

**UNITED STATES TAX COURT  
WASHINGTON, DC 20217 PA**

NCA ARGYLE LP, NEWPORT CAPITAL )  
ADVISORS, LLC, A PARTNER OTHER THAN )  
THE TAX MATTERS PARTNER, ET AL., )  
 )  
Petitioners, )  
 )  
v. ) Docket No. 3272-18, 6662-18,  
 ) 6663-18, 6829-18.  
COMMISSIONER OF INTERNAL REVENUE, )  
 )  
Respondent )

**ORDER**

Pending before us are three motions to compel taking three non-party depositions filed by the Commissioner. The petitioners object to the motions due to their timing (*i.e.*, their proximity to trial) and because the (petitioners contend) Commissioner did not request the information during informal discovery. Because the depositions sought are duplicative, we will grant one of the Commissioner’s motions to compel the taking of depositions.

**Background**

This is a case about the characterization of income. In addition to the underlying adjustments at issue, the Commissioner has asserted a section 6662 accuracy-related penalty, to which the petitioners have raised the defense of reasonable cause.<sup>1</sup>

This case is set for trial in Los Angeles, California, on September 9, 2019. On August 8, 2019, the Commissioner filed three motions to compel the taking of depositions. The parties generally have cooperated. They engaged in informal

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Internal Revenue Code in effect for the tax years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

discovery; they filed a joint stipulation of facts, and they agreed to a pretrial schedule. However, the parties are now unable to agree on these depositions.

The Commissioner asks that we compel the depositions of three individuals who were involved in giving tax advice to petitioners relating to a settlement. One of the proposed deponents, Jody Fouch, is the CPA who prepared the returns at issue and was an advisor regarding the tax treatment of the settlement proceeds. The other two potential deponents purportedly gave advice to the petitioners at the time the settlement agreement was reached. The Commissioner believes these depositions will help him to understand the advice given to petitioners regarding the settlement proceeds.

The petitioners object. Their initial objections focused on the proximity to trial. Their response to the Commissioner's motions focuses on their contention that the Commissioner did not previously request this information.<sup>2</sup>

### Analysis

Rule 70(b) directs that scope of discovery includes all information and responses that concern any non-privileged matter that is relevant to the subject matter involved in the case. Under this rule, if the information or response sought "appears reasonably calculated to lead to discovery of admissible evidence" then it is properly within the scope of discovery.<sup>3</sup>

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<sup>2</sup> There is an additional skirmish between the parties over the timing of petitioners' response to the motions. The Court ordered the response to be filed by August 14, 2019. Petitioners' counsel, located in the Pacific time zone, filed the response at 1:04 am eastern time on August 15, 2019. The Commissioner asked that we consider the response to be untimely and factor that consideration into our decision-making.

Following a recent amendment to Rule 22, effective November 30, 2018, a paper is considered timely if electronically filed by 11:59 pm eastern time on the due date. In contrast, the Practitioners' Guide to Electronic Case Access and Filing available on the Court's website states at page 42, "A document is considered timely filed if it is electronically transmitted no later than 6:00 a.m. Eastern time on the day after the last day for filing." The Court will take steps to conform the online guide(s) to the recently amended rule. As for this case, no one was prejudiced by the 65 minute delay, and the Court has filed petitioners' response.

<sup>3</sup> Rule 70(b).

Nonconsensual depositions are an extraordinary method of discovery that may only be taken pursuant to an order from our Court.<sup>4</sup> These depositions are available only where a party or nonparty witness can give testimony that is discoverable within the meaning of Rule 70(b) and where such testimony cannot practicably be obtained through informal consultation or communication under Rule 70(a)(1), interrogatories under Rule 71, requests for production of documents under Rule 72, or consensual depositions under Rule 74(b).<sup>5</sup> The decision to require an individual to submit to a nonconsensual deposition is a matter that is solely within the discretion of the presiding judge.<sup>6</sup>

The information the Commissioner seeks to obtain through the proposed depositions is relevant and discoverable information. The proposed depositions would examine, for all three of the individuals, their role in advising petitioners as to the proper tax treatment of the income at issue. This information is relevant to the question of whether petitioners had reasonable cause for their reporting on their returns.

Because we agree with the Commissioner that the information sought is relevant, discoverable, and that the Commissioner cannot otherwise obtain it, we agree that some depositions are warranted at this time.

However, under Rule 70(c)(1)(C), we must limit discovery if we determine that “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.” In this case, compelling all three depositions would be unduly burdensome and expensive, considering the circumstances, such as the overlapping nature of the testimony sought and the proximity to trial. Therefore, we will grant one of the Commissioner’s motions and order the deposition of Mr. Fouch. We will deny the Commissioner’s motions to compel the other depositions.

Upon due consideration, it is

ORDERED that the Commissioner’s motion to compel the deposition of Mr. Fouch is granted. It is further

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<sup>4</sup> See Rule 74(c).

<sup>5</sup> Rule 74(c)(1)(B).

<sup>6</sup> See Explanation to Rule 74, Tax Court Press Release, Sept. 18, 2009, at p. 24.

ORDERED that the Commissioner's motion to compel the deposition of Michael Jennings is denied. It is further

ORDERED that the Commissioner's motion to compel the deposition of Hugh Saddington is denied.

**(Signed) Ronald L. Buch  
Judge**

Dated: Washington, D.C.  
August 16, 2019