

UNITED STATES TAX COURT
WASHINGTON, DC 20217

MURFAM ENTERPRISES LLC,)	
WENDELL MURPHY, JR.,)	
TAX MATTERS PARTNER, ET AL.,)	
)	
Petitioners,)	
)	
v.)	Docket No. 8039-16, 14536-16,
)	14541-16.
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

Trial in these consolidated cases will begin August 6, 2018. On June 25, 2018, we issued to petitioners (collectively, “Murfam”) an order to show cause (ECF 42), in response to a motion filed by the Commissioner on June 22, 2018 (ECF 41), involving the parties’ inability so far to agree on a stipulation of facts. The Commissioner had proposed a basic stipulation of background facts of the sort likely to be uncontroversial, but Murfam preferred to work on a comprehensive stipulation. Our order observed that the rules do not require all stipulated facts to be included in a single document and that an initial basic stipulation seemed like a good idea.

We ordered Murfam to file a response to the Commissioner’s motion by July 2, 2018; but we did so “in the hope that instead of receiving a response from petitioners ... we will see a stipulation submitted jointly by the parties”; and we ordered that “if, by July 2, 2018, the parties have filed a stipulation of facts, then Murfam need not file a response to this order.” We think our order made it clear that we believed the parties should work on the stipulation and not on disputations about their prior communications. We explicitly “warn[ed] the parties that we and they have limited time between now and trial, that we have limited curiosity about the details of their correspondence, and that neither the Court nor the parties should

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allow themselves to be distracted from the actual merits of this case by fruitless argument about and adjudication of the parties' correspondence.”

We therefore did not expect to receive from Murfam a response (ECF 43) to our order, filed in the evening of June 26, 2018, five days ahead of the deadline we had set. Murfam's counsel is a nimble professional, manifestly capable of a high level of multi-tasking, but we still regret his spending his time, six weeks before an anticipated week-long trial, to file a response that will be moot (and not required) if the parties file a stipulation by July 2, as we still hope. He professes that “[t]he Court should not be burdened with Stipulation squabbles”, and yet the narrative in Murfam's premature, 3-page response (which contains two appendices totaling 44 pages) does precisely that. We fear that successful stipulation of the undisputed facts in this case might be imperiled by a failure of cooperation by the parties, so we offer the following observations:

Our order suggested that the Commissioner's May 31, 2018, delivery to Murfam of a draft stipulation made it appropriate for Murfam to work from the Commissioner's draft, rather than insisting on working from Murfam's subsequent draft. Murfam responds that it was Murfam's counsel who “first told Respondent” (ECF 43, p. 1, para. (i)) on May 30 that he was working on a draft stipulation, so that he was “surprise[d]” by the Commissioner's May 31 delivery of his own draft. We do not see how a draft stipulation delivered 10 weeks before a significant trial could be surprising. In our experience, the Commissioner's counsel proposes the first draft of a stipulation in a great majority of Tax Court cases, and his doing so here was entirely ordinary. But in any event, counsel did not have (and he does not say he had) the prerogative of claiming dibs on first-draft privileges and thereby requiring the Commissioner's attorneys to stand down, to shelve their draft, to await Murfam's draft, and to work from Murfam's draft thereafter.

Murfam's response ignores our comments about the utility of a basic stipulation and the possibility of seriatim partial stipulations. Murfam's response reflects a loyalty to--indeed, an apparent insistence on--a single, comprehensive stipulation, but does not explain why. We still find no fault if the Commissioner insists that the parties give priority to the basic stipulation that he first proposed. If a comprehensive stipulation is possible by July 2, 2018, then all will be well, notwithstanding Murfam's disregard of our comments. But if no stipulation is filed because of Murfam's insistence on “comprehensive”-ness, then Murfam will need to explain why it maintained that insistence notwithstanding our order. The response that Murfam has filed so far does not give any such explanation.

Of the thirty-four paragraphs in the Commissioner's draft "basic" stipulation, Murfam explains objections to twelve of them (i.e., paras. 4-8, 12-13, 24, and 31-34). Therefore, we would expect to hold that at least the remainder (paras. 1-3, 9-11, 14-23, and 25-30) are deemed stipulated. We will not now so hold, since we still expect that the parties will be able to explicitly stipulate these paragraphs. Murfam's position on some of the paragraphs to which it does object is not satisfying:

- Murfam objects to paragraphs 4 through 8 because they pertain to tax returns for which the Commissioner's proposed exhibits are (Murfam says) missing pages or information. Murfam states that they "have attached the taxpayer's retained copies to our draft of the Stipulation". It is good that they have done so, but the use of the present perfect tense ("have attached") obscures the timing. The Commissioner's motion (ECF 41, Exs. L, M, P, Q) showed that Murfam raised this problem June 12, 2018, (and thereafter) without specifying the omissions, despite the Commissioner's request that Murfam provide correct copies. The Commissioner then made the reasonable proposal that if the parties had a dispute about the authenticity of different versions, then both versions could be presented in the stipulation and the Court could decide which versions were actually filed. It does not appear that Murfam provided its copies before the Commissioner filed his motion, and Murfam does not allege that it did so.
- Paragraphs 24 and 31 address documents in the administrative file that Murfam contends are inadmissible. Of course, whether they are admissible will depend upon the purpose for which they are offered. Disputes on admissibility are often punted in a stipulation, by including the document and reserving the objection, and this would seem to be a case where that would be appropriate.
- Paragraphs 32 through 34 involve documents that appear to be related to the Commissioner's compliance with section 6751(b)(1)). Murfam says it has requested "an explanation of the surrounding facts", but "section 6751(b)(1) requires only that the penalty be 'personally approved (in writing) by the immediate supervisor'. It does not require the supervisor to follow any specific procedure in determining whether to approve the penalty." Alterman v. Commissioner, T.C. Memo. 2018-83, at *41. And even if the "surrounding facts" are relevant, there is no evident reason why, in the absence of a dispute about authenticity, the stipulation as to the documents must await the explanation of those facts.

Thus, this appears to be a case in which reasonable cooperation in the stipulation process could resolve these issues, if Murfam will not hold the basic stipulation hostage in order to force the Commissioner to address the matters that Murfam prefers.

It is therefore

ORDERED that the parties shall continue their efforts to file a stipulation in these cases, giving first priority to the basic stipulation that the Commissioner has proposed, and also giving due effort to the additional matters that will constitute a comprehensive stipulation. It is further

ORDERED that our order to show cause issued June 25, 2018, remains in effect, and Murfam shall file a further response to that order no later than July 2, 2018, and no earlier than July 1, 2018. If the parties file a stipulation (basic or comprehensive) by July 2, 2018, then Murfam need not file any response to the order to show cause, and it will be discharged.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
June 27, 2018