UNITED STATES TAX COURT
WASHINGTON, DC 20217

SCOTT A. HOUSEHOLDER & DEBRA A. HOUSEHOLDER,	)	
Petitioner(s),	)	
v.	)	Docket No. 6541-12.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER AND DECISION

This was one of two deficiency cases that were also related to two TEFRA cases. The TEFRA cases settled. The Court released its opinion in this and the other deficiency case years ago, but entry of decisions depended on computations. *See Householder v. Commissioner*, 116 T.C.M. (CCH) 219, 231 (2018). The parties succeeded in negotiating the terms of the decision in the other case but, after many months of trying, were unable to agree in this case. We finally issued an order that set a final deadline to either agree or "file their own computations with explanations of their disagreement."

We got those competing computations in late February and sided with the Householders on one of the two items that remained in dispute, in part because, although "the Commissioner asserts that the proper treatment is an increase of $404,952. . . . [h]e does not explain how he came to this number." In contrast, we noted that the Householders showed and explained their math.

The Commissioner responded with a motion to reconsider and shows his math in great detail. The Householders replied and showed their math in even

greater detail. We outline their dispute, and can now analyze this problem that is now fully briefed.

Background

This case, and the parties' dispute, is about the Householder's 2006 tax year. The only issue that was tried for that year was a theft loss claimed by the Householders, and on that issue we decided against them. *Householder*, 116 T.C.M. (CCH) at 230. The problem in these computations has nothing to do with that claimed loss, however, but is instead a dispute about the pleadings and the stipulations that the parties reached before the trial.

The Householders are a successful and prosperous couple whose returns are unusually complex. The problem that we have to analyze arises from two forms attached to their return -- a Schedule E and a Form 4797 that taxpayers use to report their sales of business property. On the 2006 return that the Householders filed with the IRS, they reported income, losses, and deductions from a number of entities on their Schedule E. The key number is on line 32, where they reported total income of $294,502. This was an aggregate number, and included in it were two other important numbers from an attachment to their Schedule E (it is a reflection of the complexity of this return that it is Attachment 17 to that schedule). The first of these is nonpassive income[1] of $264,490 from THG, Inc., itself an S corporation and the tax matters partner of Householder Group, a limited liability limited partnership that was a major source of the Householders' wealth. The second number was listed under a column labeled "nonpassive loss" on a row labeled "basis carryover." This "basis carryover" also arose from THG, Inc. This number is $226,886.

A pause to explain this number: If a taxpayer's S corporation has a bad year, he can only deduct his loss up to the adjusted basis of his stock in the corporation plus the adjusted basis of any indebtedness of the corporation to himself. *See* I.R.C. § 1366(d)(1). The loss doesn't disappear, but is carried forward until times improve and the corporation earns enough income to make the loss useful as an offset. And that's what happened here. The Householders' S

[1] All income other than that which is gained in the course of a trade or business in which the taxpayer does not materially participate. *See, e.g.*, *Golan v. Commissioner*, T.C. Memo 2018-76, at *31-*32 (citing I.R.C. § 469(c)(1)).

corporation did very well that year, so they used the loss carryforward to offset a large chunk of that income.

The second form that's important to this motion and decision is their Form 4797, on which they reported a single number, $145,000, as their gain from the sale of property used in one of their businesses.

The Commissioner chose to audit the Householders for 2006, and in the end issued them a notice of deficiency. In that notice, he proposed a number of adjustments. The two that are important here are that he determined they were entitled to a loss of $317,029 (not a gain of $145,000) on their Form 4797. This was, of course, a change greatly in the Householders' favor. The second relevant adjustment was to increase their Schedule E income by $419,510.

In each instance, the Commissioner explained himself a bit on a form called "explanation of adjustments." Here's the explanation for the adjustment to the Form 4797:

> It is determined that the amount of $317,029 claimed on your return as a loss resulting from the sale of your business is allowable . . .

And here's the explanation for the increase in their Schedule E income:

> It is determined that the income flow-through from your partnership and S Corporation is $739,569 rather than $320,059 as shown on your return for taxable year 2006.
> . . .

The important thing to note here is that the Commissioner seemed to have made a mistake -- it's as if the revenue agent wasn't looking at the filed return when he wrote about the adjustments he was making and compared it to what they had filed. The Householders had claimed a gain of $145,000 on their Form 4797, not a loss of $317,029; and they had claimed income of $294,502 from THG, not $320,059. And note as well that there is no mention of any adjustment to that "basis carryover" number on Attachment 17 to the Schedule E.

If this was a mistake, the Commissioner's agents and lawyers didn't notice it at the time.

The Householders then moved into litigation, and in their petition they challenged many of these adjustments. They didn't challenge the adjustment to their Form 4797 or the failure to adjust the "basis carryover" -- why would they, since those favored them? But they did challenge the $419,510 increase in their Schedule E income.

After discovery and settlement negotiations, the Householders and the Commissioner reached a stipulation that seemed to settle everything except for the theft loss. It increased their Schedule E income by $445,296; and it allowed the Form 4797 loss of $317,029.

Discussion

This is where we get to the dispute before us on this motion and in these conflicting computations. The Householders' computations -- the ones we said last February "showed their math" -- took the numbers on the filed returns, then substituted different numbers from the stipulations in this case and the related TEFRA cases, and hit whatever button in Excel actually does the math. The result turns out to be zero deficiency for the Householders for tax year 2006.

At this point, the Commissioner suspected something was wrong somewhere. His explanation is coherent. He suggests that the agent who drafted the notice of deficiency for the 2006 tax year compared his determination for the allowable Form 4797 loss not to their original return but to an unsigned Form 1040 that they submitted as part of settlement negotiations toward the end of the audit. That would make sense of the weird language in the verbal explanation part of the notice of deficiency.

The Householders' rejoinder is that stipulations are a deal. Their computations reflect that deal accurately. And, by the way, the exhibits that the Commissioner attached to his motion for reconsideration are not part of the trial record, and thus have no place in our posttrial, postopinion computations.

The Householders are right.

Numbers on a filed return are conceded by the Commissioner if not redetermined in a notice of deficiency or subsequent pleading before this court, *see Koufman v. Commissioner*, 36 T.C.M. (CCH) 936, 939 (1977); numbers in a notice of deficiency are conceded by a taxpayer who doesn't challenge them in his petition, *see, e.g.*, *Swain v. Commissioner*, 118 T.C. 358, 362 (2002). Pleadings

define what's at issue in a case. *See Facuseh v. Commissioner*, 54 T.C.M. (CCH) 1489, 1493-94 (1988). Stipulations are the bedrock of Tax Court litigation or, if one wants to wax nongeologically, are a contract between the parties that further narrows the issues from those that were pled to those left to be tried. *See Washburn v. Commissioner*, 116 T.C.M. (CCH) 78, 80-81 (2018).

And, as an additional ground for siding with petitioners, we do not allow introduction of new evidence in Rule 155 computations. *See Vento v. Commissioner*, 152 T.C. 1, 8 (2019).

It is true, inasmuch as stipulations are a contract, that we may set them aside or amend them when there has been a mistake in formation. *Cf. Jasionowski v. Commissioner*, 66 T.C. 312, 318 (1976) ("[W]here such facts [to which the parties have stipulated] are clearly contrary to facts disclosed by the record, we refuse to be bound by the stipulation."). That is not the situation here. As the Householders point out, the only evidence claiming to show that the notice of deficiency contains a mistake is not a part of the trial record because it was submitted with the Commissioner's motion for reconsideration. We therefore cannot find that stipulated facts *clearly* contradict the facts *contained in the record*.

It is therefore

ORDERED that respondent's April 24, 2020 motion for reconsideration is denied. It is also

ORDERED and DECIDED that there is no deficiency in income tax due from, nor overpayment due to, petitioners for tax year 2006.

(Signed) Mark V. Holmes
Judge

Entered: **SEP 11 2020**