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

DRC

RAMAT ASSOCIATES, WIL-COSER ASSOCIATES, A PARTNER OTHER THAN THE TAX MATTERS PARTNER, ET AL.,

Petitioner(s),

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. 22295-16, 22296-16.

ORDER

Petitioner has moved in both of these consolidated cases to strike portions of the amended answer (motions). Petitioner has supported the motions with memoranda. Respondent has responded, requesting that we deny the motions. We will deny the motions.

All section references are to the Internal Revenue Code of 1986, as amended and in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Rule 52

Under Rule 52, the Court may order stricken from any pleading any redundant, immaterial, impertinent, frivolous, or scandalous matter. Nevertheless: "In general, motions to strike pleadings have not been favored by the Federal courts." Evans Publ'g, Inc. v. Commissioner, 119 T.C. 242, 249 (2002). Moreover:

> A motion to strike should be granted only when the allegations have no possible relation to the controversy. When the court is in doubt

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> whether under any contingency the matter may raise an issue, the motion should be denied. If the matter that is the subject of the motion involves disputed and substantial questions of law, the motion should be denied and the allegations should be determined on the merits. In addition, a motion to strike will usually not be granted unless there is a showing of prejudice to the moving party.

Id. (quoting Estate of Jephson v. Commissioner, 81 T.C. 999, 1001 (1983)).

Amended Answers

These consolidated cases are TEFRA cases, involving Ramat Associates (Ramat), a Delaware limited liability company. The principal issues involve the substantiation of deductions for claimed interest expenses and losses.

The motions are principally concerned with allegations in the amended answers concerning one Isaac Neuberger. Among other things, respondent alleges that Mr. Neuberger, although "not a named partner on RAMAT Associates tax returns for the taxable years 2006 through 2008, claimed to be a partner of RAMAT Associates on his 2006 and 2007 Forms 1040, when he claimed losses on these returns from RAMAT Associates in the amounts of $1,205,150 and $2,363,314, respectively, a portion of which * * * [he carried over to his] tax returns for taxable years 2008 through 2011." Petitioner denies those allegations.

Respondent further alleges (and petitioner denies):

> Since Mr. Neuberger claimed to be a partner of RAMAT Associates on his tax returns for these years by claiming substantial losses as a partner, he is considered for TEFRA procedural purposes to be a "partner" pursuant to I.R.C. § 6231(a) (2) (B)[], but he is not necessarily a partner for any other provisions of the Internal Revenue Code. Mr. Neuberger meets this definition of the term "partner" for the purposes of Subchapter C of Chapter 63 of Subtitle F of the Internal Revenue Code, as his income tax liabilities under Subtitle A of the Internal Revenue Code are determined in whole or in part by taking into account directly or indirectly partnership items of the partnership, as he took into account partnership items of RAMAT

> Associates on his individual tax returns that he executed and filed with the Internal Revenue Service, under penalties of perjury.[1]

Respondent also alleges that Mr. Neuberger is considered a party to these cases. Petitioner denies that allegation.

The Motions

Respondent makes further allegations in the amended answer to which petitioner objects, but the foregoing illustrates petitioner's objection. Petitioner "moves to strike all of the allegations relating to Mr. Neuberger * * * as they are offered for an improper purpose and have no potential bearing on this matter."

Petitioner's argument is principally that respondent misreads section 6231(a)(2)(B), which provides that the term "partner" includes a "person whose income tax liability under subtitle A is determined in whole or in part by taking into account directly or indirectly partnership items of the partnership."

Petitioner explains:

> It is clear that Mr. Neuberger's income tax liability is not "determined in whole or in part," at least not in the statutory sense, by taking into account any items of Ramat Associates. Neither Respondent nor Petitioner alleges that Mr. Neuberger was a partner of Ramat Associates, Mr. Neuberger was not reported as a partner on the partnership tax returns of Ramat Associates, and Respondent has not made any determination (e.g., in an FPAA or in its Amended Answer) that references Mr. Neuberger as having any interest in the outcome of this case through the allocation of any partnership items.

Therefore, petitioner concludes: "Since Mr. Neuberger is not a partner of Ramat Associates, any allegations regarding his tax returns have no place in this matter".

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[1]The quoted language is from dkt No. 22296-16, dkt entry No. 44, par. 10(n). The corresponding language in dkt No. 22295-16, dkt entry No. 48, par. 10(j), is slightly different, not alleging that Mr. Neuberger's returns were signed under penalties of perjury. We do not consider that a material difference.

Petitioner adds that, if Mr. Neuberger once could have been considered a partner, he no longer can be because "Respondent has already assessed tax as to him in a Notice of Computational Adjustment."

"In sum," petitioner argues, "the allegations relating to Mr. Neuberger individually can have no bearing on this matter. Mr. Neuberger's relationship to Ramat Associates--either as partner or not--has never been put at issue by either party." "Moreover, Mr. Neuberger should not be treated as a party to this case because, not only was he not a partner in Ramat Associates, but he does not have any interest in the outcome of this case."

Responses

Respondent answers: "Mr. Neuberger * * * is a party to this proceeding, since he chose, by claiming losses from the RAMAT Associates partnership on his 2006 and 2007 Forms 1040, to take into account partnership items of the RAMAT Associates partnership in determining his tax liability."

Respondent explains: Partnership losses are partnership items, as are each partner's share of the partnership's losses. See sec. 6231(a)(3); sec. 301.6231(a)(3)-1(a)(1)(i), Proced. & Admin Regs. Therefore, Ramat's losses, and each partners's share of those losses, are partnership items. Mr. Neuberger, by claiming losses from Ramat on his 2006 and 2007 income tax returns, took into account partnership items of that partnership in determining his tax liability for those years. "Thus, when Mr. Neuberger took into account 'partnership items' of RAMAT Associates on his 2006 and 2007 Forms 1040, he made his income tax liability determined at least in part by those items and made himself a 'partner' of RAMAT Associates under section 6231(a)(2)(B)." Because those actions pertain to Ramat's 2006 and 2007 taxable years, Mr. Neuberger is a partner under section 6231(a)(2)(B) for each of those years. Furthermore, under section 6226(c), he is a party to this action.

In response to petitioner's argument that, even if once a partner in Ramat, Mr. Neuberger no longer is a partner because respondent has assessed tax, as evidenced by a Notice of Computational Adjustment, respondent argues that the tax assessed by him against Mr. Neuberger pursuant to the notice was a permitted assessment with respect not to Mr. Neuberger's 2006 or 2007 income tax liabilities but with respect to that portion of the RAMAT losses for those years that he could not use in those years and that he carried over to 2008 through 2011. Assessment of those adjustments, respondent argues, was permitted by section 6222 and

section 301.6222-1, Proced. & Admin. Regs. Respondent avers that the tax associated with petitioner's inconsistent treatment of Ramat-related partnership items for 2006 and 2007 has not been assessed.

In conclusion, respondent argues that the allegations that petitioner seeks to have stricken have a clear bearing on the subject matter of the litigation--"that being the determination of partnership items, the proper allocation of such items among the partners, and the applicability of any penalty." Respondent adds: "None of the allegations in the Amended Answer should be stricken from the pleading as none are 'redundant, immaterial, impertinent, frivolous, or scandalous,' as described by T.C. Rule 52."

Discussion

The principal questions dividing the parties are whether Mr. Neuberger reported losses from Ramat on his 2006 and 2007 Federal income tax returns and, if so, whether, on account thereof, he was a partner (of Ramat) within the meaning of section 6231(a)(1)(B), which includes in the meaning of the term "partner" "any person whose income tax liability * * * is determined in whole or in part by taking into account directly or indirectly partnership items of the partnership."

It is respondent's claim that Mr. Neuberger was within that definition a partner (of Ramat) and, consequently, is a party to these cases. Petitioner disagrees, claiming that Mr. Neuberger was not a party because his income tax liability was not, "at least * * * in the statutory sense", determined in whole or in part by taking into account any items of Ramat.

There are disputed questions of fact as to whether Mr. Neuberger reported--i.e., took into account--losses from Ramat on his 2006 and 2007 returns, and, if he did take the losses into account, why? Moreover, we are unclear what petitioner means when he says that Mr. Neuberger did not "in the statutory sense" take into account a share of Ramat's losses. With relevant facts in dispute, we need not at this stage of the litigation decide a question of law as to the meaning of section 6231(a)(2)(B). We do note, however, that, in Abelein v. United States, 323 F.3d 1210, 1215 (9th Cir. 2003), the Court of Appeals, in considering section 6231(a)(2)(B), observed: "If the IRS has included a person as a participant at the partnership level, he is surely in danger of having his tax liability affected, especially if, in the long run, the IRS turns out to be correct." We will follow our own advice in Evans Publ'g, Inc. v. Commissioner, 119 T.C. at 250, and deny the motions on the grounds that the principal question presented by the motions

involves disputed and substantial questions of law, and the allegations should be determined on the merits when the facts are established. Also, we see no merit to petitioner's argument that, even if once a partner, Mr. Neuberger is no longer a partner because no tax remains to be collected from him; there are still unresolved partnership adjustments for petitioner's 2006 and 2007 tax years.

Conclusion

On the premises stated, it is

ORDERED that the motions are denied.

(Signed) James S. Halpern
Judge

Dated: Washington, D.C.
January 13, 2020