UNITED STATES TAX COURT
WASHINGTON, DC 20217

THRASYS, INC.,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 11565-15.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

On September 23, 2019, petitioner filed a Motion for Summary Judgment, to which respondent objected on October 18, 2019. Embedded within petitioner's filing were motions for relief from three stipulations it had previously filed with the Court--two stipulations of partially settled issues and a second stipulation of facts. Petitioner's Motion constitutes an improper joinder of motions in violation of Tax Court Rule 54(b). We will recharacterize petitioner's Motion for Summary Judgment as a Motion to Strike Stipulations and deny it as such. If petitioner wishes, it may file, by January 27, 2020, a motion for summary judgment limited to the two questions set forth at the end of this Order.

During 2008 petitioner received, but did not report on its Federal income tax return, a $15 million payment from a customer. The IRS issued petitioner a notice of deficiency for 2008 determining (among other things) that the $15 million payment should have been reported as income for 2008, the year in which it was received. As a protective matter, the IRS concurrently issued petitioner a notice of deficiency for 2009. This notice determined that, if the $15 million payment was properly deferred to 2009, after Thrasys converted to S corporation status, then the $15 million was subject to tax under I.R.C. § 1374(b)(1) as a "net recognized built-in gain."

Petitioner filed a timely petition in response to both notices. The only error that petitioner alleged with respect to the deficiency determined for 2008 was the adjustment relating to the $15 million payment. In November 2015 respondent filed motions to compel discovery relating to the $15 million payment. In oppos-

ing those motions to compel, petitioner represented that "the issue" in this case (and in nine related cases involving petitioner's shareholders) "is based on the same taxable item, a $15 million payment." On September 23, 2016, we granted the motions to compel, warning petitioner that we would be inclined to impose sanctions if it did not fully comply with our order. See Tax Court Rule 104. Petitioner submitted supplemental discovery responses to respondent on October 24, 2016.

On November 14, 2016, Ms. Caroline Chen entered an appearance on behalf of petitioner. On December 21, 2016, the parties filed a joint status report in which petitioner acknowledged that documents responsive to the IRS discovery requests had been withheld from its October 24, 2016, production. On April 3, 2017, respondent filed a Motion to Impose Sanctions for petitioner's failure to comply fully with the Court's September 23, 2016, order granting the motions to compel.

On April 27, 2017, petitioner opposed respondent's motion for sanctions. In that document petitioner "concede[d] that the primary position taken in its petition"--namely, that the $15 million payment "was a refundable deposit when received in 2008 and then became income in 2010 when the contract was completed"--"was incorrect because it did not comply with petitioner's established method of accounting with respect to contract payments." Having made that concession, petitioner represented that it would henceforth defend "the first alternative position taken in its petition," namely, that the $15 million payment "should have been reported as an advanced payment received in 2008 and then reported as income in 2009."

On May 1 and August 3, 2017, the parties jointly filed a first and second Stipulation of Partially Settled Issues, both signed by Ms. Chen on behalf of petitioners. In the first stipulation, the parties stated that all issues regarding petitioner's 2008 tax liability had been resolved--with the sole exception of the proper treatment of the $15 million payment--and stated their agreements concerning every other adjustment included in the notice of deficiency. In the second stipulation, petitioner conceded that the $15 million payment did not constitute a nontaxable "deposit" either in 2008 or in 2009. On February 28, 2018, the parties jointly filed a Second Stipulation of Facts, signed by Morgan Anderson on behalf of petitioner.

On May 15, 2018, Ms. Chen filed a Motion to Withdraw as Counsel, and on July 10, 2018, Ms. Anderson filed a Motion to Withdraw as Counsel. Each stated

that her employment relationship with David Howard, petitioner's current counsel of record, had terminated. We granted both motions.

On June 20, 2018, respondent filed a Motion for Summary Judgment, representing that the sole remaining issue for petitioner's 2008 tax year was whether the $15 million payment was an advance payment eligible for deferral to 2009 under Rev. Proc. 2004-34, 2004-1 C.B. 991. While preserving his right to contest that question, respondent urged a distinct threshold argument in support of the adjustment for 2008, namely, that petitioner could not avail itself of the deferral method because it would constitute an impermissible change in method of accounting. Respondent represented that granting his motion "would result in a complete disposition" of petitioner's case for 2008. In opposing summary judgment, petitioner represented that "[t]he only remaining unresolved issue in the instant case has to do with a $15 million advance payment." Petitioner attached to its opposition declarations of Mr. Howard and of petitioner's chief operating officer, reciting facts relevant to the proper treatment of the $15 million payment.

On October 16, 2018, we denied respondent's Motion for Sanctions, concluding that "any failure by [petitioner] to comply with our order dated September 23, 2016, has been mitigated by its subsequent disclosures and cooperation with respondent." As evidence of petitioner's disclosures and cooperation we noted that petitioner had recently "agreed to three separate stipulations of facts and one stipulation of partially settled issues." We accordingly concluded that "public policy favors deciding the proper treatment of the $15 million payment on the merits, not by the imposition of a sanction."

In an Opinion issued December 4, 2018, we denied respondent's threshold motion for summary judgment, concluding that genuine disputes of material fact existed as to whether petitioner had previously adopted the "deposit" method of accounting for customer payments. Thrasys, Inc. v. Commissioner, T.C. Memo. 2018-199, at *18. We noted petitioner's concession that the $15 million payment was not properly treated as a non-taxable "deposit" in 2008 or 2009. Id. at *9. And we stated our understanding that "[t]he remaining unresolved issue for [petitioner's] 2008 tax year is whether it may properly account for the $15 million payment under the deferral method permitted by Rev. Proc. 2004-34." Ibid.

Following a series of status reports and telephone conferences with the Court, the parties indicated that petitioner would file a motion for summary judgment addressing the remaining unresolved issue for petitioner's 2008 tax year and respondent's alternative position for petitioner's 2009 tax year. On June 24, 2019,

we issued an order directing that, "on or before September 23, 2019, petitioners shall file a motion for summary judgment in docket number 11565-15."

On September 23, 2019, petitioner filed a Motion for Summary Judgment. Embedded within that document are motions for relief from the two Stipulations of Partially Settled Issues mentioned earlier and from portions of the Second Stipulation of Facts. Petitioner thereby seeks to withdraw its concession that the $15 million payment did not constitute a non-taxable "deposit" and to litigate other adjustments to its 2008 tax liability (including certain credits) that it had previously conceded. Petitioner asserts that these three documents were signed and submitted without its knowledge or consent.

"[A] settlement stipulation is in all essential characteristics a mutual contract by which each party grants to the other a concession of some rights as a consideration for those secured and the settlement stipulation is entitled to all of the sanctity of any other contract." McMullen v. Commissioner, T.C. Memo. 2015-219, 110 T.C.M. (CCH) 458, 459 (quoting Saigh v. Commissioner, 26 T.C. 171, 177 (1956). The considerations in determining whether to relieve a party from a stipulated settlement are akin to those involved in vacating a judgment entered by consent. Stamm Int'l Corp. v. Commissioner, 90 T.C. 315, 322 (1988). Grounds for relief from such a stipulation may include "mutual mistake, an affirmative misrepresentation by one of the parties, or other similar circumstances." Estate of La Sala v. Commissioner, T.C. Memo. 2016-42, 111 T.C.M. (CCH) 1175, 1178. We will not relieve a party of a settlement agreement absent a showing of "manifest injustice." See Stamm Int'l Corp., 90 T.C. at 322; McMullen, 110 T.C.M. (CCH) at 459.

Similarly, we give effect to joint stipulations of fact unless "manifest injustice" would result. Washburn v. Commissioner, T.C. Memo. 2018-110, at *14. "The stipulation process is considered 'the bedrock of Tax Court practice.'" Id. at *13. Responsibility rests with each party's counsel to understand the significance of the stipulations he or she is making. Mathia v. Commissioner, T.C. Memo. 2007-4, 93 T.C.M. (CCH) 653, 656. We have declined to relieve a party from a stipulation because of a unilateral mistake as to its import. See Korangy v. Commissioner, T.C. Memo. 1989-2, 56 T.C.M. (CCH) 989, 991-992, aff'd, 893 F.2d 69 (4th Cir. 1990).

For a variety of reasons, we decline to relieve petitioner of its settlement stipulations or its stipulation of facts. First, in its petition, the only error that petitioner identified in the notice of deficiency for 2008 was the proper tax treatment

of the $15 million payment. On multiple occasions petitioner has represented that this issue was the only issue in dispute for petitioner's 2008 tax year. The first Stipulation of Partially Settled Issues, in which the parties stated their agreement concerning all other adjustments for 2008, is perfectly consistent with these representations. We will not permit petitioner to withdraw that stipulation of settlement now.

Second, in our Opinion denying respondent's threshold motion for partial summary judgment, we noted petitioner's concession that the $15 million payment did not constitute a non-taxable "deposit" and stated our understanding that "[t]he remaining unresolved issue for [petitioner's] 2008 tax year is whether it may properly account for the $15 million payment under the deferral method permitted by Rev. Proc. 2004-34." T.C. Memo. 2018-199, at *9. Both parties' briefs reflected that same understanding. If our understanding as stated in that Opinion was incorrect, petitioner should have filed a motion for reconsideration of findings or opinion under Rule 161. It did not do so within 30 days, as required by Rule 161, or within the ensuing twelve months.

Third, Mr. Howard signed the petition and has been petitioner's lead counsel since this case was docketed. Ms. Chen and Ms. Anderson, who signed the stipulations in question, were employed by him (or worked as independent contractors for him). The assertion that these stipulations were filed without his or petitioner's knowledge or consent is implausible.

Finally, respondent urged, as an alternative basis for granting his threshold motion for summary judgment, that he was entitled to judgment in his favor as a sanction for petitioner's failure to comply with our September 23, 2016, order granting respondent's motions to compel. We denied respondent's motion for sanctions, citing petitioner's subsequent disclosures and cooperation with respondent, including petitioner's agreement "to three separate stipulations of facts and one stipulation of partially settled issues." It would be inequitable and highly prejudicial to let petitioner withdraw the very stipulations on which we relied in denying respondent's motion for sanctions and (as a consequence thereof) in rejecting the alternative argument respondent advanced in support of his summary judgment motion. See Thrasys, Inc. v. Commissioner, T.C. Memo. 2018-199, at *18-*19 n.8.

In its Motion for Summary Judgment petitioner also seeks to raise a new issue, namely, that its 2008 taxable income should be reduced "by the amount of $958,000, which was income which should have been reported in 2007 as an ad-

vance payment received in 2006." This issue was not included in the notice of deficiency for 2008, and petitioner failed to raise the issue in its petition. It would have to amend its pleadings to raise this issue now, and it could do so at this late date only by leave of Court. See Tax Court Rule 41(a). Respondent filed his answer in this case more than four years ago, and petitioner's delay in raising this issue is inexcusable. In any event, litigation of this issue would be inconsistent with the first Stipulation of Partially Settled Issues, in which the parties agreed that all issues for 2008 (except taxability of the $15 million payment) had been resolved. If petitioner were to seek leave to amend its pleadings to raise this issue now, we would deny leave to do so.

In consideration of the foregoing, it is

ORDERED that Petitioner's Motion for Summary Judgment, filed September 23, 2019, is recharacterized as Petitioner's Motion to Strike Stipulations. It is further

ORDERED that Petitioner's Motion to Strike Stipulations, filed September 23, 2019, is denied. It is further

ORDERED that petitioner may file, on or before January 27, 2020, a Motion for Summary Judgment addressing the following questions: (1) whether petitioner may properly defer to 2009, under the deferral method permitted by Rev. Proc. 2004-34, the $15 million payment it received form its customer in 2008; and (2) if the $15 million payment is properly deferred to 2009, after petitioner converted to S corporation status, whether the $15 million was subject to tax under I.R.C. § 1374(b)(1) as a "net recognized built-in gain." The Court will not consider any other issues when ruling on any forthcoming motion for summary judgment by petitioner.

(Signed) Albert G. Lauber
Judge

Dated: Washington, D.C.
December 17, 2019