UNITED STATES TAX COURT
WASHINGTON, DC 20217

HURFORD INVESTMENTS NO. 2, LTD., HURFORD MANAGEMENT NO. 2, LLC, TAX MATTERS PARTNER,	)	
Petitioner(s),	)	**CT**
v.	)	Docket No. 23017-11.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This case was on a pretrial-order track, then went to summary judgment. We granted Hurford Investments Number 2's (HI-2) summary-judgment motion, denied respondent's, and ordered the parties to try to agree to the language of a decision. HI-2, however, moved for reasonable litigation and administrative costs under Rule 231. We denied that motion, but it moved for reconsideration in light of the Federal Circuit's decision earlier this year in *BASR Partnership v. United States,* 915 F.3d. 771 (Fed. Cir. 2019). More briefing followed.

Background

The Court assumes the parties' familiarity with the case and previous orders. The gist of the present motion is that HI-2, having won summary judgment, wants attorneys' fees and costs. IRC § 7430 allows a prevailing party to move for litigation and administrative expenses, but in an unusually clear example of the murkiness of taxspeak, does *not* define a prevailing party as the one who prevailed. In one of our previous orders we found that HI-2 was not a prevailing party because the Commissioner's position was "substantially justified" as the Code defines that term. *See* IRC § 7430(c)(4)(B)(i).

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But HI-2's back-up argument was that it had made a "qualified offer" under section 7430(g), which would mean that it didn't even have to be a "prevailing party" to win fees and costs. In our original order, we held that HI-2's offer was not a "qualified offer" because:

> as a general matter, no qualified offer is possible in TEFRA cases; and
>
> looking at the specific offer that HI-2 made, one sees that it was not limited only to the adjustments set out in the FPAA that led to this case.

On the first of these points we noted that we disagreed with the Court of Federal Claims in its opinion in *BASR,* 130 Fed. Cl. 286 (2017). After we issued our order, the Federal Circuit affirmed the Court of Federal Claims's judgment and unambiguously held that qualified offers are possible in TEFRA cases. *BASR,* 915 F.3d at 782-83.

HI-2 reasonably asks us if we really want to disagree with a circuit court.

The Commissioner urges us to do so, but also points out we had an argument in the alternative based on HI-2's specific offer that the Federal Circuit did not address.

Analysis

The standard for reconsideration is whether the Court made "a manifest error of law or facts," or a party can point to newly discovered evidence, or there has been intervening change in controlling law. *Schiller v. Physicians Res. Grp., Inc.,* 342 F.3d 563, 567 (5th Cir. 2003).[1]

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[1] Appellate venue in this case would seem to lie in the Fifth Circuit, *see* IRC § 7482(b)(1)(E), so we'll follow that circuit's precedent, *see Golsen v. Commissioner,* 54 T.C. 742, 757 (1970), *aff'd,* 445 F.2d 985 (10th Cir. 1971). No Tax Court decision can ever be appealed to the Federal Circuit, so the proper pigeonhole for us to look into is whether we committed a "manifest error of law," not whether there has been a change in "controlling law."

HI-2's Specific Offer. We'll start with the argument that wouldn't put us in conflict with the Federal Circuit. It hinges on the specific language of HI-2's offer:

> Petitioner will concede that no portion of the taxable income (less basis) reported by Hurford Investments No. 2, Ltd., in 2006 . . . was constructively received before 2006.
>
> Petitioner will concede that income should be reported so that its partners receive refunds collectively (excluding interest) of no more than $1.37 million in tax.

Subsection 7430(g)(1)(B) defines a qualified offer as one that "specifies the offered amount of the taxpayer's liability (determined without regard to interest)." And the accompanying regulation states that the offered amount "may be a specific dollar amout of the total liability or a percentage of the *adjustments at issue in the proceeding* at the time the offer is made. This amount must be with respect to all of the adjustments at issue in the administrative or court proceeding at the time the offer is made and *only* those adjustments. The specified amount must be an amount, the acceptance of which by the United States will *fully resolve the taxpayer's liability*, and *only that liability* . . . for the type or types of tax and the taxable year or years at issue in the proceeding." 26 C.F.R. § 301.7430-7(c)(3) (emphases added).[2]

As we held in the original order, even if one read the Code to allow qualified offers in a TEFRA proceeding like this one, this particular offer wouldn't fit within the definition. The only adjustment at issue in this case, because it is the only partnership-level adjustment mentioned in the FPAA sent to HI-2, is this:

> In the course of the examination, taxpayer filed a request to reduce the reporting of the 2006 deferred compensation plan income from Hunt Oil Company and to change the character of this income from ordinary to capital gain income. This request has been considered and not allowed.

[2] This regulation has changed a bit over the years. The citation is to the regulation in effect for this case. 26 C.F.R. § 301.7430-7(f).

The offer that petitioner later made not only fails to settle the "liability" of HI-2 -- which, as a partnership, doesn't have a tax liability at all -- but also is not limited only to the adjustment in the FPAA and tries to settle the effect of this partnership-level proceeding on the liability of petitioner's individual partners.

Even if some party could make a qualified offer in some TEFRA case, HI-2's offer to settle here was not a "qualified offer" as the Code and regulation define that term.

The more general problem. Prudence dictates that a trial court not aggravate disagreements with appellate courts, even one to which no appeal of its judgments lie. But there are problems in the Federal Circuit's analysis of the question of whether qualified offers are even possible in TEFRA cases that impel us to persist in our respectful disagreement.

Both the Code and regulations use the phrases "in issue" and "at issue" to limit when a taxpayer can make a qualified offer. Code section 7430(c)(4)(E)(ii)(II) excludes from the rules on qualified offers any offer in "any proceeding in which the amount of tax liability is not *in issue*, including any declaratory judgment proceeding, any proceeding to enforce or quash any summons issued pursuant to this title, and any action to restrain disclosure under section 6110(f)." The regulation likewise requires a qualified offer to be for "a specific dollar amout of the total liability or a percentage of the *adjustments at issue in the proceeding* at the time the offer is made." 26 C.F.R. § 301.7430-7(c)(3) (emphases added).

In *BASR*, the Federal Circuit began by noting that there is no definition in the Code of these phrases. 915 F.3d at 778. It went to the dictionaries and concluded that they meant "in dispute" or "in question." *Id.* TEFRA gave courts and the IRS a way to uniformly adjust partnership items in a single partnership-level proceeding; this necessarily means that the outcome of such a proceeding will determine or at least affect the determination of a particular partner's particular tax liability for a particular year, even if later partner-level computations or proceedings are needed to do so. *Id.* at 779.

The Federal Circuit therefore rejected the Commissioner's position that, for the amount of a party's tax liability to be *at issue* in a proceeding, the amount of that tax liability must be *determined* in that proceeding. *See id.* at 778 (describing Government's position).

We agree with the Commissioner on this motion for reconsideration that there seems to be a mistake with the first part of the Federal Circuit's reasoning -- it's true that the Code itself does not define the phrase "at issue." But when a phrase like that is left undefined in a legal text, the first question should be whether it is has a more specific meaning in legal English. We think it does: In common legal English, for a question to be "at issue" means *both* that it is in dispute *and* that the Court may determine it in making its decision.[3] Look, for example, at our own Rule 34(a)(1), which says "[t]he petition shall be complete, so as to enable ascertainment of the issues intended to be presented." When pleadings are complete, we say that a case is "at issue." Rule 38. In our recent case of *Vento v. Commissioner,* 152 T.C. No. 1 (2019), we held that we would not include in the computations leading to entry of a decision a matter that "was neither placed *in issue* by the pleadings, addressed as an issue at trial, nor discussed by this Court in its prior opinion." *Id.*, slip op. at 13 (emphasis added).

Consider as well section section 6214(b), which empowers us to consider facts in tax years not before us if we need to do so to determine a deficiency in a tax year that is. To distinguish the years involved, we use these precise phrases: "Section 6214(b) says that we have no power to determine an overpayment or underpayment of tax for a year not *in issue* which would form the basis of a refund suit or an assessment of a deficiency. . . . It does not prevent us from computing, as distinguished from 'determining,' the correct tax liability for a year not *in issue* when such a computation is necessary to a determination of the correct tax liability for a year that has been placed *in issue*." *Lone Manor Farms, Inc. v. Commissioner,* 61 T.C. 436, 440 (1974) (emphasis added); *see also, e.g. Hill v. Commissioner,* 95 T.C. 437, 439 (1990); *Greene v. Commissioner,* 63 T.C.M. (CCH) 2665, 2666 (1992).

[3] One may set aside complications from arguments in the alternative here.

There's another reason that the Federal Circuit's reading is problematic. Let us assume that the amount of tax liability is, in some sense, "in issue" when we determine items in a partnership-level case that will then affect the ultimate liabilities of the partners in the partnership. The qualified-offer rules require us at the end of a proceeding to be able to compare "the liability of the taxpayer pursuant to the judgment of the proceeding" to the "liability of the taxpayer which would have been so determined" if the Commissioner had accepted the offer. *See* IRC § 7430(c)(4)(E)(i). There may be some cases -- and *BASR* might have been one of them -- where one can predict with certainty the outcome of the subsequent computations and determinations at the partner-level that are needed before determining the liability of the individual partners. But one needs to know those liabilities before one can compare it to the liability stated in the qualified offer.

The qualified-offer rules are also, in the run-of-the-mill deficiency cases, easy to administer even by almost innumerate judges -- he has only to compare two numbers and ask which is the larger. But it would not be administrable in the typical partnership-level case where there might be a sea of partner-specific numbers for him to wade through them all before he reached the shore of simple comparison.[4]

For both these reasons, it is therefore

ORDERED that petitioner's motion for reconsideration is denied. It is also

[4] We also agree with the Commissioner that the Federal Circuit's interpretation of when the amount of a tax liability is "in issue" is difficult to reconcile with the inclusion of declaratory-judgment cases in the list of cases where there can be no qualified offers. If liability is "in issue" when it might affect liability in a later proceeding, a declaratory judgment that an entity is tax exempt would surely be one in which liability is "in issue." But then why would Congress include declaratory-judgment cases in the list of those in which "the amount of tax liability is *not* in issue?" *See* IRC § 7430(c)(4)(E)(ii)(II).

ORDERED that on or before November 13, 2019, the parties submit an agreed decision, file their own proposed decisions with explanations of any points of disagreement, or file a joint status report that describes their progress in doing so.

(Signed) Mark V. Holmes
Judge

Judge

Dated: Washington, D.C.
September 11, 2019