 2007 “were crystalized during the August 2nd and 3rd trial proceedings wherein petitioners and their witnesses attempted to disavow Exhibit 8-P and distance themselves from any dealings with ‘Attorney Soltanpour’.”

Petitioners object to the granting of respondent’s Motion on the basis that it is “entirely without legal support, untimely, and deeply prejudicial”. We agree.

First, we find no precedent for respondent’s Motion. Each of the three cases cited by respondent in his Memorandum is readily distinguishable. In two of the cases, Edwards v. Commissioner, T.C. Memo. 2016-117 and Daoud v. Commissioner, 2010-282, the fraud penalty was asserted in the notice of deficiency. Moreover, in Edwards v. Commissioner, the amended answer concerned only an increase to the amount of the deficiency and fraud penalty, and in Daoud v. Commissioner, the taxpayers did not object to the Commissioner’s motion. A review of the transcript in the third case, Ernle v. Commissioner, T.C. Memo. 2010-237, reveals that the taxpayer--by all appearances a tax protestor--objected to the Commissioner’s motion only on the grounds that there had been “no ratification”, a frivolous objection he raised (without ever offering a coherent explanation therefor) at nearly every opportunity during the trial.

Second, our review of the record persuades us that “the essential facts on which respondent bases his allegations of fraud were known to respondent’s counsel prior to trial.” Julicher v. Commissioner, T.C. Memo. 2002-55, slip op. at 23; see also Pallante v. Commissioner, T.C. Memo. 1989-334 (counsel for respondent sought amendment to pleadings to assert fraud after trial on the basis of facts known prior to trial). The core of respondent’s case for fraud rests on the report of his expert, Mr. Hadjian, which concludes that the Iranian Documents are forgeries. However, Mr. Hadjian’s report was submitted to the Court and served on petitioners on March 28, 2017; consequently, respondent has had the basis for his assertion of a fraud penalty since that time. We find no reasonable justification for respondent’s delay in asserting the fraud penalty.

Finally, we conclude that petitioners would suffer undue prejudice if we were to grant respondent’s Motion. At a minimum, petitioners were entitled to notice and an adequate opportunity to elicit testimony and present evidence to rebut respondent’s fraud allegations. See Julicher v. Commissioner, T.C. Memo. 2002-55, slip op. at 23. The Court itself might have asked additional questions of the witnesses were it on notice that the issues in the case included fraud rather than merely the substantiation of the claimed loss.

II. Supplemental Briefing

Since the initial trial proceedings in this case, the parties have offered additional evidence in the form of fact testimony and expert reports. In light of this additional evidence, which the Court deems significant, the Court shall direct the parties to file supplemental briefs.

The foregoing considered, it is

ORDERED that respondent’s Motion for Leave to Conform the Pleadings to the Evidence Presented at Trial is denied. It is further

ORDERED that the parties shall, on or before February 12, 2018, file simultaneous supplemental briefs in which they address the additional evidence offered since the initial trial proceedings in this case and that evidence’s effect, if any, on two issues: (1) Whether petitioners are entitled to a loss under section 165 for the 2007 taxable year for three parcels of land confiscated by the Islamic

Republic of Iran; and (2) whether petitioners are liable for a section 6662(a) accuracy-related penalty for the 2007 taxable year.

(Signed) Joseph H. Gale
Judge

Dated: Washington, D.C.
December 12, 2017