

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217 PA

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

ORDER

Now before the Court is petitioner’s motion to strike (Doc. 64). We will deny it.

Background

After trial in this case was set to begin July 22, 2019 (see Doc. 24), the parties jointly suggested (see Doc. 26) a schedule for pretrial activity, which the Court ordered on October 26, 2018 (see Doc. 27). Under that pretrial schedule, requests for documents under Rule 72 were due to be served by January 30, 2019.

However, from December 22, 2018, through Friday, January 25, 2019, there was a lapse in appropriations to fund the Commissioner’s operations. Funding was temporarily restored and work resumed on Monday, January 28, 2019; but at that time funding was assured only through February 15, 2019. On February 1, 2019, respondent filed a motion for a continuance (Doc. 28) that asked the Court to “continue the date of the trial of this case and all pretrial deadlines dates”. The motion reported that “petitioner stated that it is open to respondent seeking a continuation of the commencement of trial to the fall of 2019 and extending certain pre-trial deadlines. Petitioner, however, objects to extending pre-trial deadlines that it contends has lapsed.” (Emphasis added.)

SERVED May 24 2019

By order of February 5, 2019 (Doc. 30), we--

ORDERED that respondent's motion is denied without prejudice. Respondent may renew his motion after February 15, 2019. The Court advises the parties that it is inclined to adjust the pretrial schedule to account for respondent's counsel's furlough, and that it is willing to consider a trial date two or three weeks later than the current schedule. However, the trial in this case probably cannot be set to begin in September 2019, because numerous regular sessions will take place that month, and the Court is strongly disinclined to schedule a trial to take place after the end of the Government's current fiscal year on September 30, 2019, when new funding issues might arise. [Emphasis added.]

On February 20, 2019, the Commissioner served document requests. Under the previous schedule (ordered before the 5-week Government "shutdown"), those requests were due January 30, 2019, and were thus three weeks out of time.

On February 28, 2019 (Doc. 34), a new trial date was set--August 5, 2019, two weeks after the prior date of July 22, 2019. On March 7, 2019, the parties filed a joint status report (Doc. 35) recommending agreed changes to the pretrial schedule, which the Court endorsed (see Doc. 36). The parties' status report explained a dispute about the timeliness of the Commissioner's document requests:

Petitioner's position is that these requests are untimely. Respondent's position is that he should not be precluded from issuing discovery requests he was unable to issue due to the government's 35-day lapse in appropriations. The parties are conferring about these requests and are attempting to work through the issues without the need for the Court's intervention.

However, the parties were unable to come to agreement about the petitioner's response to the Commissioner's document requests, and on April 26, 2019, respondent filed a motion to compel (Doc. 50), which is still pending, and which we do not resolve in this order. Petitioner filed an objection to the motion (Doc. 56), which argues that the document requests should be denied because, among other things, they were untimely and the Commissioner did not request or receive an extension of the deadline to serve document requests. The Commissioner filed a reply (Doc. 63) in which he argues that petitioner's

“hardline” insistence on untimeliness is at odds with (for example) its undertakings in the parties’ joint status reports that it was “working in good faith to resolve the unagreed scheduling issues” (Doc. 32) and that it was “attempting to work through the issues without the need for the Court’s intervention” (Doc. 35). The Commissioner also argues that petitioner had misstated that the Commissioner never sought an extension of the pertinent deadline, since the Commissioner’s motion for a continuance (Doc. 28) did request that the Court extend “all pretrial deadlines dates”.

Petitioner has now filed its motion (Doc. 64) to strike portions of that reply (Doc. 63). Petitioner explains (correctly, we think) that it always expressly reserved its timeliness objections, even while it undertook to attempt to come to agreement. However, we find nothing strike-worthy in the Commissioner’s reply.

Moreover, when in due course we rule on the motion to compel (Doc. 50), we expect to overrule the petitioner’s untimeliness objection. As we plainly signaled in our order (Doc. 30), which denied a continuance and extensions at a time when the Government’s continued funding was still in doubt, we were (and are still) “inclined to adjust the pretrial schedule to account for respondent’s counsel’s furlough”. Arguably, best practice would have been for the Commissioner, after receiving our denial (Doc. 30), to have filed another, narrower motion seeking an extension only of the deadline for document requests--but maybe not. At that time the Commissioner (like the Court) was busy recovering from the shutdown and was awash in scheduling issues in numerous cases. Given that context, and given that we had indicated our “inclin[ation] to adjust the pretrial schedule” and had invited the Commissioner to “renew his motion after February 15, 2019”, his service of document requests three weeks out of time (under the schedule entered in October 2018) was not unreasonable.

We think that the pending motion to strike was not a good expenditure of petitioner’s counsel’s time and that it required from the Court attention that would have been better spent on the remaining motions to compel (Docs. 45, 50). It is therefore

ORDERED that the motion to strike (Doc. 64) is denied. It is further

ORDERED that, no later than June 3, 2019, the parties shall file a joint status report (or, if that is not expedient, then separate reports) indicating the extent, if any, to which the parties’ disagreements on the still-pending motions to compel (Docs. 45 and 50) have been resolved or narrowed. This order has

addressed one issue (untimeliness) that was raised in opposition to the Commissioner's motion (Doc. 50). And it may be that our order of May 22, 2019 (Doc. 62), has shed some light that might be useful in resolving either or both of the motions.

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
May 24, 2019