

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

Trial in this case will begin August 6, 2018. This week the parties have filed eight motions *in limine* seeking the exclusion of expert witness reports on various grounds--one of them (Doc. 72) filed by petitioners (collectively, “Murfam”), and seven (Docs. 60, 61, 63, 70, 71, 73, 75) filed by the Commissioner. We address in this order only the five of the Commissioner’s motions *in limine* (Docs. 60, 61, 70, 71, and 75) that seek to exclude five of Murfam’s expert reports on the grounds that the reports list multiple authors. We do not address in this order Murfam’s motion *in limine* (Doc. 72) or the Commissioner’s other two motions *in limine* (Docs. 63, 73). In this order we will deny the five motions *in limine* without prejudice and will order alternative relief.

The listing of multiple authors in an expert report is an anomaly in the Tax Court, given this Court’s unique procedure regarding expert testimony: Under Tax Court Rule 143(g)(1), every (singular) “expert witness” must submit a (singular) “written report”; and under Rule 143(g)(2) “[t]he report will be ... received in evidence as the direct testimony of the [singular] expert witness”. A report written by multiple authors cannot really be received into evidence as the direct testimony of one of them. In a trial each witness gives his own testimony and only his own testimony, and the witness then is subject to cross-examination that is limited to the scope of his direct testimony. Fed. R. Evid. 611(b).

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If on cross-examination an expert is unable to answer (or to answer convincingly) a question on some aspect of his report, that inability will usually undermine the report; but where there are multiple authors, the proponent may attempt to minimize that inability by calling on another author to give a better answer. The unclarity of the situation would impermissibly “impair[] the opposing party’s ability to cross-examine the expert witness”, which Rule 143(g)(2) expressly forbids. And the possibility of multiple authors being called as witnesses to give different answers to overlapping questions, and being quoted against each other to impeach their testimony, may extend the trial inordinately. Thus, Murfam’s submission of five multiple-author expert reports is very problematic.

However, an expert report with multiple authors is not unheard of in the Tax Court (see, e.g., IRS Chief Counsel Notice CC-2004-023), so we are not inclined to exclude the reports from evidence altogether, without first attempting a lesser remedy that may address the Commissioner’s objections. During a telephone conference with the parties on July 27, 2018, the undersigned judge developed the impression: that Murfam may intend that one or more of these five reports is in fact the report of, and reflects the opinions of, one single expert (whom we will call “the principal expert”) who warrants the entire report; that Murfam may have named the other experts (whom we will call “assisting experts”) only to indicate their work on the report as helpers of the principal expert; and that Murfam may intend to offer the report as the opinion of only that principal expert and to call only that principal expert as their witness.

It is

ORDERED that the Commissioner’s five motions *in limine* based on multiple authorship (Docs. 60, 61, 70, 71, and 75), are denied without prejudice to the renewal of one or more of those motions if the remedies ordered here do not mitigate the problems of those reports. It is further

ORDERED that for each of the reports that is the subject of one of these five motions, Murfam shall, no later than close of business on Monday, July 30, 2018, file with the Court and serve on respondent a response to this order that gives an absolutely clear indication of which opinions in the report are attributable to each expert and which portions of the report were drafted by each expert whose name is listed on the report, or who signed the report, or whose resume is attached to the report. If, consistent with the undersigned judge’s impression described above, Murfam intends a report to be in fact the report of a single principal expert, then

Murfam's response to this order shall so state; but Murfam shall nonetheless indicate the portions of the expert report that were initially drafted by each of the assisting experts. It is further

ORDERED that, for each report that Murfam offers into evidence, Murfam shall make available at the trial of this case all of the experts whose names are listed on the report, or who signed the report, or whose resume is attached to the report, whether or not Murfam intends to call them as witnesses, so that the Commissioner can, if he wishes, call that expert to be cross-examined in connection with that report. (The Commissioner shall cooperate with Murfam to keep to a minimum the amount of time that an assisting expert must be available to be called by the Commissioner to testify. Presumably, all the experts whose names appear on a given report will be examined on the same day and will be excused when the presentation of that report has been completed.)

**(Signed) David Gustafson
Judge**

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