UNITED STATES TAX COURT
WASHINGTON, DC 20217

FRANK W. DOLLARHIDE & MICHELLE D. DOLLARHIDE, ET AL.,		**CZ**
Petitioner(s),		
v.	Docket No.	23113-12, 23139-12, 21366-14.
COMMISSIONER OF INTERNAL REVENUE,		
Respondent		

O R D E R

The Court has already entered decisions in these cases after the Commissioner moved for entry of decision late last year. The Dollarhides moved on April 18 to vacate or revise those decisions under Rule 162.

We begin where we left off in ruling on those motions for entry of decision: Neither party objected to the computation of the Dollarhides' tax liability in any of the cases. But the Dollarhides wanted credit for payments -- payments so much larger than their liability that they should get a big refund -- for their individual 2006 tax year. But there was a problem: The payments were mostly in the form of withholding from the Dollarhides' pay back in 2006, plus a substantial amount of excess Social Security tax. The Internal Revenue Code says that money that is withheld from taxpayers' pay and excess Social Security tax does count toward their income-tax debt, and is treated as being paid all at once on the due date of the return, *see* I.R.C. § 6513(b). This means that the Dollarhides are treated as having paid more than $47,000 in April 2007, when they should have filed their return. But the Dollarhides didn't file their 2006 return until February 3, 2011, and it was only on *that* return that they reported the big withholding and excess Social Security credits.

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This meant that the Dollarhides were claiming a refund more than three years after the Code says they are treated as having been paid. (February 3, 2011 is almost four years after April 2007.) Section 6511(b)(2) of the Code says that they have only three years to claim this refund. We therefore granted the Commissioner's motions.

The Dollarhides claim, however, that they never would have agreed to the stipulation of settled issues if they knew they weren't going to get that refund. Is that enough?

In ruling on Rule 162 motions, we look to Federal Rule of Civil Procedure 60. *See, e.g., Etter v. Commissioner,* 61 TCM 1772, 1773 (1991). FRCP Rule 60(b) is the rule that's applicable here, and the Dollarhides point us to FRCP 60(b)(3) which requires a showing of "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." The fraud or other misconduct that the Dollarhides argue the Commissioner engaged in is not telling them about the legal requirement that they had only three years from the due date of their 2006 tax return to file a claim for refund of any overpayment.

There are at least three reasons this doesn't work.

1. Not telling someone something they would like to know is generally not fraud, misrepresentation, or misconduct,[1] particularly where that thing could be discovered with a little bit of due diligence. *See Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004) (FRCP Rule 60(b)(3) requires "that fraud . . . not be discoverable by due diligence before or during the proceedings" (quoting *Pac. & Arctic Ry. & Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir. 1991))). The statute of limitations on refunds is a legal issue, and one that the Dollarhides could have easily discovered by cracking open the Code.

2. The Dollarhides do also complain that the only reason that they didn't file their 2006 tax return within three years of its due date is that the revenue agent examining that year insisted that they submit it to her. The records that they attach to their motion, however, do not show that there was even an ongoing audit of this

[1] We are not dealing here with a knowing failure to disclose or produce documents in response to a discovery request. *See, e.g.*, *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 879 (9th Cir. 1990) (citing to First Circuit's broad construction of "misconduct" in *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988)).

year for themselves as individuals (in contrast to their corporation, Dollarhide Enterprises, Inc.) within three years of that return's due date.

3. There is no mention of an alleged overpayment by the Dollarhides of their 2006 individual tax obligation in their petition, meaning that they never placed the possibility of a refund in issue. This means that their stipulation of settled issues was accurate when it said that it resolved all issues in the case, and that any misrepresentation that someone at the IRS made is not material to this case. *See Pac. & Arctic Ry.*, 952 F.2d at 1148 (FRCP Rule 60(b)(3) requires "that fraud . . . be materially related to the submitted issue").

For these reasons, it is

ORDERED that petitioners' April 18, 2018 motion to vacate or revise is denied.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
May 4, 2018