UNITED STATES TAX COURT
WASHINGTON, DC 20217

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TRUST U/W/O BH AND MW NAMM F/B/O ANDREW I. NAMM, ANDREW I. NAMM AND JAMES DORAN, TRUSTEES, TRANSFEREE, ET AL.,		
Petitioner(s),		
v.	Docket No. 8485-17,	8487-17,
	8488-17,	8490-17,
COMMISSIONER OF INTERNAL REVENUE,	8496-17,	8498-17,
	8499-17,	8500-17,
Respondent	8501-17.	

O R D E R

On May 17, 2018, petitioners filed Petitioners' Motion to Compel Production of Documents, to which respondent responded on June 26, 2018. We shall deny the motion.

These cases involve what appears to be an intermediary or "Midco" transaction. See Notice 2001-16, 2001-1 C.B. 730, clarified by Notice 2008-111, 2008-51 I.R.B. 1299. Petitioners, former shareholders of Arebec, Inc. (Arebec), sold their stock to an affiliate of Diversified Group Inc. (Diversified). Diversified and its principal, James Haber, promoted tax shelters.[1]

[1]Diversified and Haber have promoted Midco transactions and other tax shelters that have previously been the subject of litigation in this Court. See e.g., Greenberg v. Commissioner, T.C. Memo. 2018-74; Jacoby v. Commissioner, T.C. Memo. 2015-67; Markell Co. v. Commissioner, T.C. Memo. 2014-86; Humboldt Shelby Holding Corp. v. Commissioner, T.C. Memo. 2014-47, aff'd, 606 F. App'x 20 (2d Cir. 2015).

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The Diversified affiliate purchased Arebec's stock with financing from Rabobank, a Dutch bank. Following that acquisition, Haber and his colleagues allegedly caused Arebec to invest in a Son-of-BOSS transaction in a effort to eliminate Arebec's built-in tax liability. Upon examination of Arebec the IRS disallowed the claimed losses, and Arebec's tax liability remains unpaid.

Respondent seeks to recover Arebec's unpaid tax liability from petitioners as transferees of Arebec under I.R.C. § 6901 and New York fraudulent conveyance law. Toward that end, respondent will seek to establish that petitioners had constructive knowledge of the entire scheme, i.e., that they knew or should have known that Arebec's tax liability would go unpaid. See Diebold Found., Inc. v. Commissioner, 736 F.3d 172, 190 (2d Cir. 2013). Petitioners dispute that contention.

In connection with the transactions at issue, petitioners received advice from (or interacted directly or indirectly with) a number of third parties. These third parties included Diversified, the Diversified affiliate that bought their shares, Haber, Rabobank, Grant Thornton LLP (which prepared at least one tax return for Arebec), and Proskauer Rose LLP (which supplied legal advice). Respondent avers that he has already supplied petitioners with all documents he has received from these third parties that are directly connected to petitioners, Arebec, and the transactions are the subject of this litigation.[2]

In their Motion to Compel Production of Documents petitioners demand--in addition to the transactional documents the IRS has already given them--a vast universe of information that may be contained in IRS files as a result of possible prior or ongoing IRS examinations or investigations of the third parties mentioned above:

• Petitioners first demand to know whether the IRS has examined Diversified, Haber, Rabobank, or Grant Thornton "related to the promotion of tax shelters, abusive transactions, or gross valuation statements for the year 2000 or thereafter." IRS examinations within the scope of petitioners' discovery request would include any IRS examination of Diversified, Haber, Rabobank, and/or Grant Thornton relating to possible violation of I.R.C. §§ 6694 (penalty for understate-

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[2]Respondent agrees that petitioners may be entitled to additional discovery relating to Proskauer Rose LLP, and we accordingly exclude from the scope of this Order any on-going discovery proceedings relating to it.

ment of a taxpayer's liability by a return preparer); 6700 (penalty for promoting abusive tax shelters); 6701 (penalty for aiding and abetting understatement of tax liability); 6702 (penalty for frivolous tax submissions); 6707 (penalty for failure to furnish information regarding reportable transactions); 6707A (penalty for failure to include reportable transaction information with tax return); 6708 (penalty for failure to maintain a list of advisees with respect to reportable transactions); and/or 6111 (requirement that a material advisor disclose reportable transactions.)

• In the event that the IRS has undertaken any examination of any of the specified third parties under any of these Code provisions for any year after 1999, petitioners demand that respondent produce:

- A complete copy of the IRS administrative file;
- The examining officer's activity reports;
- Complete IRS account transcripts;
- All reports created during or after the examination relating to the examination; and
- All summons or other requests for information, documents, interviews, or testimony that the IRS issued in conjunction with any such examination, as well as all correspondence and documents that the IRS received in response.

Virtually all of the information petitioners seek--including the existence vel non of the examinations about which they inquire--constitutes confidential third-party tax return information. See I.R.C. § 6103(a). Respondent contests petitioners' request for this information on three alternative grounds: (1) it is not relevant, (2) it is not disclosable to petitioners under I.R.C. § 6103, and (3) it violates the proportionality requirements of Tax Court Rule 70(c)(1).

We agree with respondent. Petitioners' discovery request strikes us as a classic "fishing expedition." See, e.g., United States v. Nixon, 418 U.S. 683, 700 (1974); Moore v. Commissioner, T.C. Memo. 2003-307, 86 T.C.M. (CCH) 546, 547 (quoting Estate of Woodward v. Commissioner, 64 T.C. 457, 459 (1975)). We shall deny the Motion to Compel for three reasons.

First, we share respondent's view that petitioners' request is unlikely to lead to the discovery of much (if any) relevant evidence.[3] Petitioners hypothesize that information in the IRS' investigative files may show that it was difficult for the IRS to gather information from the third parties and/or to reach a conclusion as to whether they had engaged in activity that was penalizable under one of the eight Code sections mentioned above. If that is so, petitioners say, one might infer that petitioners would likewise have been unable to discern the facts about the purported Midco scheme, if they had exercised due diligence by making inquiries of the third parties themselves. And that inference, petitioners say, might support their assertion that they lacked constructive knowledge.

We find this chain of hypotheses and inferences too thin a reed on which to hang a discovery request of this magnitude. Indeed, the ultimate target of petitioners' request would seem to be the opinions and observations of the IRS officers who may have participated in whatever investigations occurred. Wholly apart from section 6103, those opinions and observations would appear to be immune from discovery under the deliberative process privilege. See Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) ("[D]eliberative process covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'") (quoting NLRB v. Sears, Roebuck & Co., 421 U.S., 132, 150 (1975)); Deseret Mgmt. Corp. v. United States, 76 Fed. Cl. 88, 99 (2007) (holding that deliberative process privilege applied to IRS documents generated during tax audit).

Second, even if petitioners' request might produce some relevant information, we agree with respondent that this information would be exempt from disclosure under section 6103. That section generally protects tax returns and return information from disclosure, subject to limited exceptions. The exception upon which petitioners rely is contained in I.R.C. § 6103(h)(4)(C). That section permits the disclosure of third-party tax return information in a judicial or administrative

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[3]It appears that petitioners have filed a civil action against certain of the third parties. See Andrew Namm and James Doran as Trustees, et al., v. Proskauer Rose LLP, Ira Akselrad and Grant Thornton LLP, No. L004149-18, (N.J. Essex County Ct., filed June 13, 2018). To the extent that petitioners seek discovery of documents that might be useful in that case, they may seek that discovery in that forum.

tax proceeding "if such return or return information directly relates to a transactional relationship between a person who is party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding."

Petitioners have not convinced us that they qualify for this exception. Given the questionable relevancy of information contained in IRS files regarding investigations of third parties, petitioners have not shown that such information "directly affects the resolution of an issue" in these cases. I.R.C. § 6103(h)(4)(C). In any event, respondent has already supplied petitioners with all documents he has received from these third parties that are directly related to petitioners, Arebec, and the transactions that are the subject of this litigation. Documents contained in other IRS investigative files would necessarily relate to transactions between or among the third parties, other taxpayers, and the general public. Petitioners have failed to show that such information "directly relates to a transactional relationship" between the third parties and them. I.R.C. § 6103(h)(4)(C).[4]

Finally, even if the information petitioners seek would otherwise be discoverable, we would deny their motion to compel because the scope of their request is disproportionate to the potential utility of the information. We have discretion to limit the scope of discovery if we determine that: (1) "[t]he discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive"; or (2) "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Tax Court Rule 70(c)(1)(A) and (C).

Petitioners have requested 18 years of IRS examination material possibly involving as many as six separate taxpayers, including two tax-shelter promoters and one of the largest accounting firms in the world. Most if not all of this information will have no bearing on the transactions that are actually at issue in these cases. Through informal discovery, respondent has already provided petitioners with all documents it has obtained from the third parties relating to the transactions at issue. If that information is insufficient petitioners can seek additional informa-

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[4]Petitioners cite Alterman v. Commissioner, T.C. Memo. 2015-231, 110 T.C.M. (CCH) 507. That case did not involve a discovery dispute. And because the third-party tax return information discussed in that case was already in the public record, this Court had no occasion to address the application of section 6103.

tion from the third parties directly. They have made no showing that they are unable to do this.

We confronted a discovery request similar to petitioners' in 3K Investment Partners v. Commissioner, 133 T.C. 112, 118 (2009), which involved a Son-of-BOSS tax shelter. The IRS there had provided the taxpayer with all documents it possessed relating to the transaction at issue. The taxpayer demanded that the IRS produce, in addition, "copies of all tax opinions collected by respondent that have been issued regarding Son-of-BOSS transactions," as well as "a list of the names and addresses of all law firms and accounting firms known to respondent to have issued tax opinions regarding Son-of-BOSS transactions." 33 T.C. at 114.

We denied the taxpayer's motion to compel disclosure of this third-party tax return information, citing the questionable relevance of the information and the protection afforded by section 6103. See 133 T.C. at 115-121. We also concluded that "the requested discovery would be unduly burdensome on respondent," that the information sought was "obtainable from other sources that are more convenient and less burdensome," and that "any relevance of such evidence would be too remote * * * to justify discovery of the requested materials, especially considering that they relate directly to confidential information of third parties." Id. at 118; see Rule 70(c)(1)(A) and (C). We reach the same conclusions here.

In consideration of the foregoing, it is

ORDERED that Petitioners' Motion to Compel Production of Documents, filed May 17, 2018, is denied.

(Signed) Albert G. Lauber
Judge

Dated: Washington, D.C.
July 17, 2018