UNITED STATES TAX COURT
WASHINGTON, DC 20217

LEON MAX,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 20237-16.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This case is before us on the Commissioner's motion to review the sufficiency of Leon Max's answers or objections to the Commissioner's request for admissions dated February 27, 2019.

This case is calendared for a special trial session beginning September 16, 2019, in Los Angeles, California. After the parties attempted informal discovery, the Commissioner made his first request for admissions in December 2018 to which Mr. Max responded in January 2019. The Commissioner then timely filed the motion before us. Petitioner filed a response and the Commissioner filed a motion for leave to file a reply (lodging the reply along with it).

In his response to the Commissioner's request for admissions, Mr. Max made both general and specific objections to the requested admissions. The Commissioner argues that many of the responses are insufficient.

Rule 90 governs requests for admissions. Rule 90(a) provides that a party may serve on another party requests for admissions of the truth of "any matters * * * relevant to the subject matter involved * * * if such matters are set forth in the request and relate to statements or opinions of fact".[1] Rule 90(c) sets forth the answering party's obligations. An answer must "specifically admit[] or deny[] the matter involved * * * or assert[] that it cannot be truthfully admitted or denied and set[] forth in detail the reasons why". Rule 90(c). Importantly, a denial must

[1]Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure.

SERVED Apr 08 2019

"fairly meet the substance of the requested admission". Rule 90(c). A party may object to a request, but must state the reasons for their objection in detail. Rule 90(c). A party may not fail to respond to a request because it considers the request to raise an issue for trial or because it does not consider the request relevant. Rule 90(c). Rule 90(e) grants us the authority to review the sufficiency of answers or objections, on motion of the requesting party. If we find a response insufficient we may order the matter admitted or allow the responding party to file an amended answer. Rule 90(e).

With these rules in mind, we turn to the specific requests for admissions. Several of the requests are identical or nearly identical, with only minor difference (such as relating to different tax years). For purposes of addressing the motion, we address similar requests together.

Requests 7 through 10 ask Mr. Max to admit that Leon Max, Inc. (LMI) did not design or manufacture children's clothing or apparel in 2011 or 2012. Mr. Max denied the request. The Commissioner objects to this response because LMI admitted this request in informal discovery. In his response to the Commissioner's motion, Mr. Max explains that LMI has lines that "relate to juniors and preteens and thus focus on the younger consumer market." He continues in a footnote "Clearly, the concept of a pre-teen or 'juniors' market, is intended to encompass age groups contemporarily associated with 'children', even if not named identically." While this explanation would have been helpful to include in the initial denial, especially in light of the initial admission, we side with Mr. Max. Because the Commissioner does not define "children's" clothing or apparel and because LMI evidently includes juniors and pre-teen to college lines in its definition of "children's" clothing, we find that Mr. Max has adequately responded to these requests.

Requests 11 through 14 ask Mr. Max to admit that in 2011 and 2012 no employee of LMI held a degree in engineering or the physical sciences. Requests 31 to 34 ask Mr. Max to admit that no LMI employee for whom Mr. Max claimed qualified research expenditures in 2011 or 2012 had a degree in chemistry or engineering. Mr. Max objects to these requests as "misleading and vague." He responds "[o]n this basis, the request is denied." The basis Mr. Max provides for denying these requests is that LMI's employees took classes that incorporated the principles of these sciences.

We deem these requests admitted. The questions are neither vague nor misleading. Mr. Max was asked about *degrees* held by LMI's employees. He

responded with a discussion of their coursework. Mr. Max's denial does not fairly meet the substance of the request as required by Rule 90(c). Mr. Max is obligated to answer the question as it is asked, not as he rewrites it as he sees fit.

Requests 19 through 22 ask Mr. Max to admit that neither he nor LMI can "determine the amount of time any employee spent * * * on any Style Number LMI developed, produced, or sold" and that they "did not record the identity of every employee who worked on each Style Number it developed, produced, or sold" in 2011 or 2012. In response Mr. Max denies "that it does not have a reasonable basis for allocating employees." Again, Mr. Max has attempted to rewrite the question. Instead of admitting or denying that neither he nor LMI recorded and can determine the amount of time spent, Mr. Max volunteers that LMI has the ability to allocate time to estimate the time spent. This denial cannot fairly be considered to meet the substance of the request. We therefore deem these requests admitted.

Requests 23 through 26 are similar. Requests 23 and 24 ask Mr. Max to admit that neither he nor LMI "is able to determine the total amount of QREs" incurred in 2011 and 2012 with respect to *any particular* style number. Requests 25 and 26 ask Mr. Max to admit that neither he nor LMI "is able to determine the total amount of QREs" incurred in 2011 and 2012 with respect to *each and every* style number. Mr. Max responds that he can "neither admit nor deny" requests 23 and 24 "at this time." Mr. Max states that he has identified QREs for every style number collectively and further states that LMI has not attempted to determine the QREs for each style number.[2] We find it reasonable for Mr. Max to neither admit nor deny a request asking whether LMI can make a determination it has not yet tried to make.

Requests 29 and 30 ask Mr. Max to admit that for 2011 and 2012 "LMI did not incur QREs with respect to every Style Number it developed, produced, or

---

[2] Although it does not affect our conclusion as to Mr. Max's ultimate response to requests 25 and 26, we note his attempt to fundamentally change the meaning of those requests. Both requests 25 and 26 ask about "each and every Style Number"; yet Mr. Max responds as to "'every' Style Number collectively.'" As both the context of the requests and common usage make clear, "every" refers to "all the separate individuals who constitute the whole, regarded one by one." Black's Law Dictionary 555 (6th ed. 1990). The request did not refer to all style numbers, collectively; it referred to every style number, individually. There is no ambiguity here; merely an attempt to rewrite the inquiry.

sold." Mr. Max responds that he "can never admit nor deny this request as drafted." He objects on the grounds that the request is misleading and confusing. Mr. Max then discusses the statistical sampling method used to identify QREs. He states that "[b]ased upon the statistical model, it anticipates that all Style Numbers may not be qualified for the credit and adjusted the QREs down accordingly. However, every Style Number was not independently evaluated." The question at issue is whether LMI incurred QREs with respect to *every* style number. Therefore, if there was *any* style number for which LMI did not incur QREs Mr. Max must admit this question.

In Mr. Max's response to the Commissioner's motion, he elaborates on the sampling method LMI used in calculating its credit. LMI explains that a random selection of the 13,764 projects at issue was taken. According to LMI, the method

> acknowledged the chance for some measure of error, by applying a percentage of reduction, which was staggered based upon the number of errors found within the referenced sample size (known as the 'scaling factor'). As such, * * * [LMI]'s methodology acknowledges there can be and probably are non-qualified project within the 13,764 style numbers. As * * * [LMI's] methodology anticipates and incorporates a reduction of costs for non-conforming styles * * * [LMI], itself, already acknowledged outliers based upon its approach.[3]

We understand "errors found within the referenced sample size" and "non-conforming styles" to mean style numbers for which LMI did not incur QREs. We agree with the Commissioner that Mr. Max should have admitted these requests and deem these requests admitted.

On the basis of the foregoing, it is

ORDERED that he Commissioner's motion for leave to file a reply to petitioner's response to the motion to review the sufficiency of answers or objections to request for admissions filed March 12, 2019, is granted. It is further

ORDERED that the Commissioner's motion to review the sufficiency of answer or objections to request for admissions filed February 27, 2019, is granted

---

[3]We note that LMI does not address the Commissioner's reference to Stipulated Exhibit 10-J, which shows that the credit study concluded LMI did not perform qualified research on 3 of the 35 sampled style numbers.

in that requests 11, 12, 13, 14, 19, 20, 21, 22, 29, 30, 31, 32, 33, and 34 are deemed admitted.

(Signed) Ronald L. Buch
Judge

Dated: Washington, D.C.
April 8, 2019