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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 TO SHOW CAUSE

This case is scheduled to be tried at the Court's special trial session in Winston-Salem, North Carolina, beginning August 6, 2018. On June 22, 2018, the Commissioner filed, pursuant to Rule 91(f), a "Motion for Order to Show Cause Why Proposed Facts and Evidence Should Not Be Accepted as Established" (ECF 41). We will grant the order, and will require a response by July 2, 2018; but we will do so in the hope that instead of receiving a response from petitioners (collectively, "Murfam"), we will see a stipulation submitted jointly by the parties.

Background

Subject to correction that Murfam can make in any response that it might file, we observe the following apparent facts about the parties' attempts to comply with Rule 91(a)(1):

On May 31, 2018, the Commissioner proposed to Murfam a stipulation (ECF 41, Ex. A) of certain facts about the parties, tax returns, notices of deficiency, and appraisals. It is evidently not comprehensive but appears to be an attempt to stipulate the basic facts underlying the case that are reasonably likely not to be controversial. Murfam's response has been (a) to resist this approach because the proposed stipulation is not as comprehensive as Rule 91(a)(1) requires,

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and (b) not to work toward agreement on that basic stipulation, but instead (c) to propose its own (comprehensive) stipulation and invite the Commissioner to respond to it (see ECF 41, Exs. G, H, I and K).

Of course, if this is a distortion of the actual facts, then Murfam will be entitled to correct it. But we warn the parties that we and they have limited time between now and trial, that we have limited curiosity about the details of their correspondence, and that neither the Court nor the parties should allow themselves to be distracted from the actual merits of this case by fruitless argument about and adjudication of the parties' correspondence.

Discussion

Piecemeal stipulations

Tax Court Rule 91(a)(1) does indeed require a stipulation that is as comprehensive as possible:

> The 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, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute.

However, the rule does not at all require that all the parties' stipulations be filed in a single document. The seriatim filing of stipulations is common and ordinary in the Tax Court.

It is true that, in many cases, working toward a single comprehensive stipulation will be expedient and appropriate. First, that approach may be the simplest and most economical, especially in a simple case. Second, some amount of horse-trading may properly go on in the stipulation process, and sometimes one party might be willing to give up some potential factual disputes if the other party made equivalent concessions on other potentially disputable facts--a process that depends on keeping at least certain facts together in a proposed stipulation. Third, if one party were to attempt to stipulate facts helpful to his case but to defer stipulation of the facts helpful to the other side, the result could be unfair and could impede trial preparation.

However, this is a fairly complicated case. It seems likely that agreement can be easily reached as to the identities of parties, the documented transactions they engaged in, the returns they filed, the notices that the IRS issued, and other such basic facts, but that other facts will be more difficult to stipulate. In such a case, it may often be helpful to resolve those basic facts in order to get them out of the way and to give the parties a firm place to stand from which they can make further progress toward stipulating the less obvious facts.

We perceive, subject to Murfam's correction, that this is a case where a basic, non-"comprehensive" initial stipulation would be helpful--or at least not un-helpful. We do not yet see any reason that the parties should not promptly finish and file a first stipulation of basic facts with the expectation of further cooperation toward and filing of a subsequent stipulation of the additional, eventually undisputed facts. So far, it appears to us that cooperation with the Commissioner on this basic stipulation should be Murfam's first order of business.

Counter-drafts

Where parties must cooperate to draft a document, it is inevitable that one of them ("Party 1") will be the first to propose a draft to the other ("Party 2"). One tactic that Party 2 might adopt would be to set aside Party 1's first-exchanged draft and to insist that the parties' further negotiations must proceed from a later counter-draft that Party 2 proposes (or promises) from whole cloth. This can be maddening to Party 1. It makes his effort a waste; it delays the process; it perversely punishes the prompt early work and rewards the delayed later work; it puts on Party 1, who has the virtue of having gone first, the chore of figuring out whether and how his proposals have or have not been accepted, rejected, ignored, or modified by Party 2. Subject to correction, it appears to us that, broadly speaking, this has been Murfam's approach.

This approach might be taken deliberately and with the intention of frustrating the other side. Or it might be undertaken innocently, without any realization of the cost and annoyance it causes. Or perhaps there are even circumstances in which this approach can be entirely reasonable and fair, but we cannot now think of any.

Or perhaps this does not fairly describe Murfam's approach. Its response to this order could so explain. However, no such explanation could have as good an effect as the prompt filing of a stipulation of the basic facts of this case.

It is

ORDERED that the Commissioner's motion for an order to show cause why proposed facts and evidence should not be accepted as established, as provided in Rule 91(f) of the Court's Rules of Practice and Procedure, is granted. It is further

ORDERED that Murfam shall, on or before July 2, 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 the Commissioner's proposed stipulation of facts, and accompanying exhibits, should not be deemed admitted for purposes of the pending case. For the matters that Murfam does admit, its response should so indicate; for the matters it does not admit, its response should explain why and should state what it believes the actual facts to be. 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). However, it is further

ORDERED that if, by July 2, 2018, the parties have filed a stipulation of facts, then Murfam need not file a response to this order. Rather, this order to show cause will be discharged.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
June 25, 2018