UNITED STATES TAX COURT
WASHINGTON, DC 20217

TRILOGY, INC. & SUBSIDIARIES,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 12097-16.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

Now before the Court is a motion filed April 5, 2019, by petitioner Trilogy, Inc., asking us to review the sufficiency of the Commissioner's responses to eight of Trilogy's requests for admissions. We will grant the motion in part.

Background

Prior proceedings

Trilogy filed the petition in this case almost three years ago in May 2016. Trial in this case was originally set to begin in October 2017. That trial date has been previously continued for a total of 19 months. As discovery has proceeded during that continuance, we have allowed the Commissioner to be relieved from admissions (see Doc. 23) and to be relieved from stipulations (see Doc. 33). The trial will commence on May 21, 2019--i.e., six weeks from now, and three years after the petition was filed. All discovery requests and requests for admission were to be served by March 7, 2019 (so that responses would be due by April 8, 2019); all discovery depositions (to the extent allowed; see Rule 74) were to be taken by April 5, 2019; and all motions to compel were to be filed by April 5, 2019 (and the Commissioner has filed none). (See Docs. 43, 44.) Thus, the parties have had ample time to conduct discovery, and the Commissioner's discovery under the Rules is complete. It is now necessary for the parties to complete their pretrial work and make their final preparations for trial.

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Trilogy's requests and the Commissioner's responses

By means of requests for admissions, Trilogy attempted to discern the Commissioner's position in the case and to rule out contentions that the Commissioner is apparently not making. The Commissioner's responses to five of the requests (Nos. 1, 2, 8, 14, and 15) are qualified admissions in which the Commissioner "[s]tates" or "[a]dmits [that] respondent does not [so] contend currently" but "reserves the right to pursue on brief this and any other legal theories that might be applicable based on the totality of the evidence in the record after trial." Trilogy's other three requests for admissions (Nos. 5, 6, and 7) assert that Trilogy was not "precluded" by various factors from purchasing stock, and the Commissioner's responses to these three requests consist of the word "Denies", followed by a period and then by arguable explanations of the denial.

Trilogy's motion

On April 5, 2019, Trilogy filed its motion to review the sufficiency of the Commissioner's responses to those eight requests for admissions. Trilogy's motion complains that the responses are defective, both because the Commissioner reserves the right to later deny what he has tentatively admitted and because the explanations of the denials in Nos. 5, 6, and 7 do not, in Trilogy's view, account for those denials.

In view of the imminency of trial and the need to avoid further delay, the Court held an hour-long off-the-record telephone conference with the parties on April 8, 2019, in order to understand better their contentions about the requests for admission. We have determined that we can rule on Trilogy's motion without further written responses from the parties.

Discussion

Even a petitioner, who has the burden of proof and has easier access to the relevant facts (because they are facts about the petitioner), is entitled to learn what its opponent knows and will contend at trial. And of course, the Commissioner is entitled to the same. Exactly when a party may fairly be required to make these disclosures may vary from case to case depending on the facts, issues, complexity and procedural posture of the case; and in this case, that time is now. After a substantial continuance and a generous allowance of time for discovery, and after our giving extraordinary allowances to the Commissioner to correct his position in

this case, Trilogy is reasonable in pressing to know what the Commissioner is contending.

It is true that in this case the Commissioner can point out that he has imperfect knowledge of the facts, that he may yet learn additional facts before or at trial, and that the petitioner has the burden of proof. But these propositions are true in nearly every case, and while they are relevant considerations for setting and revising deadlines, they do not constitute reasons that the Commissioner cannot be required to give reliable answers to questions about his contentions.

The possibility of mistake does not relieve a party from disclosing his contentions. Rather, a party who has in good faith answered questions about his contentions and later learns that his answer was mistaken may ask to be permitted to revise his answer (e.g., by requesting to withdraw an admission under Rule 90(f) or by amending his pleading to conform to the evidence under Rule 41(b)). As the Court decides whether to permit such a revision, the Court will take into account the culpability (if any) of the party who made the mistake and the prejudice (if any) to the party objecting to the revision. We need not now attempt to anticipate whether or how that might hereafter occur in this case.

We find that the Commissioner's tentative admissions as to Requests Nos. 1, 2, 8, 14, and 15--in which he "states" or "admits" that he "does not [so] contend currently" but "reserves the right to pursue on brief this and any other legal theories"--are, within the meaning of Rule 104(d), "evasive". We hold that under that Rule they are therefore properly "treated as a failure to answer or respond". Consequently, the Commissioner's answers "do[] not comply with the requirements of this Rule [90(e)]", and we will hold that "the matter[s are] ... deemed admitted" under that Rule.

We think the analysis must be different as to the Commissioner's responses to Requests Nos. 5, 6, and 7. The Commissioner has made unequivocal denials, and if his reasons for those denials are erroneous, Rule 90 is not the means by which the merits of the Commissioner's position will be litigated. Rather, if his denials later prove to have been "unjustifiabl[e]", then the sanctions of Rules 90(g) and Rule 104 may be available. However, Trilogy is entitled to more information about the Commissioner's denials, and we will order the Commissioner to give that information.

We note that May 7, 2019, is the date by which each party must "[i]dentify and exchange documents and materials that a party expects to offer as evidence at

trial and which are not stipulated". (See Docs. 43, 44.) The parties are advised that the Court expects to enforce this deadline with rigor.

It is therefore

ORDERED that Trilogy's motion is granted in part as to Requests Nos. 1, 2, 8, 14, and 15, in that "the matter[s are] ... deemed admitted" under Rule 90(e), but is otherwise denied in part, insofar as it requests other relief. It is further

ORDERED that Trilogy's motion is denied in part as to Requests Nos. 5, 6, and 7, in that the Commissioner's unequivocal denials of the requested admissions are taken as such, except that the motion is granted in part to the extent that, no later than April 16, 2019, the Commissioner shall serve Trilogy with an explanation of each reason (i.e., each factual reason, and each legal reason) by which Trilogy was "preclude[d] ... from purchasing more shares of Selectica common stock."

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
April 9, 2019