

UNITED STATES TAX COURT
WASHINGTON, DC 20217

RICHARD EDWARD MCCORMICK &)	
CIELO MARIE MENDOZA,)	
)	
Petitioners,)	ALS
)	
v.)	Docket No. 6186-17.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

Now pending in this case are a motion to dismiss for lack of prosecution filed by respondent and a motion to continue filed by petitioners.

Background

The petition in this case was filed March 13, 2017. Both petitioners are attorneys, though apparently they are not tax attorneys and are not admitted to practice in the U.S. Tax Court. On September 26, 2017, the Court served on the parties (1) a notice that this case would be tried at the Court's session in Boston beginning February 26, 2018, and (2) a standing pretrial order that, among other things, required the parties to file pretrial memoranda and to exchange trial exhibits no later than February 12, 2018.

Respondent filed a pretrial memorandum, and the memorandum alleges, among other things, the following four facts, based (it says) on the IRS's comparison of petitioners' 2014 Federal income tax return with information that the IRS received from third parties (on Forms 1099 and the like):

1. Petitioner Richard McCormick received interest income from the Vermont State Employees Credit Union during 2014 in the aggregate amount of \$47, which petitioners did not report on their 2014 return.

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2. Mr. McCormick received non-employee compensation from the State of Vermont Treasurer's Office during 2014 in the amount of \$45,977, of which petitioners reported \$39,178 and did not report \$6,799 on their 2014 return.

3. Petitioner Cielo Marie Mendoza received capital gain dividends totaling \$2,775, of which petitioners reported \$1,317 and did not report \$1,458 on their 2014 return.

4. Ms. Mendoza received taxable dividend income totaling \$838, of which petitioners reported \$388 and did not report \$450 on their 2014 return.

(Respondent's pretrial memorandum also states: "respondent has issued a subpoena decus tecum to the State of Vermont Treasurer's Office with regard to non-employee compensation at issue in this case. Respondent may not receive the documents sought prior to the two-week deadline for the exchange of documents. Nonetheless, because respondent has informed petitioners of this subpoena and the documents sought may in fact be exculpatory, respondent does not believe that any prejudice to petitioners will result from the potentially late exchange of documents." However, documents attached to respondent's motion to dismiss, discussed below, show that respondent later received information responsive to the subpoena, which purports to show that the Form 1099 did not overstate the amount of compensation paid to petitioner-husband.)

Petitioners did not file a pretrial memorandum.

The Court initiated a telephone conference with the parties, and it took place on February 16, 2018. Ms. Mendoza participated on behalf of herself and her husband. She stated that the parties had previously submitted a motion for a continuance by mailing it to the Court's address in Boston. The undersigned judge explained that filings are not mailed to a Boston address, that no such motion appears on the Court's docket for this case, that the Court would not now rule on an oral request, and that petitioners should not expect that a motion for a continuance filed so late would be granted (citing Rule 133). The Court instructed petitioners to cooperate in preparing the parties' stipulation of facts, as required by Rule 91 and the standing pretrial order.

This case was called from the calendar for the Trial Session of the Court at Boston, Massachusetts, on February 26, 2018, as previously noticed. There was no appearance by or on behalf of petitioners. No stipulation was submitted. Counsel for respondent appeared and filed with the Court a Motion to Dismiss for Lack of

Prosecution. The motion alleges a history of non-communication and non-cooperation by petitioners. The Court has not yet ruled on respondent's motion.

On the same day as the calendar call (February 26), the Court received at its offices in Washington, D.C., a "Motion to Continue" mailed by petitioners, with a postmark of February 20, 2018. Signature blocks on the motion and an attached certificate of service bear three handwritten dates-- "11.21.17", "12.17.17", and "2.20.18". The certificate of service also bears a typed date of "21 November 2017". The motion alleges facts, but there is no sworn affidavit (nor any unsworn statement under penalty of perjury pursuant to 28 U.S.C. sec. 1746) attached to the motion.

Discussion

Rule 133 provides, "A motion for continuance, filed 30 days or less prior to the date to which it is directed ... ordinarily will be deemed dilatory and will be denied unless the ground therefor arose during that period or there was good reason for not making the motion sooner." When a party mails a motion for a continuance to the Court 6 days before a trial date and then leaves the country, he does not thereby tie the Court's hands and effectively grant himself a continuance.

Rule 91(a)(1) provides, "The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case...." Even if a party can convincingly demonstrate serious reasons that a particular upcoming trial date is inconvenient for him, he is not thereby excused from complying with Rule 91(a).

On the contrary, where it appears that there are issues or sub-issues in the case that can be resolved without trial, it is sometimes appropriate to condition the allowance of a continuance on a showing that the moving party has been cooperating in narrowing issues and stipulating facts, so that time already spent on the case by the nonmoving party and the Court will not have been wasted.

The Court is so far not convinced that facts existed at any time to warrant a continuance in this case. Detail and substantiation are remarkably lacking in petitioners' motion, especially given the timing of its submission.

It is

ORDERED that, on or before March 30, 2018, petitioners shall file a supplement to their motion for a continuance. That supplement shall include a sworn affidavit (or unsworn statement under penalty of perjury pursuant to 28 U.S.C. sec. 1746) that substantiates the allegations in their motion. If they allege that nonrefundable tickets had been purchased before the Court set the trial date in this case, then the details of that purchase shall be substantiated and documented. If they mean to allege the previous mailing of a motion to continue, then by detail in an affidavit or statement and any available documentation they shall substantiate that previous submission. The supplement shall state whether petitioners admit the four numbered allegations of facts set out above and, if not, shall state in detail what petitioners contend about those allegations, supported by relevant documentation. Of course, there is no reason for the Court to allow a future trial if petitioners have no evidence to put on at that trial. It is further

ORDERED that, on or before March 30, 2018, petitioners shall file a response to respondent's motion to dismiss for lack of prosecution. Any facts that they allege in their response, or any contradictions they assert as to respondent's allegations, shall be supported by sworn affidavit (or unsworn statement under penalty of perjury pursuant to 28 U.S.C. sec. 1746) and, where appropriate, by documentary evidence. It is further

ORDERED that, if the parties are able to agree on a stipulation of facts before March 30, 2018, then they shall file it by that date.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
March 12, 2018