UNITED STATES TAX COURT
WASHINGTON, DC 20217

TRILOGY, INC. & SUBSIDIARIES,	)	
	)	
Petitioners,	)	**CT**
	)	
v.	)	Docket No. 12097-16.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

On April 20, 2018, in this case not yet set for trial, the Commissioner filed a motion (ECF 25) under Rule 91(e) to strike a paragraph from the First Stipulation of Facts (ECF 18), which was jointly filed on March 26, 2018. We will grant the motion.

Background

Delaware litigation

This case involves the deductibility of certain legal fees in the 2009, 2010, and 2011 tax years. The factual issue underlying that controversy relates to an issue that petitioner, Trilogy Inc., has been litigating for some time. In that litigation, the Supreme Court of Delaware upheld a finding that Trilogy "sought to increase the percentage of its stock ownership [in Selectica], not for the purpose of conducting a hostile takeover but, to intentionally impair corporate assets, or else coerce Selectica into meeting certain business demands under the threat of such impairment." Versata Enterprises, Inc. v. Selectica, Inc., 5 A.3d 586 (Del. 2010) (emphasis added), aff'g, 36 Del. J. Corp. L. 319 (Del. Ch. 2010). See Ex. 23-J.

SERVED May 31 2018

Requests for admissions

On November 29, 2017, Trilogy filed requests for admissions (ECF 11). They included three requests--in Nos. 46, 57 and 69--asserting that:

> 46. [Trilogy] intentionally triggered the Poison Pill through its purchases of shares of Selectica common stock * * * *
>
> 57. Trilogy sought to invalidate Selectica's Poison Pill to clear the path for Trilogy to pursue a hostile takeover of Selectica.
>
> 69. Trilogy incurred the Litigation Fees to eliminate the Poison Pill as a potential barrier to a hostile takeover of Selectica.

These assertions appear to be at odds with the findings of the Delaware courts quoted above. The Commissioner admitted these assertions (ECF 15) on January 16, 2018. (Our later order of April 12, 2018 (ECF 23), discussed below, relieved the Commissioner of these admissions.)

Stipulation

About two months after making those admissions, the Commissioner's counsel signed the parties' first stipulation of facts (ECF 18) on March 19, 2018. Paragraph 38 of the First Stipulation states: "In response to Selectica's rebuke of Trilogy's offers to purchase Selectica's assets or the Selectica common stock, beginning in October 2008, Trilogy pursued a hostile takeover plan of Selectica, pursuant to which Trilogy ultimately purchased 6.7% of the outstanding Selectica common stock" (ECF 18 at 8, ¶ 38; emphasis added)--again, apparently at odds with the findings of the Delaware courts. The parties filed the stipulation a week later on March 26, 2018.

Motion to withdraw admissions

However, on March 20, 2018--one day after the Commissioner's counsel had signed the stipulation (including paragraph 38)--the Commissioner filed a motion to withdraw or modify admissions Nos. 46, 57, and 69.

By our order issued April 12, 2018 (ECF 23), we granted the motion for the reasons explained in our order; and on April 13, 2018, the Commissioner

responded to our order, providing modified responses to those requested admissions (ECF 24).

Motion to be relieved from stipulation

On April 20, 2018--a month after his previous motion, and 8 days after our order granting it--the Commissioner filed a second motion (ECF 25)--this one asking to be relieved from paragraph 38 of the First Stipulation, which carries the same "import" as the withdrawn admissions (i.e., regarding Trilogy's "acquisitive intent") (see ECF 25 at 2-3). The Commissioner now disavows this stipulated assertion, citing contemporaneous public filings submitted by Trilogy to the SEC and Trilogy's post-trial opening brief demonstrate that Trilogy had a "multifaceted" intent underlying its acquisition of Selectica common stock. (See ECF 25 at 3, ¶6-7).

Discussion

Trilogy opposes the Commissioner's motion and argues that it would be unfairly prejudiced if the Court granted the Commissioner's motion to strike (see ECF 27). We disagree.

The Commissioner's motion to be relieved from the stipulation is equivalent to his earlier motion to withdraw the admissions. While we note the Commissioner's unaccountable delay in filing the latter motion, Trilogy has known that the Commissioner proposed to raise this factual controversy in this suit since no later than March 20, 2018 (i.e., the day that Commissioner moved to withdraw or modify its three admissions on this issue--which was the day before the petitioners signed the First Stipulation and a week prior to its filing). And Trilogy (like everyone else interested in its affairs) has known of this factual controversy generally since the Delaware litigation that resulted in the Delaware Court of Chancery's opinion in February 2010 and the Supreme Court of Delaware's opinion in October 2010. Therefore, in the absence of prejudice, we will grant the Commissioner's motion under Rule 91(e), and allow the parties to introduce evidence at trial on this issue.

However, we do not condone the Commissioner's inefficient handling of this issue. Absent truly extraordinary circumstances, we do not expect to allow the Commissioner to make any further correction of his admissions or stipulations in this case.

It is

ORDERED that, the Commissioner's motion to strike paragraph 38 is granted and petitioners' objections are overruled for the reasons stated in the Commissioner's motion and reply. Paragraph 38 of the First Stipulation of Facts is deemed stricken. During trial, the parties may present evidence in support of their respective positions on this issue.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
May 31, 2018