UNITED STATES TAX COURT
WASHINGTON, DC 20217

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CROSS REFINED COAL, LLC, USA REFINED COAL, LLC, TAX MATTERS PARTNER, Petitioner(s), v. COMMISSIONER OF INTERNAL REVENUE, Respondent	)))))))))))	Docket No. 19502-17.

O R D E R

Trial in this case will begin August 5, 2019, in Boston, pursuant to our order of February 28, 2019 (Doc. 34). Now pending before the Court are five discovery motions, three of which (Docs. 46, 47, and 48) we will resolve by this order, and two of which (Docs. 45, 50) we will act on in due course.

Background

Cross and the claimed credits

Cross Refined Coal, LLC ("Cross") claimed "refined coal" tax credits under section 45(e) (8) for the years 2011 and 2012. The primary issue in this case is whether for federal income tax purposes Cross was in substance a bona fide partnership and whether its members were bona fide partners.

The IRS's adverse position in the TAM

The Internal Revenue Service ("IRS") examined the issue. The IRS articulated its adverse position as to Cross and the tax credits in Technical Advice Memorandum ("TAM") 201729020 (Mar. 23, 2017), and consistent with the TAM

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it disallowed those credits in a Notice of Final Partnership Administrative Adjustment ("FPAA") issued to Cross.

The CCM

About a year later, the Office of Chief Counsel of the IRS issued Chief Counsel Memorandum ("CCM") AM2018-002 (Mar. 9, 2018), which explained:

> Since issuing TAM 201729020, July 21, 2017, the IRS Office of Chief Counsel has received several requests for clarification as to the treatment of refined coal credit transactions and the eligibility of participants therein to claim the § 45 tax credit. In response to these requests, this memorandum sets forth some general guidelines for analyzing refined coal transactions.

For purposes of this order, we accept Cross' characterization of the CCM:

> The Refined Coal CCM states that "the refined coal industry has developed a structure (the 'common structure') that places several limits on the risks to investors." CCM AM2018-002, at 3. It goes on to describe a number of features of that "common structure," many of which are shared by Cross. It then focuses on additional, purportedly distinguishing, features of Cross (e.g., the royalty provision) that it claims "place yet further limits on risk (or reward) to the investor."

The CCM indicates that for certain taxpayers other than the one in the TAM (i.e., other than Cross) whose circumstances are different from those in the TAM (i.e., different from Cross's), Chief Counsel concludes that the credits should not be disallowed.

Cross's attempted discovery regarding the CCM

By document requests, Cross has attempted to learn facts relied on in the CCM about the taxpayers other than Cross and their different circumstances. The IRS has objected on grounds of irrelevance, attorney-client privilege, deliberative process privilege, section 6103, overbreadth, and undue burden. Cross filed a motion to compel; the Commissioner objected; and Cross replied. (Docs. 46, 54, 59.)

Cross requested the Commissioner's consent to conduct a deposition of an IRS designee on 34 "designated matters" concerning the CCM, the first of which is "The meaning of the terms and language used in the Refined Coal CCM." The Commissioner objected on grounds of irrelevance. Cross filed a motion to compel; the Commissioner objected; and Cross replied. (Docs. 48, 53, 61.)

By requested admissions (Nos. 15, 16, and 18), Cross attempted evoke admissions by the Commissioner of various legal propositions related to the conclusions in the TAM and the CCM. The Commissioner objected on various grounds and, in the alternative, denied. Cross also requested that the Commissioner admit certain propositions about: what "Congress intended" in enacting section 45(e) (No. 4), economic effects of section 45(e) as Cross construes it (No. 5), and economic circumstances of Cross (Nos. 20, 22, which the Commissioner said he does not know) and its industry (Nos. 19, 21). The Commissioner objected to these requests on various grounds. Cross filed a motion to review the sufficiency of the Commissioner's answers and objections; the Commissioner objected; and Cross replied. (Docs. 46, 54, 59.)

Discussion

Cross's entitlement to the credits at issue in this case will be decided by applying the law to the facts about Cross and its transactions. All of the facts that the Commissioner knows about Cross he learned from Cross. Cross makes no allegation that, in responding to discovery, the Commissioner has withheld any facts about Cross. Rather, the principal dispute now before us concerns facts about other entities and their transactions. But such facts will have no bearing on the outcome of this case.

The Court will not adjudicate the correctness of the CCM. Neither party argues that the CCM has precedential value nor that we should defer to it in any way. We do not expect to attempt to distinguish Cross's facts from those in the CCM. We do not expect to evaluate the CCM's conclusions as to other taxpayers nor to determine whether, in issuing the CCM, the Office of Chief Counsel had an adequate factual or legal predicate for those conclusions. If the CCM was factually unsupported and legally without merit, that would not help Cross; and if instead the CCM was factually impeccable and legally brilliant, that fact would not help the Commissioner. Consequently, Cross's efforts in discovery to learn more about the background of the CCM are misdirected.

Cross argues that, in the context of resolving a simultaneous Freedom of Information Act ("FOIA") dispute and to avoid the need to produce documents both under FOIA and in Tax Court discovery, the Commissioner expressly waived his relevance objections as to the discovery requests now at issue. The Commissioner denies it. We will not resolve that dispute in this order. We do not insist that it is always absolutely impossible for someone to bargain away a relevance objection (and in connection with Cross's other motion to compel (Doc. 45), not ruled on here, we may need to give closer attention that alleged waiver); but today we must decline to overlook the palpable irrelevance of the requests at issue and must decline to become, in effect, a proxy for a district court adjudicating a FOIA dispute (in which context relevance is not an issue). We will not use the resources and authority of the Tax Court to compel disclosures extraneous to our proper business.

Cross expresses the concern that the Commissioner "[has] had access to the facts underlying the Refined Coal CCM since before it was issued. To the extent he believes that information helps him, he can use it. To the extent he believes it does not, he can withhold it." This need not be a concern. These facts about other taxpayers are irrelevant and would not be admitted into evidence. The Commissioner's repeated (and correct) insistence that facts about other taxpayers are utterly irrelevant here makes it doubly certain that at trial we would not permit him to change his mind and attempt to offer evidence that he had refused to give in discovery. In the unlikely event that the Court were to be forgetful or inattentive on this point at trial, we would expect petitioner's counsel to remind us of the ruling we make in this order.

It is

ORDERED that, for the reasons stated here and in the Commissioner's responses to Cross's document requests and in his opposition (Doc. 54), Cross's motion to compel the production of documents (Doc. 46) is denied. It is further

ORDERED that, for the reasons stated here and in the Commissioner's responses to Cross's requests for admissions and in his opposition (Doc. 52), Cross's motion to review the sufficiency of respondent's answers and objections to the requested admissions (Doc. 47) is denied. It is further

ORDERED that, for the reasons stated in our order of April 18, 2019 (Doc. 49)--i.e., "under Rule 74(c)(1)(B), 'The taking of a deposition of a party ... is an extraordinary method of discovery.' It seems likely to be even more so when the

party whose facts are the subject of the lawsuit proposes to depose the party with no personal knowledge of the facts and who first had access to the relevant information only after the fact and indirectly"--and in the Commissioner's opposition (Doc. 53), Cross's motion to compel the taking of deposition (Doc. 48) is denied.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
May 22, 2019