

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

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| KEVIN JOHN, SR. & WHITNEY S. |) | |
| WITASICK, |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | Docket No. 23069-16. |
| |) | |
| COMMISSIONER OF INTERNAL REVENUE, |) | |
| |) | |
| Respondent |) | |

ORDER

On February 26, 2020, respondent filed a motion for leave pursuant to Rule 41(a)¹ for what he calls computational errors in his original notice of deficiency. In response, on March 5, 2020, petitioners filed a motion for continuance upon the grounds that: (1) respondent surprised them with its motion when petitioners believed this case was moving steadily towards settlement; (2) petitioners do not have enough time to respond to respondent’s motion before trial; and (3) if the Court grants respondent’s motion, petitioners will need to hire counsel.

The Court held a conference call with the parties on March 10, 2020. On March 11, 2020, by Order of the Chief Judge and for reasons unrelated to the pending motions in this case, the Court canceled the March 16, 2020, Philadelphia, Pennsylvania trial session, and this case was assigned to the undersigned.

Section 6214(a) 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.”

Rule 41(a) 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 given freely when justice so requires.”

Whether a party may amend its answer lies within the sound discretion of the Court.² In determining the justice of allowing a proposed amendment, the Court must examine the

¹All section references are to the Internal Revenue Code for the relevant years. All Rule references are to the Tax Court Rules of Practice & Procedure.

²Quick v. Commissioner, 110 T.C. 172, 178 (1998)(citations omitted).

particular circumstances of the case, and consider, among other factors (1) whether an excuse for the delay exists; and, (2) whether the opposing party would suffer unfair surprise, disadvantage, or prejudice.³

The Court is troubled by respondent's motion. The notice of deficiency at issue is dated July 26, 2016, but respondent's motion was not filed until more than 3 years later. In the years since the petition was filed, respondent has had ample time to identify and seek correction of its "clerical and reporting" error. Petitioners' frustration on this score is understandable. Further, this case is facing its sixth continuance, and respondent's motion comes only 18 days prior to (the since canceled) trial. Nonetheless:

The question of prejudice under Rule 41(a) is not simply whether an amended pleading that includes the proposed new issues would make the case harder or more expensive for the other party than a pleading that lacks those issues. Rather, the question is whether the addition of those new issues by a later amendment, rather than by inclusion in the initial pleading, works an unfair disadvantage to the other party. Where an amendment is requested on the eve of trial, so that the other party is deprived of fair notice and an opportunity to prepare, prejudice may be obvious. In such an instance, one could not say (in the language of Rule 41(a)) that "justice * * * requires" that leave be granted to amend the pleading. Justice might require the opposite. However, where instead the non-moving party is given adequate time (such as by a continuance of trial) to respond to the new pleading, there is no prejudice (or any prejudice is cured).⁴

Petitioners' filed motion asks the Court to continue trial to the Court's April 14, 2020, Philadelphia, Pennsylvania trial session. As noted above, a continuance cures any prejudice against petitioners to properly address the claims in respondent's amended answer. Respondent does not object to the April continuance, however, during the conference call, petitioner Kevin Witasick proposed that the Court continue this case for trial in October. The proposal to continue the trial until October also appears in an email between Mr. Witasick and respondent's counsel, which is attached to petitioners' motion for continuance. In the email, respondent's counsel agrees to a continuance of only one month, to the April 14, 2020, trial calendar.

A review of the record indicates that the parties have consistently worked toward settling this case or narrowing the issues for trial. The Court's March 11, 2020, Order offers the parties an opportunity to continue their efforts. As such, the Court is not inclined at this time to calendar this case for trial on April 14, 2020.⁵

³Estate of Ravetti v. Commissioner, T.C. Memo. 1992-697.

⁴Ax v. Commissioner, 146 T.C. 153, 168 (2016) (citing Church of Scientology of Cal. v. Commissioner, 83 T.C. 381, 469 (1984), aff'd, 823 F.2d 1310 (9th Cir, 1987).

⁵During the conference call, the Court informed petitioners that it would grant their motion for continuance but needed to consider an appropriate trial date. This call preceded the Chief Judge's March 11, 2020, Order cancelling the March 16, 2020, Philadelphia, Pennsylvania trial session. In deciding not to calendar this case for trial in April, petitioners' motion (continued...)

Upon due consideration, it is

ORDERED that respondent's Motion for Leave to File First Amendment to Answer, filed February 26, 2020, is granted. It is further

ORDERED that petitioners Motion for Continuance, filed March 5, 2020, is denied. It is further

ORDERED that, on or before May 11, 2020, the parties shall file with the Court a joint report regarding the status of this case. If the case has not settled, the parties shall report on the preparation of the stipulation of facts and preparation for trial.

**(Signed) Courtney D. Jones
Judge**

Dated: Washington, D.C.
March 12, 2020

is denied. However, if needed, the Court will set this case for trial at a future trial session in Philadelphia, Pennsylvania.