

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 this case will begin on August 6, 2018. Now before the Court is a motion to quash (Doc. 82), that the petitioners (collectively “Murfam”) filed on July 30, 2018. The motion asks us to quash two subpoenas *duces tecum* that the Commissioner issued to Mr. David G. Pope. Murfam’s motion to quash states that the Commissioner’s first subpoena served on Mr. Pope is attached as “Exhibit A”, and that the second subpoena is attached as “Exhibit B”. In fact those subpoenas are not attached to Murfam’s motion. However, the Court held a conference call with the parties on July 31, 2018, during which they discussed the subpoenas and Murfam’s subsequent motion to quash, and the Commissioner did not allege any inaccuracies in Murfam’s motion’s description of the subpoenas. We will grant the motion to quash in part.

Background

It appears that the facts relevant to the motion to quash are as follows:

Sometime before the commencement of this case, possibly in 2010 and/or 2012, banks who were prospective lenders for transactions involving the property

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at issue hired Mr. Pope to appraise the properties, and he prepared appraisal reports.

After this case commenced, Murfam's counsel retained Mr. Pope as a consulting expert, not intending to call him as an expert witness in this case. (Murfam has not submitted any report from Mr. Pope and did not list him as a witness in its pretrial memorandum.)

In discovery conducted in this case, the Commissioner attempted to obtain any appraisals on the subject properties that had been previously performed by Mr. Pope. Murfam responded that none existed.

The Commissioner served a subpoena *duces tecum* upon Mr. Pope on July 12, 2018 ("first subpoena"). That subpoena demanded documents from January 1, 2017, to present--i.e., the period of time during which Mr. Pope has served as a consulting expert to Murfam's counsel. When that subpoena was served, Mr. Pope apparently remarked to the person making service (evidently before reading what the subpoena actually demanded) that he was not surprised to receive the subpoena, because he had appraisals of the property at issue.

Because of Mr. Pope's remarks, the Commissioner on July 24, 2018, served another subpoena ("second subpoena"), this one expanding the document request and demanding that Mr. Pope produce 23 years of records and correspondence (i.e., from January 1, 1995, to present).

Murfam then filed its motion to quash. Its primary objection to the subpoenas concerns the Commissioner's request for documents from Mr. Pope. The motion requests that the Court quash the Commissioner's subpoenas because Mr. Pope is a non-testifying consulting expert with no personal interest in the litigation. Without citing Fed. R. Civ. P. 26(b)(4)(D) but evidently relying on it (see Tax Court Rule 1(b)), Murfam argues that the documents requested by the first subpoena (i.e., those generated during his retention as a consulting expert) are protected as work-product. (Doc. 82 at 2).

As to the 23 years of documents demanded by the second subpoena, Murfam argues that the subpoena is unreasonable and oppressive. (Doc. 82 at 3). Murfam also contends that if the Commissioner enforces the subpoenas, then Mr. Pope should be entitled to a reasonable fee, beyond the normal witness rate, since Mr. Pope is an expert.

During the July 31, 2018, conference call the Commissioner responded to Murfam's objections. The Commissioner argues that Mr. Pope has documents in his possession, which contradict previous responses to the Commissioner's discovery requests. The Commissioner further alleges that, upon service of the first subpoena, he first became aware of the existence of these documents and that awareness is what prompted the second subpoena with the more expansive document request dating back to 1995.

During that conference call, the Commissioner stated that he is unaware of the contents or conclusions contained in the documents, which are allegedly in Mr. Pope's control. The Commissioner stated that, if the documents support his position, he would expect to call Mr. Pope as a witness at trial, in an attempt to impeach Murfam's valuation expert. However, the Commissioner stated that he would be calling Mr. Pope only as a fact witness, rather than an expert witness, and that therefore Murfam's arguments concerning fees to which Mr. Pope might be entitled as an expert are beside the point.

Analysis

I. First subpoena

Murfam represented during the conference call that the only documents responsive to the Commissioner's first subpoena are Mr. Pope's communications with counsel and are therefore protected work-product. Fed. R. Civ. P. 26(b)(4)(D) generally excepts from discovery "facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial". Accordingly, we will grant Murfam's motion to quash, insofar as it pertains to the July 12, 2018, subpoena.

II. Second subpoena

A. Documents

During the conference call, the Commissioner indicated no objection to the granting of the motion to quash the second subpoena insofar as it requested documents before 2010. Murfam indicated that Mr. Pope has at least two appraisals that are responsive to the Commissioner's request, one from 2012 and one from 2010. Murfam stated that they would review those documents and that, if they are not privileged, Murfam would produce them to the Commissioner on

August 1, 2018. Therefore we will grant in part Murfam's motion to quash the second subpoena, to the extent that it requests documents and correspondence generated prior to January 1, 2010.

B. Testimony

The second subpoena requires Mr. Pope to appear at trial to give testimony. The Commissioner explains: that it is possible that he will not need to call Mr. Pope, and that Mr. Pope will be called (if at all) to give fact testimony, not expert testimony. In this regard the second subpoena raises several issues:

1. Nature of testimony

It is not clear what the nature of Mr. Pope's testimony might be. The Commissioner supposes that he will evoke fact testimony, not expert opinion, from Mr. Pope; but the Court is not certain that the Commissioner's characterization of the testimony is correct. It seems possible that what the Commissioner really intends to ask Mr. Pope will necessarily evoke his expert opinions--but the Commissioner did not list him as an expert witness in his pretrial memorandum nor submit an expert report in compliance with Rule 143. We do not decide the now-hypothetical questions of what the nature of the testimony would be nor whether it should be permitted. We will be better able to rule on those questions when they actually arise at trial.

2. Appearance

It would therefore not be expedient to require Mr. Pope to be present at trial when he might not be needed. Fortunately, Murfam indicated that Mr. Pope lives relatively close to the location of the upcoming trial and that he can appear to testify if he receives several hours' notice before being called as a witness. Murfam's counsel stated a willingness to assure his appearance in the event the Court actually permits the Commissioner to call him to testify. Murfam's counsel is therefore instructed to advise Mr. Pope that he may be called on several hours' notice.

3. Fees

The Commissioner will be responsible for Mr. Pope's fees, in the event that he is permitted to call Mr. Pope as a witness. Rule 148(c) provides that "[t]he

party at whose instance a witness appears shall be responsible for the payment of the fees and mileage to which that witness is entitled.”

However, the amount of those fees is not agreed on. If the Commissioner calls Mr. Pope only as a fact witness, then Mr. Pope would be entitled only to per diem and mileage as set forth in 28 U.S.C. section 1821. See Rule 148(a). But if Mr. Pope were called not as a fact witness but instead to give expert testimony, then, Murfam contends and the Commissioner acknowledges, he would be entitled to a reasonable fee beyond the normal witness rate. Cf. Fed. R. Civ. Pro. 45(d)(1), (d)(3)(A)(iv), (d)(3)(B)(ii), (d)(3)(C)(ii).

Accordingly, if and when the Commissioner notifies the Court of his intent to call Mr. Pope as a witness, we will at that time: (1) determine whether the Commissioner will call Mr. Pope only as a fact witness or as an expert witness; (2) rule on the propriety of his being called; and, if he is to be called, (3) determine what fee is appropriate. It is

ORDERED that the motion to quash is granted in part insofar as it relates to the July 12, 2018, subpoena *duces tecum* served on Mr. David G. Pope. It is further

ORDERED that the motion to quash is also granted in part as to the July 24, 2018, subpoena *duces tecum* insofar as it demands documents that were generated prior to January 1, 2010. It is further

ORDERED that the motion to quash is otherwise denied without prejudice. It is further

ORDERED that if the Commissioner determines to call Mr. Pope as a witness at trial, then he shall provide the Court and Murfam with at least 24 hours’ notice of his intent to do so and shall then advise the Court and Murfam of the subject of the expected testimony and the Commissioner’s position as to the fact or expert character of the expected testimony. It is further

ORDERED that Murfam's counsel shall immediately effect service of this order upon David G. Pope (whose address is lacking from our record), and shall file a certificate of service.

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
August 2, 2018