

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ERNEST S. RYDER & ASSOCIATES, INC.,)		
APLC, ET AL.,)		
)		
Petitioner(s),)		
)		
v.)	Docket No. 14619-10,	14687-10,
)	7527-12,	9921-12,
COMMISSIONER OF INTERNAL REVENUE,)	9922-12,	9977-12,
)	30196-14,	31483-15.
Respondent)		
)		
)		
)		
)		

ORDER

These cases were tried in two special trial sessions in 2016: one in San Diego from July 25 to August 3, and another in Phoenix from August 22 to August 26. The Commissioner has already filed his opening brief; Ryder’s response and the Commissioner’s reply are due later this year. During trial, counsel for the Commissioner made an oral motion to conform the pleadings to the proof, and we told him to put it in writing. The Commissioner filed a written motion; Ryder responded about a month later.

In his motion, the Commissioner asks us to “cause the issues raised by respondent at trial to be treated in all respects as if they had been raised in the pleadings.” His motion has two attachments: Exhibit A, which contains 94 numbered items he describes as “[t]he issues raised in the statutory notices of deficiency issued to the petitioners in the remaining consolidated cases”; and Exhibit B, which contains 28 numbered items he says are “the issues outstanding in these cases” that “[b]y way of the notices of deficiency, respondent’s pleadings, or the consent of the parties during the trial, respondent put at issue.” In other words, Exhibit B contains not just the issues the Commissioner says were raised at trial that he wants treated as though they’d been pleaded, but also issues raised in

the notice of deficiency and amended answer -- including items that are in Exhibit A.

Even more confusing, items that are separately numbered in Exhibit A are grouped together in single numbered paragraphs in Exhibit B. For example, items 2 and 3 in Exhibit A appear to be the same as item 2 in Exhibit B. Figuring out what issues the Commissioner thinks were tried by consent and should be treated as pleaded would require at the very least parsing the individual items in Exhibit B and cross-referencing them against Exhibit A. But the Commissioner doesn't even claim that Exhibit B is an exhaustive list -- instead, he says: "If respondent inadvertently omitted an issue from the list in Exhibit B, respondent will address the issue in the brief; the inadvertent mistake does not constitute a concession of any issues."

In response, Ryder succinctly argues that the Commissioner's raising of "constantly evolving theories," first in the amendment to answer and now in the lengthy attachments to his motion, prejudice him by making it hard to know what arguments he needs to respond to.

Tax Court Rules of Practice and Procedure Rule 41(b) lets parties move to amend pleadings to conform them to the proof, as the Commissioner has done here, and Rule 41(d) says amended pleadings relate back to the original. But all pleadings must be "simple, concise, and direct." Rule 31(b). The Commissioner's motion is not; rather than "give the parties and the Court fair notice of the matters in controversy," Rule 31(a), it obfuscates what he's asking for by burying the purportedly tried but unpleaded issues in Exhibit B -- which might not even list all of them.

Whether to allow amendments to pleadings is within our discretion. *See, e.g., Commissioner v. Estate of Long*, 304 F.2d 136, 144-45 (9th Cir. 1962); *Callahan v. Commissioner*, 94 T.C.M. 355, 357 (2007), *aff'd without published opinion*, 354 F. App'x 754 (7th Cir. 2009). We now exercise that discretion to deny the Commissioner's motion without prejudice because it violates Rule 31. This violation of the Court's rules also prejudices Ryder because it doesn't make clear what new issues he needs to address, and prejudice to the opposing party is a primary factor we consider when deciding this type of motion. *See, e.g., Kroh v. Commissioner*, 98 T.C. 383, 389 (1992); *Hardy v. Commissioner*, 113 T.C.M. 1070, 1076 (2017). If the Commissioner resubmits his motion, we urge him to make clear what the unpleaded issues are.

It is therefore

ORDERED that respondent's June 16, 2017 motion to conform the pleadings to the proof is denied without prejudice.

(Signed) Mark V. Holmes
Judge

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