

UNITED STATES TAX COURT
WASHINGTON, DC 20217

EDWARD G. KURDZIEL, JR., ET AL.,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 21186-12
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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ORDER

This case, as well as the one with which it was consolidated, was about whether Kurdziel’s restoration of a WW II-era plane was an activity engaged in for profit. The Commissioner won this key issue. But now the Commissioner says he made what he calls computational errors in his original notice of deficiency.

We need to run down the checklist of their disagreements and get the case flying back to its final destination.

Background

In the notice of deficiency, the Commissioner listed the following key numbers on line 7 of his Form 5278 -- the IRS form that the Commissioner uses to summarize changes that he wants to make to a taxpayer’s return:

Adjustment	2007	2008	2009
Sch. C IRC 183	\$107,456	\$99,178	\$106,013
Itemized Deds.	\$3,900	\$758	\$1,968
Exemptions	\$363	--	--

He now says that those numbers were wrong, and should instead be:

Adjustment	2007	2008	2009
Sch. E after passive loss limit	\$25,000	--	\$25,000
Other income	\$ 9,685	\$14,400	\$14,000
Sch. C IRC 183	\$117,141	\$118,865	\$122,033
Itemized Deds.	\$(13,381)	\$(17,670)	\$(15,693)
Exemptions	\$1,179		

The first difference one notices is the inclusion of an extra \$25,000 in taxable income because of the passive-income loss limitation for owners of rental real estate. The second difference -- which triggers the rest of the different numbers between these two tables -- comes from what the Commissioner says was his revenue agent's mistake in preparing the notice. The agent seems to have subtracted gross receipts from total expenses; the Commissioner now says that she should have added any gross receipts from Kurdziel's plane restoration and flying to his gross income, increased his miscellaneous deductions up to the amount of that gross income, and denied the remainder. His revenue agent did not do this when drafting the notice of deficiency for the 2007-09 tax years.¹

This problem arose because the Court released its opinion, T.C. Memo. 2019-20, but left it to the parties to prepare the computations needed to enter decisions in this case and its companion. The changes in these numbers that the

¹ The parties' competing computations also differ in whether there should be accuracy-related penalties for these years. Kurdziel includes them in his proposed decision document; the Commissioner excludes them in his. The opinion quite clearly ruled in Kurdziel's favor on this point. *Kurdziel v. Commissioner*, T.C. Memo. 2019-20, at *39. The decision here should reflect Kurdziel's victory.

The Commissioner also made a different computational error in the notice for the 2010 year, the one that led to docket number 12674-13. When corrected, this mistake benefited Kurdziel, who naturally does not object to a reduction in the deficiency he owes for that year. We can enter decision in that case without further analysis.

Commissioner now wants to make -- after discovery, after the trial, after even the posttrial briefing -- would mean that Kurdziel owes more to the IRS for two of the years at issue. The Commissioner has moved to amend his answer to increase the deficiencies he now wants.

Kurdziel objects.

Analysis

Section 6214(a) of the Code does give us jurisdiction “to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency * * * if claim therefor is asserted by the Secretary *at or before the hearing or a rehearing.*” (emphases added). The italicized language is no bar to the Commissioner’s motion -- though it might surprise a nonspecialist, that phrase doesn’t mean “at or before the trial,” but means any time before our Court enters a final decision. *See, e.g., Sun v. Commissioner*, 880 F.3d 173, 182 (5th Cir. 2018); *Henningsen v. Commissioner*, 243 F.2d 954, 959 (4th Cir. 1957).

The Commissioner asserts his claim for increased deficiencies here in the form of a posttrial motion to amend his answer under Rule 41. That rule provides that when more than 30 days have passed after an answer has been served, “a party may amend a pleading only by leave of Court or by written consent of the adverse party, and leave shall be give freely when justice so requires.”

Whether a party may amend its answer lies within the sound discretion of the Court. *Quick v. Commissioner*, 110 T.C. 172, 178 (1998) (citations omitted). In determining the justice of allowing a proposed amendment, we 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. *Estate of Ravetti v. Commissioner*, 64 T.C.M. (CCH) 1476, 1478 (1992).

With these general considerations safely on board, we can now look at each question that the Commissioner’s motion asks.

We’ll first look at the \$25,000 increase in Kurdziel’s income for 2007 and 2009. This increase is a consequence of our disallowance of the numerous expenses for restoring and flying the plane that Kurdziel claimed. That disallowance led to an increase in his taxable income. Kurdziel owned some rental

real estate which also lost money those years. Section 469(i)(3)(A) phases out the amount of those losses that he can deduct as his adjusted gross income increases. *Bosque v. Commissioner*, 101 T.C.M. (CCH) 1355, 1358 (2011). The revenue agent should have noticed this, but by the time of trial the Commissioner had. At the very start of trial, the Court raised it with the parties and Kurdziel's lawyer specifically acknowledged that the phase out would apply to any posttrial computations and would be entirely mathematical.

There's no surprise and no unreasonable delay here. As the Commissioner rightly points out, there is much case law that allows amendments to conform to things that happen at trial. *See, e.g., Bhattacharyya v. Commissioner*, 93 T.C.M. (CCH) 711, 714 (2007); *Myers v. Commissioner*, 41 T.C.M (CCH) 83, 91–92 (1980).

There's a difference, however, in the somewhat more complicated changes that the Commissioner proposes for the treatment of the gross receipts from Mr. Kurdziel's plane project. *These* were not brought up at trial. And the only excuse for delay that the Commissioner suggests for their late arrival is that he didn't notice them until it came time to do the computations. Here, the closest case we could find is *Hanley v. Commissioner*, 58 T.C.M. 1326 (1990), where we analyzed a nearly identical situation:

[R]espondent has failed to persuade us that justice requires us to allow him to amend his answer and increase the deficiency. The discrepancy at issue appears to be solely the result of respondent's error in his preparation of the notice of deficiency. In his motion, respondent contends that he notified petitioners' counsel of this discrepancy 'some time ago' and petitioners' counsel has not communicated with him since February 1989. Yet respondent does not explain why he waited until November 1989 [i.e., months after the opinion and more than a year after trial], to move to amend his answer.

Id. at 1327.

Just so here -- except here there's nothing to show that the Commissioner contacted Mr. Kurdziel's lawyer until just before filing the motion. We will exercise our discretion here as we did in *Hanley* and deny the Commissioner's

motion to amend. Justice doesn't require letting him fix mistakes in his own notice of deficiency that he should have noticed a long time ago and that now come as a surprise to his adversary.

It is therefore

ORDERED that respondent's June 19, 2019 motion for leave to file an amended answer is granted in part and denied in part, as explained above. It is also

ORDERED that on or before October 21, 2019 the parties submit the computations under Rule 155 or file a status report to describe their progress.

**(Signed) Mark V. Holmes
Judge**

Dated: Washington, D.C.
September 6, 2019