

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

MURFAM ENTERPRISES LLC,)		
WENDELL MURPHY, JR.,)		
TAX MATTERS PARTNER, ET AL.,)		
)		
Petitioners,)		
)		
v.)	Docket No. 8039-16,	14536-16,
)	14541-16.	
COMMISSIONER OF INTERNAL REVENUE,)		
)		
Respondent)		

ORDER

This case is scheduled to be tried at the Court’s special trial session in Winston-Salem, North Carolina, beginning August 6, 2018. On May 16, 2018, petitioners, whom we refer to collectively as “Murfam”, filed two motions: (1) a motion to compel the Commissioner to serve responses to Murfam’s interrogatories (ECF 33); and (2) a motion to compel the Commissioner to produce documents (ECF 34). We will largely deny Murfam’s two motions to compel without prejudice and will order the parties to file a joint status report addressing a jurisdictional question.

Background

Informal Discovery

On February 7, 2018 (ECF 23), the parties submitted a joint status report to the Court that proposed a schedule for proceedings in this case. That schedule proposed deadlines for, among other things, the service of interrogatories by April 16, 2018, the service of requests for production of documents by April 16, 2018, the service of requests for admission by April 16, 2018, motions to compel answers

to interrogatories by May 16, 2018, motions to compel production of documents by May 16, 2018, and the exchange of the parties' expert reports by June 21, 2018. On February 8, 2018 (ECF 24), we granted the parties' request and ordered them to follow their proposed schedule.

The parties engaged in informal discovery pursuant to Rule 70(a)(1) and filed a stipulation of settled issues on February 23, 2018 (ECF 25).

Formal discovery

On April 12, 2018 (ECF 26), Murfam filed its first request for admissions. On May 11, 2018 (ECF 32), the Commissioner filed its response. In its response, the Commissioner objected generally to Murfam's request for admissions, alleging that the informal discovery request that it first received on May 29, 2018, was informal only in title (i.e., the Commissioner was only given approximately two weeks to respond to a request comprised of 175 requests for admissions, 41 exhibits, 14 numbered interrogatories, and 25 subparts requesting documents) (ECF 32 at 1-2). The Commissioner alleges that during a conference held between the parties, Murfam--

[S]tated that a "true/false" marking by each request for admission would be sufficient based on the timeframe of petitioners' request. Respondent informed petitioners' counsel that petitioners' counsel would have more detailed responses, beyond a "true/false" marking by April 13, 2018. Nonetheless, respondent was served with formal discovery and formal requests for admissions on April 12, 2018.

The Commissioner argues that it did not have sufficient time to respond to the informal discovery request before Murfam filed the formal discovery request. Notwithstanding the Commissioner's general objection, he responded to Murfam's request for admissions. (ECF 32).

Motions to compel

On May 16, 2018, Murfam filed its motions to compel (ECF 33, 34). In those motions Murfam generally alleges that Murfam "informally conferred with [the Commissioner] ..., and waited until April 12, 2018 for a written response that [the Commissioner] indicated may be forthcoming", and the Commissioner's "answers changed radically" between informal and formal interrogatories (ECF 33 at 1, ¶ (i)). Murfam also requests that this Court order the Commissioner to

“produce the rest of the documents requested by Petitioners’ First Request for Production of Documents and provide a good-faith written response....” (ECF 34 at 1).

The Commissioner filed a response (ECF 36) to these allegations, to which he attached email correspondence that seems to indicate that the Commissioner did attempt to meet Murfam’s deadline imposed during informal discovery, and that Murfam was satisfied with the Commissioner’s answers and progress of the informal discovery process. (See ECF 36, Exs. D and E). The Commissioner also contends that he has submitted over 25,000 pages of documents to Murfam in response to its requests (ECF 33 at 19) and that he is unable to respond to certain requests since the Commissioner’s experts have not yet produced their final reports. (See e.g., ECF 36 at 16).

Analysis

Compliance with Rule 70(a)(1) and communications between the parties

Rule 70(a)(1) explains that “the Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules.”

The Court notes that Murfam took approximately 7 weeks from the date (February 8, 2018) on which the Court approved the parties’ proposed schedule to provide the Commissioner with its informal discovery requests on March 29, 2018. Murfam gave the Commissioner approximately two weeks to respond to its voluminous requests, and apparently the Commissioner indicated it would provide more information on April 13, 2016. However, Murfam filed its request for admissions 1 day before the date on which the Commissioner had communicated that he would provide more complete answers, and 4 days before the agreed upon deadline, April 16, 2018, for filing such a request.

Murfam’s motions state that Murfam “ha[s] been unable to reach Respondent but presumes he objects to this Motion” (ECF 33 at 15), whereas the Commissioner asserts that Murfam’s counsel attempted only to call the personal cell phone of the Commissioner’s counsel on the morning of May 14, 2018, at a time when neither counsel had yet reached the office, and then did not subsequently attempt a follow-up phone call, email, fax, or other form of communication, and never left a message before making such a statement (ECF 36 at 22-23).

We think that communication during the discovery process and prior to the filing of the subject motions has been inadequate. We encourage the parties to communicate and cooperate with one another throughout the remainder of this case in accordance with the Court's Standing Pretrial order issued December 21, 2017, except to the extent modified by the schedule set forth in their joint report (ECF 23).

Interrogatories and production of documents

A party is entitled to learn, through informal and formal discovery, his opponent's contentions and factual information, so as to be able to prepare for trial. However, the right to conduct discovery does not entitle the requesting party to deprive his opponent of the time that the Court, by its scheduling order, has allowed for the completion of an expert report, for the final exchange of trial documents, and for the final statement of the party's contentions in a pretrial memorandum. On the other hand, a party is not allowed to make unfair objections to discovery and thereby hide his contentions and information so as to disable his opponent from preparing for trial. The remedy for such an abuse would include barring at trial any information that had been unfairly concealed and untimely revealed.

The Commissioner has responded to Murfam's discovery requests. For present purposes we assume that the Commissioner is--indeed, that both parties are--making good-faith efforts to disclose their contentions and facts, and that any revisions and additions to their contentions that they make between now and the time of trial will be reasonable refinements of their positions, rather than surprising new arguments for which they had made the other side incapable of preparing. If our assumption were to prove untrue, then the time to address any abuses would have to be when those surprises (which we do not expect) were sprung. If either party is currently being coy or secretive with its disclosures to the other party, it should cease that approach immediately, since we would not condone such an approach if it became evident. Rather, if it were to become apparent at trial that either party had misled the other during the discovery process, then we might limit the offending party's arguments, or in the alternative, allow the affected party to supplement its filings so that it could adequately respond to any argument for which it did not have fair notice. But we will not now presume that any refinements made hereafter by a party would necessarily be improper, and we will not now lock the parties into their positions ahead of the schedule that the parties agreed to and that we ordered.

With respect to the Commissioner's responses to interrogatories and document requests served by Murfam's motions to compel, we find that the Commissioner's reservations against making statements that he cannot definitively make until he receives his experts' final reports, are largely reasonable.

Murfam asks that this Court to "Bar Respondent from offering into evidence any fact that should have been disclosed in response to these Interrogatories" and "[b]ar [the Commissioner] from tendering into evidence any document he fails to produce in response to the Court's Order". For the reasons stated above, we will not issue such an order at this time. At trial, we will consider all objections raised by either party to the testimony and documents offered by its opponent.

Of course, the parties may limit the scope of the disputes and contentions in this case by the judicious use of the stipulation process set forth in Rule 91(a). The only stipulation in the record so far was filed on February 23, 2018 (ECF 25). (The Commissioner has not filed a motion to amend any stipulation made therein, and we would not expect him to advance any argument that contradicts a stipulation.)

Three weeks have passed since the Commissioner filed his oppositions to the motions to compel. It is possible that, since that time, he has learned more about the case to an extent that he can now supplement responses that were previously limited by his imperfect knowledge of the case. We will therefore order him to supplement his responses pursuant to Rule 102(3).

Additional jurisdictional issue

Section 6226(a) requires that a tax matters partner petition this court within 90 days after the day on which a notice of a final partnership administrative adjustment ("FPAA") is mailed. However, under section 7502, when a petition is delivered by mail after the due date, "the date of the United States postmark ... shall be deemed to be the date of the delivery". On December 21, 2015, the Internal Revenue Service mailed Murfam's FPAA to its tax matters partner. The date 90 days after that mailing was March 20, 2016--a Sunday, so therefore the deadline was Monday, March 21, 2016.

Murfam mailed a petition, dated March 15, 2016, and this Court received it on April 5, 2016. However, the envelope in which Murfam mailed its petition is missing a complete postmark. The only legible portion of the postmark date reads

“6/2016” (ECF 1). Therefore, we are unable to determine whether the petition is timely under sections 6226(a) and 7502. That is, we are unable to determine whether the petition was mailed on March 16, 2016 (which would have been a timely mailing), or on March 26, 2016 (which would have been an untimely mailing). Therefore, we will order the parties to make a filing on this issue.

It is

ORDERED that both of petitioners’ motions to compel, filed May 16, 2018 (ECF 33, 34), are denied for the reasons set forth in the Commissioner’s responses, with the exceptions ordered hereafter. It is further

ORDERED that Murfam’s motion to compel responses to interrogatories is granted in part, in that on or before July 6, 2018, the Commissioner shall serve on Murfam supplemental responses made under oath to--

- Interrogatory No. 5, providing the name, current business address, and business telephone numbers of the three IRS employees listed as potential witnesses (and, if any of them is known to be a represented party for purposes of Model Rule of Professional Conduct 4.2, also providing the identity and contact information of the attorney who represents him);
- Interrogatory No. 11, describing in reasonable detail the facts surrounding the supervisor’s giving written approval of the penalties (though he need not describe the reasons for that approval); and
- Interrogatory No. 13, stating the amounts the Government paid for the prior engagements and the amounts paid to date in the current engagement.

It is further

ORDERED that Murfam’s motion to compel responses to document requests is granted in part, in that on or before July 6, 2018, the Commissioner shall serve on Murfam supplemental responses to--

- Request No. 16, providing “[a]ny lists of species of plants or wildlife upon which Respondent or any of his witnesses rely with respect to the River and/or Landing Tracts”, and No. 17, providing “[a]ny

surveys of plants, animals, fish, or other wildlife surveys relating to the River and/or Landing Tracts"--to the extent that those lists and surveys have not already been provided in the Commissioner's expert's report or otherwise;

- Request No. 21, providing "copies of appraisal analysis, notes, and workpapers by Matthew P. Hawk relating to Magnolia 3, Magnolia 4, and [to the extent not already provided in the Commissioner's expert's report or otherwise] Rose Farm Tract that reflect any aspect of his methodology on permitted hog farms."

It is further

ORDERED that, no later than July 6, 2018, the parties shall either (a) file a stipulation as to the date of the mailing of the petition (if they agree on that fact), or (b) file a joint status report (or, if that is not expedient, then separate reports) as to the parties' contentions with respect to the illegible postmark on Murfam's petition (at docket No. 8039-16), and whether it was timely filed, or (c) make another appropriate filing.

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
June 21, 2018