

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

WILLIAM BUDELL MARKOLF,)
)
Petitioner,) **CZ**
)
v.) Docket No. 23475-15.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

Now before us is petitioner’s response, filed by counsel on March 16, 2018 (ECF 31, 32), to our order to show cause filed February 23, 2018 (ECF 28). We will make absolute our order to show cause.

Background

This case concerns petitioner’s tax liabilities for the four years 2008 through 2011. For the latest of those years (2011), petitioner’s tax return was due almost 6 years ago in April 2012. On June 16, 2015, the IRS issued to petitioner a notice of deficiency. The petition in this case (ECF 1) was filed September 15, 2015--i.e., 2-1/2 years ago. This case was set for trial at the Court’s session in Columbia, South Carolina, beginning October 17, 2016 (see ECF 5), and our standing pretrial order issued May 16, 2016 (ECF 6), ordered the parties, among other things, to exchange the documents they intended to rely on at trial no later than two weeks before the trial session. On September 26, 2016, petitioner’s counsel filed a motion for a continuance (ECF 8), explaining that he “needs additional time to secure the required documents, receipts, etc. to satisfy the Internal Revenue Service, and it is estimated that it will take another three weeks or so to secure such data and forward same to the Service for its review.” “[T]hree weeks” from September 26, 2016, would have been October 17, 2016.

SERVED Mar 19 2018

The Court required petitioner to supplement the motion with a description of his work toward, and his proposed schedule for, producing information to respondent (see ECF 10), and he filed a supplement on October 3, 2016 (ECF 17). With respondent's consent, the Court granted petitioner's motion for a continuance. (ECF 19.)

By notice served April 11, 2017 (ECF 20), the Court next set this case for trial at the session in Columbia beginning September 11, 2017. In anticipation of that trial, the Court again issued its standing pretrial order (ECF 21).

On August 8, 2017, respondent mailed petitioner's counsel a proposed Stipulation of Facts consisting of paragraphs 1 through 65 and Exhibits 1-J through 49-J. Petitioner's counsel did not respond. In the weeks before trial, the Court held a series of telephone conferences with the parties to monitor petitioner's delinquent compliance with the standing pretrial order--in particular, petitioner's response to the proposed stipulation and petitioner's production to respondent of documents on which he intended to rely at trial, which production was apparently still not complete as of a week before trial.

Unfortunately, Hurricane Irma was expected to reach Columbia on September 11, 2017--the first day of the trial session--and the Court judged it expedient to continue this case. Our order (ECF 24) explained:

An unintended consequence of this continuance is that petitioner will not now have to go to trial. He is, in effect, given more time, which we think he does not deserve.

Therefore, we stress that petitioner should not delay his final production of documents (including summaries or demonstrative exhibits) to respondent but should instead complete that work while the iron is hot and while respondent's personnel have this case and its details in their minds. When this case is once again set for trial, petitioner should certainly expect no further continuance and no latitude in the enforcement of the standing pretrial order.

On September 15, 2017, via electronic and regular (i.e., United States Postal Service) mail, respondent sent petitioner's counsel two copies of a revised Stipulation of Facts consisting of paragraphs 1 through 73 and Exhibits 1-J through 49-J, expecting that petitioner's counsel was ready to sign and return the stipulation. He did not do so. By communications sent September 26, 2017,

November 3, 2017, December 12, 2017, and January 8, 2018, respondent requested petitioner to sign and return the revised Stipulation of Facts. He did not do so (ECF 27 at 3-4).

By notice served December 4, 2017 (ECF 25), the Court next set this case for trial at the session in Columbia beginning April 30, 2018. In anticipation of that trial, the Court again issued its standing pretrial order (ECF 26).

On February 21, 2018, respondent filed a motion for an order to show cause (ECF 27). The motion recounted the facts about the stipulation process that are set out above. On February 23, 2018, the Court initiated a telephone conference with counsel for the parties to discuss respondent's motion and the failure so far of the stipulation process. Petitioner's counsel stated that petitioner had hired someone to work on document retrieval for the case and that progress on the case was difficult because petitioner had recently had surgery. The Court stated that any request for relief based on such allegations would have to be documented. (This statement by the Court is imprecisely recounted in petitioner's filing, which states that in the "conference call ... it was agreed that ... Petitioner's counsel would submit to this Court a letter from Petitioner's physician ... [and] a letter ... [from] an independent contractor ... [hired] to assist Petitioner to assemble the records and documents requested for this trial".) We stated that no further continuance in the case is likely. By our order of February 23, 2018 (ECF 28), we granted respondent's motion for an order to show cause and—

ORDERED that petitioner shall, on or before March 15, 2018, file a response in compliance with the provisions of Rule 91(f)(2), with proof of service of a copy thereof on opposing counsel, showing why the matters set forth in respondent's proposed stipulation of facts, and accompanying exhibits, should not be deemed admitted for purposes of the pending 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, that matter or portion thereof will be deemed stipulated for purposes of the pending case, and an order will be entered accordingly, pursuant to Rule 91(f)(3).

On March 2, 2018, respondent filed a motion to compel production of documents (ECF 29), which we granted in part on March 7, 2018 (ECF 30).

On March 16, 2018, petitioner submitted twice a one-page document entitled “Petitioner’s Answer to Respondent’s Motion for Order to Show Cause”--once with a cover sheet bearing the incorrect caption “Petitioner’s Response to Motion to Compel Production of Documents” (ECF 31) and once with a cover sheet bearing the caption “Petitioner’s Reply to Answer” (ECF 32). Except for its title, the document makes no reference to the order to show cause or the motion it granted (possibly referring instead to respondent’s motion to compel (ECF 29)). Petitioner’s filing does not refer by paragraph number to any statement in the proposed stipulation nor to any exhibit identified in it.

Attached to the document are two memoranda. They are not sworn affidavits and are not signed under penalty of perjury pursuant to 28 U.S.C. section 1746. One is a purported memorandum from a physician stating that petitioner had surgery on December 6, 2017, and that a month later, on January 7, 2018, he was “released to full-time work”. The other is a purported memorandum from an accountant hired by petitioner on December 5, 2017, “to document with evidence the tax returns filed by” petitioner, and the memorandum states:

In January of 2018, I was out of work for approximately two weeks as I caught the flu twice. Then on February 11, 2018 I fell and broke my right ankle and was admitted to Carolinas Health Systems Hospital in Pineville through the emergency room and subsequently had surgery on February 12, 2018. I was then released from the hospital directly to a long-term care facility named Cleveland Pines Nursing Home and Rehabilitation Center for physical rehabilitation. I was a patient there from February 15 until I was discharged March 8, 2018. I returned to work for Mr. Markolf on Tuesday, March 13, 2018.

Due to the above circumstances, it has put me way behind in completing the assembly and preparation of documentation of evidence needed as stated above.

Discussion

Tax Court Rule 91(a)(1) provides that “[t]he parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case”. Rule 91(f) (“Noncompliance by a Party”) provides for an order to show cause why matters proposed for stipulation should not be deemed admitted, and it requires that--

(2) Procedure: ... [T]he party to whom the order is directed shall file a response with the Court, with proof of service of a copy thereof on opposing counsel or the other parties, showing why the matters set forth in the motion papers should not be deemed admitted for purposes of the pending case. The response shall list each matter involved on which there is no dispute, referring specifically to the numbered paragraphs in the motion to which the admissions relate. Where a matter is disputed only in part, the response shall show the part admitted and the part disputed. Where the responding party is willing to stipulate in whole or in part with respect to any matter in the motion by varying or qualifying a matter in the proposed stipulation, the response shall set forth the variance or qualification and the admission which the responding party is willing to make. Where the response claims that there is a dispute as to any matter in part or in whole, or where the response presents a variance or qualification with respect to any matter in the motion, the response shall show the sources, reasons, and basis on which the responding party relies for that purpose....

Petitioner's failure to comply with this rule and with our order to show cause is wholesale, consistent with his prior dilatory actions. In a case filed 2-1/2 years ago, involving tax returns due 6 years ago and more, petitioner received a second continuance of trial six months ago in September 2017, at which time we orally and by order admonished petitioner to delay no further and "stress[ed] that petitioner should not delay his final production of documents (including summaries or demonstrative exhibits) to respondent but should instead complete that work while the iron is hot and while respondent's personnel have this case and its details in their minds. When this case is once again set for trial, petitioner should certainly expect no further continuance".

Nonetheless, petitioner's attachments show that not in September, October, or November but instead in December he allegedly hired someone to gather documents to substantiate the positions he took on returns due 6 years ago and more. He should have done so when he prepared the returns, or, if not then, when the IRS examined them, or when he received the notice of deficiency, or when he filed his petition, or when he received the first notice of trial and standing pretrial order, or the second, or when we warned that no further continuance was likely. Even if we fully credit the documents attached to his recent filing, they show

difficulties that arose in January and February 2018--long after petitioner's work on this case should have been largely finished.

But those late-occurring mishaps seem an attempt to explain petitioner's failure to provide documents. They have little or nothing to do with petitioner's failure to cooperate in the stipulation process (which involved facts disclosed on documents that were available to the parties), and those mishaps have nothing at all to do with petitioner's failure to make an actual response to our order to show cause.

It is therefore

ORDERED that "Petitioner's Answer to Respondent's Motion for Order to Show Cause" with a cover sheet bearing the incorrect caption "Petitioner's Response to Motion to Compel Production of Documents" (ECF 31) shall be recharacterized on the Court's docket as petitioner's response to our order to show cause, and the same document with a cover sheet bearing the caption "Petitioner's Reply to Answer" (ECF 32) shall be stricken from the record. It is further

ORDERED that our Order to Show Cause (ECF 28) is hereby made absolute, and the proposed stipulation attached to respondent's motion for an order to show cause (ECF 27) is hereby deemed stipulated for purposes of the pending case, pursuant to Rule 91(f)(3).

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
March 19, 2018