UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

JOHANNES LAMPRECHT & LINDA LAMPRECHT,	)	
Petitioners,	)	
v.	)	Docket No. 14410-15.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

In a notice of deficiency ("NOD") issued to petitioners Johannes and Linda Lamprecht, the IRS determined that they were liable for accuracy-related penalties under section 6662(a) for 2006 and 2007. In his answer to the petition, the Commissioner asserted fraud penalties under section 6663. On February 20, 2018, the Commissioner filed a status report (Doc. 69) that conceded that the requirements of section 6751(b)(1) were not met with respect to the section 6663 fraud penalties that were first raised in his answer, so that the only issues in dispute in this case are the accuracy-related penalties for tax years 2006 and 2007.

Now pending before the Court is the Commissioner's motion to amend his answer (Doc. 73) to plead issues related to the statute of limitations for assessment of the penalties. We will grant the Commissioner's motion to amend his answer.

Background

Penalties at issue

The Lamprechts filed Federal income tax returns for 2006 and 2007 on which they did not report certain items of income. In December 2010 they filed amended returns reporting that income. (Doc. 1, ¶ 16.)

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On January 9, 2015, the Internal Revenue Service ("IRS") issued to the Lamprechts an NOD (Doc. 1, Ex. A) determining 20% accuracy-related penalties under section 6662 for the 2006 and 2007 tax years. The Lamprechts filed their petition with this Court asserting, among other arguments, that the statute of limitations precludes the Commissioner from assessing section 6662 penalties.

Statute-of-limitations contentions in the answer

On August 3, 2015, the Commissioner filed his answer. (Doc. 3.) In addition to raising as a new matter the section 6663 fraud penalties (¶¶ 55-56), which the Commissioner has since then conceded, the answer pleaded three additional contentions as to the statute of limitations:

First, the answer pleaded fraud as a defense, under section 6501(c)(1), to the contention that the statute of limitations would bar assessment of the penalties. (Doc. 3 at 16, ¶ 57). Under that section, "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time". (Emphasis added.)

Second, the Commissioner alleged the statute of limitations did not start running because the Lamprechts failed to report certain information that is required by section 6501(c)(8). (Doc. 3 at 17, ¶ 58). Section 6501(c)(8) provides that if a taxpayer fails to file certain forms (concerning certain foreign transfers), then the statute of limitations will not expire until 3 years after the date on which the IRS is furnished the required information.

Third, the Commissioner also raised in his answer the position that "[p]ursuant to [section] 6501(e)(1)(A)(ii), the statute of limitations on the assessment and collection of the deficiency in income tax and penalties is extended from three years to six years if a taxpayer omits from gross income more than $5,000 attributable to one or more assets with respect to which information is required to be reported under [section] 6038D." (Doc. 3 at 17-21, ¶ 59).

The Commissioner admits that even a six-year statute of limitations for the Lamprechts' 2006 and 2007 tax years would have expired prior to his January 9, 2015, mailing of the NOD (i.e., for 2006 on April 15, 2013, and for 2007 on April 15, 2014); but he contends that the six-year statute of limitations was suspended for a period of time under section 7609(e), because of a "John Doe" summons that was served on Mr. Lamprecht's employer, UBS, AG, in July 2008, and therefore that the NOD was timely.

However, after the Commissioner asserted this contention based on section 6501(e)(1)(A)(ii), this Court concluded in Rafizadeh v. Commissioner, 150 T.C. No. 1 (Jan. 2, 2018), that "the wording of the effective date for section 6501(e)(1)(A)(ii) limits its application to years for which the reporting requirement of section 6038D also is effective" (i.e. taxable years beginning after March 18, 2010, the date of its section 6038D's enactment).

The Commissioner's motion to amend the answer

On March 30, 2018, the Commissioner filed a motion (Doc. 73) to amend his answer. He concedes that "[i]f this Court's opinion in Rafizadeh were to be applied in [the Lamprechts'] case, the statute [of limitations] would have expired under [section] 6501(e)(1)(A)(ii) prior to the issuance of the statutory notice of deficiency". But as an alternative argument that the statute of limitations did not expire, the Commissioner moves for leave to assert section 6501(e)(1)(A)(i), which provides for a six-year statute where "the taxpayer omits from gross income an amount properly includible therein and ... such amount is in excess of 25 percent of the amount of gross income stated in the return". The Commissioner argues that section 6501(e)(1)(A)(i) extended the statute of limitations to six years. He acknowledges that this six-year period would be insufficient in itself, but he contends that, pursuant to section 7609(e), the issuance of the "John Doe" summons to Mr. Lamprecht's employer suspends that six-year period in the same manner described above.

On April 20, 2018, the Lamprechts filed their response (Doc. 77), objecting to the Commissioner's motion to amend his answer. They argue that this Court should deny the motion because the Lamprechts would be prejudiced by the Commissioner's undue delay, and because the amendment would be futile. On May 2, 2018, the Commissioner filed his reply (Doc. 84).

Discussion

I. General principles concerning amendment of pleadings

Rule 41(a) provides that when more than 30 days have passed after an answer has been served, the Commissioner may amend the answer "only by leave of Court or by written consent of the adverse party, and leave shall be given freely when justice so requires." Whether a motion seeking amendment should be

allowed lies within the sound discretion of the Court. Quick v. Commissioner, 110 T.C. 172, 178 (1998) (citations omitted).

In determining whether "justice ... requires" the granting of a proposed amendment, the Court must examine the particular circumstances of the case and consider, among other factors, (a) whether an excuse for the delay exists, and (b) whether the opposing party would suffer unfair surprise, disadvantage, or prejudice if the motion to amend were granted. Id.

The Court may deny a motion to amend if permitting the amendment would be futile. See Block v. Commissioner, 120 T.C. 62, 64 (2003) (citing Klamath–Lake Pharm. Association v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983); Estate of Ravetti v. Commissioner, T.C. Memo. 1992-697). A motion is considered futile where the requesting party cannot prevail on the merits. See Wolfington v. Commissioner, T.C. Memo. 2014-45 at *12. We interpret "cannot prevail on the merits" to mean that even if we viewed the material facts and inferences in the light most favorable to the amending party, that the moving party would not prevail. The Court of Appeals for the D.C. Circuit, the Circuit to which a decision in this case would be appealable, has enumerated the same standard:

> '[A] * * * court has discretion to deny a motion to amend on grounds of futility where the proposed pleading would not survive a motion to dismiss.' Consequently 'our review in this instance is, for practical purposes, identical to review of a [Federal Rules of Civil Procedure,] Rule 12(b)(6) dismissal based on the allegations in the amended complaint.' On review of a motion to dismiss, we 'treat the complaint's factual allegations as true * * * and must grant [the amending party] the benefit of all inferences that can be derived from the facts alleged.' In re Interbank Funding Corp. Sec. Litig., 629 F.3d 213, 215-16 (D.C. Cir. 2010) (citations omitted).

In determining whether to grant or deny the amendment, we are therefore not deciding the merits of the proposed argument, but rather whether the moving party has successfully pleaded a prima facie case.

II. Undue delay and prejudice

The Lamprechts contend the Commissioner's motion is made at the last minute after unexplained delay. In Phelps v. McClellan, 30 F.3d 658, 663 (6th Cir. 1994), one of the cases cited by the Lamprechts for that proposition, the Court of Appeals for the 6th Circuit explained that "[i]n determining what constitutes

prejudice, the court considers whether the assertion of the new claim or defense would: require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction." Phelps, 30 F.3d at 662-663 (holding that the lower court did not abuse its discretion in allowing a party to amend his answer).

This case is not yet set for trial, and the Lamprechts still have ample opportunity to conduct discovery and any other pretrial activity prompted by the addition of this new issue to the case. The Commissioner filed his motion to amend his answer (Doc. 73) less than three months after Rafizadeh was decided, less than 15 days after the March 15, 2018, conference call, and by the deadline set out in our order of March 16, 2018 (Doc. 72).

The question whether section 6501(e)(1)(A)(i) extends the statute of limitations for the Lamprechts' 2006 or 2007 tax year is relatively straightforward. The answer depends on whether they omitted gross income, and if so, what the relative amount of omitted income was, compared to the amount they stated on their return. The facts necessary to answer that question have been before the Court since the parties filed their initial pleadings with the Court. (That is, the information that is necessary to calculate the section 6662 accuracy-related penalties that are at issue in this case the same information that is required to determine liability.) Additionally, the contention that, under section 7609(e), the issuance of the "John Doe" summons suspends the statute of limitations was pleaded in the Commissioner's original answer. The Lamprechts have since responded to this argument in several of their pleadings, as is discussed below.

Therefore, the granting of the Commissioner's motion will not result in the Lamprechts expending "significant additional resources to conduct discovery and prepare for trial", nor will it "significantly delay the resolution of the dispute".

III. Futility

A. Section 6751(b)

The Lamprechts contend that the Commissioner's pleading an extension of the statute of limitations argument would be futile because in developing that argument the Commissioner did not comply--and does not allege that he complied--with section 6751(b)(1). That provision requires supervisory approval of the "initial determination" of a "penalty under this title". The Lamprechts attempt to

expand the requirement of section 6751(b)(1) to reach extensions of the statute of limitations.

The general rule of section 6501(a) is that tax "shall be assessed within 3 years after the return was filed"; but here the Commissioner invokes the exception of section 6501(e)(1)(A)(i)--i.e., "If the taxpayer omits from gross income an amount properly includible therein and ... such amount is in excess of 25 percent of the amount of gross income stated in the return, ... the tax may be assessed ... at any time within 6 years after the return was filed." The Lamprechts seem to argue that the 6-year exception to the general 3-year rule constitutes a "non-monetary penalty", and that this "non-monetary penalty" ought to be subject to the requirement of supervisory approval imposed by section 6751(b). Since the Commissioner does not allege supervisory approval of the assertion of the 6-year statute of section 6501(e)(1)(A)(i), the Lamprechts contend that the 6-year contention must fail for lack of supervisory approval.

However, section 6501(e)(1)(A)(i) makes no provision for any "penalty", and section 6751(b) makes no provision whatsoever purporting to affect the running of the statute of limitations. Even if we were to accept the Lamprechts' novel suggestion that an extension of the statute constitutes a "penalty" of sorts, it would not be the sort of penalty affected by section 6751(b), which provides that "No penalty shall be assessed". A statute of limitations is not "assessed". The Lamprechts have not demonstrated that section 6751(b)(1) renders futile the Commisioner's proposed new argument based on section 6501(e)(1)(A)(i).

B. Section 7609(e)(2)(B)

The Lamprechts also argue (see Doc. 77 at 7-8), incorporating by reference their simultaneously filed second motion for summary judgment (see Doc. 79 at 19-23), that the Commissioner's alternative argument is futile due to his reliance on section 7609(e)(2)(B) and the "John Doe" summons. The Lamprechts allege that the UBS summons was not valid and that, even if it was, it did not extend the statute to the extent the Commissioner claims it did.

The Lamprechts' two arguments concerning the extension of the statute of limitations under section 7609(e)(2)(B) are the same as those advanced in their first motion for summary judgment dated February 7, 2016 (Doc. 8), which we denied by our order of December 20, 2016 (Doc. 38). They thus in effect request reconsideration of our prior order; but their deadline for doing so lapsed in January 2017. See Rule 161 (requiring a party to file "[a]ny motion for reconsideration ... within 30 days"); Bedrosian v. Commissioner, 144 T.C. 152, 156 (2015) ("A motion for reconsideration is not an appropriate mechanism by which to assert previously unsuccessful arguments". Accordingly, we will not now in the pleading context reconsider the same arguments that the Lamprechts have previously advanced, and this Court previously rejected, using effectively the same standard of review in the summary judgment context.

We reject the Lamprechts' futility arguments because the Commissioner pleads a prima facie case that the statute of limitations was extended to six years by section 6501(e)(1)(A)(i) and was suspended under section 7609(e)(2)(B), for the duration of time he alleges. The Lamprechts' arguments do not establish that the Commissioner "cannot prevail on the merits"; rather they oppose the amended answer with counter-arguments concerning disputed facts, which are the type of questions that are not resolved at trial and not at the pleading stage.

We will therefore grant the Commissioner's motion for leave to file out of time his first amendment to answer.

It is

ORDERED that, the Commissioner's motion (Doc. 73) for leave to file amendment to answer out of time is granted, and the amendment to answer (Doc. 74) lodged on March 30, 2018, shall be filed as of the date of this order.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
July 27, 2018