

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

EDWARD J. TANGEL & BEATRICE C.	)		
TANGEL, ET AL.,	)		
	)		
Petitioner(s),	)		
	)		
v.	)	Docket No. 27268-13,	27309-13,
	)	27371-13,	27373-13,
COMMISSIONER OF INTERNAL REVENUE,	)	27374-13,	27375-13.
	)		
Respondent	)		

**ORDER**

On May 20, 2020, petitioners filed a Motion for Protective Order Pursuant to Rule 103. On August 26, 2020, respondent filed an Objection to petitioners’ motion. We will deny the motion at this time.

The principal issue in these cases is whether petitioners, for the taxable years 2008-2010, are entitled to research and experimentation (R&E) credits under I.R.C. § 41 in the aggregate amount of \$872,993 as flow-through items from Enercon Engineering, Inc. (Enercon), an S corporation. These R&E credits were claimed with respect to hundreds of engineering projects. The parties have selected a sample of projects for trial.

Petitioners supplied thousands of documents to respondent during discovery, and they seek an order that would protect a large subset of these documents from public disclosure at trial. Were we to grant such an order, the protected documents would be included in one or more stipulations of fact that would be sealed and made non-viewable by the public. Trial testimony addressing the sealed exhibits would be taken in a closed courtroom, and the transcript of such testimony would be contained in separate volumes of the transcript that would also be sealed.

Petitioners appear to seek protection for 2,472 trial exhibits. Of these, 2,417 seem to relate to a single project, “Terminal High Altitude Area Defense” (THAAD), which petitioners describe as a “national defense system.” The other 55 documents relate to a project described as “Capstone.” About 75% of the

THAAD-related exhibits appear to have stamped upon them a warning stating that the items contain technical data or software whose export is restricted by Federal law.

Petitioners assert that these 2,472 exhibits include “contracts, design documents, project specifications, schematic drawings, conceptual drawings, and construction drawings” that contain “sensitive and proprietary information.” According to petitioners, “disclosure of this proprietary information at trial will result in irreparable harm to Enercon’s business, violate the trade secret protections pursuant to contract, and may impact the national security.”

Section 7461(a) provides that “all evidence received by the Tax Court \* \* \*, including a transcript \* \* \* of the hearings, shall be public records open to the inspection of the public.” Section 7461(b)(1) creates an exception to this rule, permitting this Court to “make any provision which is necessary to prevent the disclosure of trade secrets or other confidential information,” including placing documents under seal. Tax Court Rule 103(a)(7) authorizes the Court to issue protective orders to accomplish that result.

The Court determines whether records should be sealed by balancing the public’s right of access against the interest of the party seeking the protective order. Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 920 (1985). The party seeking a protective order bears the burden of showing that the material is the kind of information courts will protect and that there is good cause for such protection. Ibid.

The vast bulk of the 2,472 documents petitioners seek to protect relate to the THAAD project, and about 75% of those documents bear a warning that the items contain technical data or software whose export is restricted by Federal law. But petitioners do not seem to contend that Federal law categorically precludes public disclosure of THAAD-related documents in general, or of documents bearing this warning in particular. If that is indeed petitioners’ contention, they have not supplied any evidence or authority to support it.

Rather, petitioners make the generalized assertion that all of the documents in question contain “information which is proprietary and subject to trade secret protection.” But this is simply an assertion by petitioners’ counsel. The motion for protective order is only two pages long, and it is supported by no affidavits from Enercon officers or technicians having first-hand knowledge of the relevant facts. Respondent notes that some of the exhibits appear to relate to such everyday

items as gaskets, steel plates, a fire extinguisher, a fan, a thermostat panel, and various forms of correspondence. Petitioners have supplied no detail from which the Court could conclude that all 2,472 documents (or any of them) contain protectable trade secret (or other confidential) information. “A party must come forth with appropriate testimony and factual data to support claims of harm that would occur as a consequence of disclosure” and “may not rely on mere conclusory statements or his attorney’s unsupported self-serving hearsay statements to establish good cause.” Willie Nelson Music Co., 85 T.C. at 920.

The tax years at issue here are 2008-2010. Most or all of the documents in question are presumably at least 10 years old. It is common knowledge that many documents, while sensitive when created, lose their saliency over time and become “old and cold.” For that reason, protective orders issued by this Court routinely deny protection to some older documents. For example, in Amazon.com, Inc. & Subs. v. Commissioner, the protective order defined “confidential information” to exclude certain types of documents that were more than five or ten years old. See T.C. Docket No. 31197-12 (Order dated Nov. 21, 2013). In The Coca-Cola Co. & Subs. v. Commissioner, the protective order defined “confidential information” to exclude certain types of documents that were more than five or seven years old. See T.C. Docket No. 31183-15 (Order dated Nov. 21, 2017). Petitioners have not addressed how the age of these 2,472 documents affects their entitlement to protection from public disclosure.

The Court is inclined to believe that some form of protective order may be needed to govern the trial and post-trial proceedings in this case. But petitioners have not made a persuasive case--at least not yet--for protecting all 2,472 of these documents. We will direct the parties to work together to produce a protective order, modeled on those previously issued by the undersigned, that is targeted to protect genuine trade secrets and national security (or other confidential) information. If the parties cannot agree on a jointly-proposed protective order, we will direct each party to submit its own proposed protective order, and the Court will select one or the other.

In consideration of the foregoing, it is

ORDERED that petitioners' Motion for Protective Order Pursuant to Rule 103, filed May 20, 2020, is denied.

**(Signed) Albert G. Lauber**  
**Judge**

Dated: Washington, D.C.  
September 29, 2020