United States Tax Court
Washington, DC 20217

JAMES E. HANSEN & HELEN R. HANSEN,

Petitioners

v.

Commissioner of Internal Revenue,

Respondent

Docket No. 16157-18.

O R D E R

The Court's July 20, 2021 Order to Show Cause regarding petitioners' motion under Rule 91(f)[1], filed on April 12, 2021, is made absolute in part and discharged in part.

In this Order, petitioners are referred to as the Hansens and respondent is referred to as the IRS.

Background

As part of their 2015 return the Hansens included a Schedule C for their real-estate-development business. The Schedule C reported no gross income and $82,949 of deductions. Of this total $82,949 amount, $162 was for advertising, $1,933 was for insurance, $8,562 was for repairs and maintenance, $687 was for taxes and licenses, $3,638 was for utilities, and $67,967 was for "[o]ther expenses". Of this $67,967 deduction for other expenses, $227 was for office supplies, $95 was for printing, $60 was for postage, $16 was for bank charges, and $67,569 was for "abandoned development costs".

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Served 11/04/21

The return reported tax of $9,165, total payments of $7,380, and an amount owed of $1,785.

On July 20, 2018, the IRS sent the Hansens a notice of deficiency for their 2015 tax year, determining a $26,402 deficiency and determining the Hansens were liable for a section 6662(a) penalty of $5,280. The notice of deficiency disallowed all $82,949 of deductions claimed by the Hansens on their Schedule C. The adjustments were shown on Form 4549-A, line 1.b ($3,638 for utilities), 1.c ($687 for taxes and licenses, 1.d ($8,562 for repairs and maintenance), 1.e ($1,933 for insurance), 1.f ($162 for advertising), and 1.g ($67,967 for other expenses). The notice of deficiency allowed $14,820 of unreported Schedule E rental deductions. The notice of deficiency determined that the total corrected tax liability was $35,567, the deficiency was $26,402 (equal to $35,567 of the total corrected tax liability minus $9,165 reported tax). It reflected a balance due of $26,402.

On August 20, 2018, the Hansens timely filed their petition for redetermination of the deficiency.

On October 17, 2018, the IRS filed its answer. As to the statement in the petition, "Tax payer/Petitioners (TP) disputes the Notice of Deficiency Increase in Tax of $26,402.00 for 2015 and seeks redetermination of the deficiency", the answer responded: "Admits, but alleges for clarification that the only portion of the deficiency being disputed is the $67,967.00 adjustment to petitioners' Schedule C Other Expenses (the adjustment shown on line 1.g of Form 4549-A)."

On October 29, 2019, the Court set the case to be tried during the Trial Session in Los Angeles that was to begin March 23, 2020.

On March 6, 2020, the IRS filed its pretrial memorandum. According to the memorandum, the case involved three issues. The first issue was whether the Hansens "are entitled to claim a $67,569.00 Schedule C deduction on their 2015 return relating to their real estate activities." The second issue was whether the Hansens were liable for the section 6662(a) penalty. The memorandum stated: "This issue is conceded by respondent and is not discussed further herein". The third issue was explained by the memorandum as follows: "The remaining Schedule C adjustments in the notice of deficiency are being conceded by respondent and are not discussed further herein." The memorandum also stated: "The parties plan to file a motion to submit this case fully stipulated for briefing and decision under Rule 122."

Also on March 6, 2020, the Hansens filed their pretrial memorandum. The pretrial memorandum stated that the "primary issue remaining for trial (or resolution by the Court under Rule 122) is whether petitioners are entitled to claim a $67,569.00 deduction on their 2015 Schedule C relating to petitioners' real estate activities." The Hansens' pretrial memorandum stated that the amounts in dispute were "Deficiencies/Liabilities" of $26,402 and "Additions/Penalties" of $5,280.

On March 11, 2020, the Court cancelled the March 23, 2020 Los Angeles Trial Session due to the pandemic.

On July 9, 2020, the Court ordered the parties to file a status report, or a motion to submit this case without trial under Rule 122, by August 10, 2020.

On August 7, 2020, IRS counsel Berwind filed a status report. He reported that he and the Hansens were negotiating a proposed stipulation of facts and that he anticipated the parties would be able to lodge a final version of the stipulation of facts, and file a Rule 122 motion, within two weeks of the date of the report.

On August 10, 2020, the Court ordered the parties to file a status report, or a motion to submit this case without trial under Rule 122, by September 10, 2020.

On August 31, 2020, the Hansens made a Rule 91(f) motion as to a 38-paragraph proposed stipulation of facts, with attached Exhibits 1-P through 14-P. The 38 paragraphs are found on pages 4 through 12 of the Hansens' Rule 91(f) motion. The 14 exhibits were filed by the Hansens at docket entry number 41 (Exhibits 1-P and 2-P), 42 (Exhibits 3-P to 12-P), and 43 (Exhibits 13-P and 14-P). Paragraph 2 of the proposed stipulation of facts stated: "The sole issue remaining for trial (or resolution by the Court under Rule 122) is whether petitioners are entitled to claim a $67,569.00 deduction on their 2015 Schedule C relating to petitioners' real estate development activities." Paragraph 3 of the proposed stipulation of facts stated: "The accuracy-related penalty asserted in the notice of deficiency is conceded by respondent." Paragraph 4 of the stipulation stated: "The remaining Schedule C adjustments in the notice of deficiency were conceded by respondent on answer. See Answer, page 1 (respondent acknowledges that the reference on page 1 of the Answer to $67,967.00 should read $67,569.00)."

On September 3, 2020, the Court vacated in part the Court's August 10, 2020 Order, in that the parties were no longer required to file status reports or a Rule 122 motion by September 10, 2020. Simultaneously, the Court granted the Hansens' Rule 91(f) motion and ordered the IRS to file a response showing cause

why the matters set forth in the Hansens' 38-paragraph proposed stipulation of facts should not be accepted as established for purposes of this case.

On September 30, 2020, the IRS filed a response to the Court's September 3, 2020 show-cause order. The IRS did not dispute that the 38-paragraph proposed stipulation of facts should be accepted as established. The IRS stated that it anticipated that the case would be ready to be submitted to the Court under Rule 122 in three weeks.

On the same day, September 30, 2020, the Court ordered that the Hansens' 38-paragraph proposed stipulation of facts was deemed established and that Exhibits 1-P through 14-P were admitted.

On October 15, 2020, the parties jointly moved to submit the case without trial pursuant to Rule 122.

On October 21, 2020, the Court granted the joint Rule 122 motion and ordered the parties to file simultaneous opening briefs on or before January 4, 2021, followed by simultaneous opening briefs on or before February 3, 2021.

On December 23, 2020, at 5:43 a.m., IRS counsel Berwind sent the following email to Mr. Hansen:

> Good morning, Jim:
>
> I was in the middle of writing up my nearly 40-page opening brief when I found a 61-year-old Tax Court case, affirmed by the Ninth Circuit, which pretty clearly indicates that on our stipulated facts you are entitled to the deduction. My manager has signed off on my proposed concession. If you have not yet filed your opening brief, please stop working on it. I will call chambers today, inform the judge of respondent's concession and ask that we be relieved of our briefing duties. I will also request 30 days to file a stipulated no-deficiency, no-penalty decision.
>
> If you have any questions, let me know. Otherwise, Happy Holidays, be well, and stay safe.

On December 23, 2020, at 6:50 a.m., Mr. Hansen emailed Berwind: "Thanks. Can you send me the case site [sic]? And Merry Christmas".

On December 23, 2020, at 7:12 a.m., Berwind emailed Mr. Hansen: "Yes. Burke v. Commissioner, 32 T.C. 775 (1959), aff'd 283 F.2d 487 (9th Cir. 1960)."

On December 23, 2020, at 8:12 a.m., Berwind emailed Mr. Hansen:

> I just spoke with Judge Morrison's chambers. As a result of the government's concession, the judge will relieve us of our briefing obligations and give us time to file a stipulated decision. He will cut an order to that effect.

On January 5, 2021, the Court suspended the briefing schedule until further notice and required the parties by February 4, 2021 to file status reports.

On January 5, 2021, at 7:07 a.m., Berwind sent the following email to Mr. Hansen:

> Good morning, Jim, and Happy New Year. The Court just cut an order for a status report to be filed by February 4, 2021. Did you receive my proposed decision documents yet? Drop me a note when you come up for air.

It is unclear what document Berwind was referring to when he referred to his "proposed decision documents".

On January 5, 2021, at 2:30 p.m., Mr. Hansen sent an email to Berwind that began:

> Mike--
>
> I hope this finds you well. Yes, I received your documents by mail yesterday.
>
> You mentioned that upon finding the case of Burke v. Commissioner, 32 T.C. 775 (1959), aff'd 283 F.2d 487 (9th Cir. 1960) while working on your 40 page opening brief, you determined my deduction was justified and now propose a court order for no change in the filed tax return and no penalties.

It is unclear what documents Mr. Hansen was referring to as "your documents". The email then explained that, in Mr. Hansen's view, his treatment by the IRS had

been "severely oppressive". The letter proposed that the stipulation of settled issues include an award of costs:

> As first stated to the Tax Compliance Officer regarding the burden if he continued, we have incurred both administrative and legal costs. My question for you is, do you want to stipulate to costs or litigate them by way of a motion and potential appeal?
>
> The above certainly appears to be relevant to Rule 33 and Rule 270/IRS Sec. 7430 motions. I don't know what the 9th Circuit would consider a reasonable amount of award to change the behavior of the IRS in a continuing pattern of abuse of taxpayers regarding Sec. 165 worthlessness deductions but I would think it is substantial.
>
> I notice that Internal Revenue Manual Sec. 35.10.1.1.2.2. (01-06-2016) allows,
>
> > Settlement authority has been delegated to Field Counsel in the following situations:
> >
> > > a. The litigation costs settlement offer does not exceed $25,000 and the administrative costs settlement offer does not exceed $5,000. ...
>
> So, in the spirit of settlement and to avoid future litigation costs, I propose we include a stipulation of the Field Counsel's maximum of $25,000 in litigation costs and $5,000 in settlement costs and be done with the matter.
>
> Do you agree?

On January 20, 2021, at 9:23 a.m., Berwind sent an email to Mr. Hansen:

> Good morning, Jim:
>
> I have converted my proposed decision document to a stipulation of settled issues which will resolve our case except for your two motions. Please let me know if this meets with your approval, but do not sign and return anything until my manager has also approved it.

Attached to the email was the following stipulation of settled issues prepared for the signatures of the Hansens and Berwind:

> With respect to the Notice of Deficiency dated July 20, 2018, which forms the basis of this case, the parties stipulate and agree as follows with respect to petitioners' 2015 taxable year:
>
> 1. There is no deficiency in income tax due from, nor overpayment due to, petitioners.
>
> 2. Petitioners are not liable for the accuracy-related penalty under the provisions of I.R.C. § 6662(a).
>
> 3. Except for petitioners' motion to recover fees and costs and their separate motion for sanctions, this stipulation resolves all the issues in the case.
>
> 4. The parties agree to this stipulation.

On January 21, 2021, Mr. Hansen sent to Berwind the following email: "Mike – See attached for my slight modifications. I'll sign it once you have manager approval. Thanks." It is unclear what modifications Mr. Hansen made to the stipulation of settled issues.

On January 22, 2021, in response to Mr. Hansen's January 21, 2021 email, Berwind sent to Mr. Hansen the following email: "Thanks, Jim. I will get this off to my manager today with your edits."

On February 4, 2021, Berwind filed a status report:

> 1. This case has been submitted for decision without trial under Rule 122. It is currently under the jurisdiction of the Honorable Richard T. Morrison.
>
> 2. In late December of 2020, at the request of respondent's counsel, the briefing schedule ordered by the Court was suspended while respondent reached out to petitioners with a proposed settlement offer.
>
> 3. Petitioners received the offer and informed respondent's counsel of their plans to file a motion to recover both administrative and legal

costs as well as a possible motion for sanctions. Petitioners' reply was coupled with a counteroffer to settle the cost, fees and sanctions issue for an agreed-upon stipulated settlement amount. The counter-offer has been declined by respondent.

4. In light of the foregoing development, the undersigned has reached out to the National Office for its advice and assistance. That assistance is currently ongoing.

Also on February 4, 2021, the Hansens filed a status report which stated:

> On 12/23/20, Respondent asked Petitioner to stop working on its Rule 122 opening brief, stating Respondent found a case '[w]hich pretty clearly indicates that on our stipulated facts you are entitled to the deduction. … I will call chambers today, inform the judge of respondent's concession and ask that we be relieved of our briefing duties. I will also request 30 days to file a stipulated no-deficiency, no-penalty decision." [sic] Presumably, this prompted the court's 1/5/21 order.
>
> Petitioner responded offering a settlement for costs "[t]o avoid future litigation costs …" that did not exceed the authority delegated to Field Counsel pursuant to Internal Revenue Manual Sec. 35.10.1.1.2.2. (01-06-2016). Respondent informed Petitioner that Respondent does not pay costs.
>
> Subsequently, the parties agreed to the following stipulation pending Respondent manager's approval,
>
> 1. There is no deficiency in income tax due from, nor overpayment due to, petitioners.
>
> 2. Petitioners are not liable for the accuracy-related penalty under the provisions of I.R.C. § 6662(a).
>
> 3. Except for petitioners' motion to recover fees and costs and their separate motion for sanctions, this stipulation resolves all the issues in the case.
>
> 4. The parties agree to this stipulation.

Petitioner awaits Respondent's reply.

On February 19, 2021, the Court ordered the parties to file status reports on or before April 19, 2021.

On April 9, 2021, at 4:49 a.m., Berwind sent the following email to Mr. Hansen:

> Hi Jim: I hope this note finds you well. I got your email message and VM message about our case. In my forthcoming status report, which is due on the 19th, I am planning to inform the Court that in respondent's view we did not reach a basis for settlement and, thus, the briefing schedule should be reset.

On April 12, 2021, the Hansens made a Rule 91(f) motion seeking an order for the IRS to show cause why the following matters should not be deemed admitted:

1. With respect to the Notice of Deficiency dated July 20, 2018, which concerns petitioners 2015 tax year,

2. There is no deficiency in income tax due from, nor overpayment due to, petitioners[.]

3. Petitioners are not liable for the accuracy-related penalty under the provisions of I.R.C. § 6662(a).

4. Except for petitioners' motion to recover fees and costs and their separate motion for sanctions, all issues are resolved in the case.

These statements are sentences 1 through 4 in part B of the Hansens' motion. In support of their motion, the Hansens argue in part that "[w]ith management approval, R informed the court *ex parte* of R's concession of the tax and penalty liability and requested relief of briefing duties." The Hansens stated that in their view, the IRS had conceded the deficiency and the penalty on December 23, 2020, that the only issue remaining in the case was fees and costs, and that therefore Mr. Hansen's January 5, 2021 email to Berwind was an offer to settle only the remaining issue in case, i.e., fees and costs. The Hansens further argue that the

IRS is bound by its December 23, 2020 concession under the doctrine of judicial estoppel.

On April 15, 2021, Berwind filed a status report stating that "[a]t the request of respondent's counsel in late December of 2020, the briefing schedule ordered by the Court was suspended while respondent reached out to petitioners with a proposed settlement offer" and that the parties did not agree to settle.

On July 20, 2021, the Court granted the Hansens' Rule 91(f) motion and ordered the IRS to show cause why the four sentences stated in the Rule 91(f) motion should not be accepted as established for purposes of this case.

On September 20, 2021, IRS counsel Eggerth responded to the July 20, 2021 show-cause order on behalf of the IRS. The IRS contends that Berwind's emails to Mr. Hansen on December 23, 2021, and his conversation with Court staff on the same day, did not constitute a concession but instead constituted an offer to settle the case. The IRS also contends that Berwind's statements should be construed as an offer to settle the case because Berwind's statements about a "concession offer" and were conditioned on petitioners' stipulating that there was no overpayment. The IRS further contends no settlement was reached because the Hansens did not sign either a decision document or a stipulation of settled issues. More generally, the IRS argues, no settlement was reached because there was no "meeting of the minds", no "mutual assent", no "executed agreement", and "no communication of acceptance of an agreement". The IRS contends that the deficiency is still "contested", and that under the application of the facts to the law, the Hansens are not entitled to the abandonment-loss deduction. As to petitioners' judicial-estoppel theory, the IRS contends (1) that Berwind did not tell the Court the government conceded the case but that he had merely asked the Court to "suspend the briefing schedule so the parties could, in effect, settle the case, which Mr. Berwind thought would result in a settlement wherein Respondent conceded the deficiency", (2) the IRS did not gain an unfair advantage from any of Berwind's statements, and (3) the Court did not accept the position that there was no deficiency because it "did not need to make any finding of fact or conclusion of law to suspend the briefing schedule in a way that allowed the parties to attempt to settle the case." As to the second sentence referred to in the Hansens' Rule 91(f), the IRS contends that there is a genuine dispute as to whether there is a deficiency, but agrees that there is no overpayment due to the Hansens and that it should be deemed admitted that there is no overpayment. As to the third sentence, the IRS agrees that petitioners are not liable for the accuracy-related penalty and that sentence 3 can be deemed admitted.

Discussion

Rule 91(f)(2) provides that the party to whom a show-cause order is directed must file a response with the Court showing why the matters set forth in the motion papers should not be deemed admitted for purposes of the case. Rule 91(f)(4) provides:

> Opposing claims of evidence will not be weighed under this Rule unless such evidence is patently incredible. Nor will a genuinely controverted or doubtful issue of fact be determined in advance of trial. The Court will determine whether a genuine dispute exists, or whether in the interests of justice a matter ought not to be deemed stipulated.

The Hansens claimed an abandonment-loss deduction of $67,569 on their 2015 tax return. The IRS issued a notice of deficiency disallowing that deduction and other deductions, and determining a section 6662(a) penalty liability.

On March 6, 2020, the IRS conceded in its pretrial memorandum that the other deductions should be allowed and that the Hansens were not liable for the penalty. At that point, if not sooner, the only issues in this case had been narrowed to (1) the amount of the deficiency, which depended entirely on the abandonment-loss deduction, see sec. 6214(a) (giving Tax Court jurisdiction to redetermine the correct amount of the deficiency), and (2) whether the Hansens had made an overpayment of taxes for 2015. See sec. 6512(b)(1). Administrative costs and litigation costs were not yet at issue. Section 7430(a) provides that the prevailing party in a Tax Court proceeding may recover a judgment for administrative costs and litigation costs. Rule 231(a)(2) provides that a motion for administrative costs and litigation costs is made only after an opinion determining the issues in the case or after the parties have settled all issues in the case other than costs. Rule 143(a) provides that evidence that is relevant only to the issue of a party's entitlement to administrative costs and litigation costs is not to be introduced during the trial of the case.

This case was submitted without for trial under Rule 122 on October 21, 2021. When the briefing deadline for the parties' opening briefs was imminent, Berwind emailed Mr. Hansen to state that the Hansens were "entitled to the deduction", that Berwind's manager had signed off on his "proposed concession", and that Berwind would "call chambers today" to "inform the judge of respondent's concession". Berwind then called chambers (meaning Court staff).

After this call, Berwind sent another email to Mr. Hansen confirming that he informed chambers by telephone of the "government's concession".

Concessions by litigants on the record are binding. Church of Scientology of California v. Commissioner, 83 T.C. 381, 524 (1984), aff'd, 823 F.2d 1310 (9th Cir. 1987). The statements made by Berwind, though not on the record, were so formal and intentional that they rise to the level of a binding concession. Berwind, an attorney, explained in writing to the opposing party that he would tell the Court he had conceded the case. Then, after speaking to a member of Court staff, he then confirmed in writing with the opposing party that he had told Court staff he had conceded the case. The purpose of Berwind's conversation with Court staff was to influence the Court's handling of the litigation.

Although the conversation between Berwind and Court staff was not in writing, Berwind memorialized the conversation in emails to the opposing party directly before and directly after the conversation.

The IRS contends that Berwind was only communicating his willingness to negotiate a settlement. That interpretation of Berwind's statements is unreasonable. Berwind's emails referred to a "concession". They did not refer to a proposed concession, or to a concession to be made later as part of settlement negotiations.

The IRS observes that Berwind and the Hansens failed to agree later on a settlement in the form of a stipulation of settled issues or a proposed stipulated decision. A settlement agreement can itself be binding. Dorchester Industries, Inc. v. Commissioner, 108 T.C. 320, 330 (1997). But the lack of a settlement agreement does not detract from the binding nature of Berwind's concession made on December 23, 2020.

We need not address the Hansens' arguments that the IRS is bound by Berwind's statements under the doctrine of judicial estoppel, given our view that Berwind's statements amounted to a binding concession.

The IRS has not raised any relevant issues of fact regarding the question of Berwind's concession. Although the IRS asserts that Berwind now believes a concession is unmerited, that belief is irrelevant. All that matters is that Berwind has already made the concession.

The IRS asserts that a concession of the abandonment-loss deduction is objectively unmerited because, it says, the Hansens are not entitled to the abandonment-loss deduction. This assertion need not be evaluated given that Berwind conceded the entitlement to the deduction. Had Berwind's concession been made on the record, we would have accepted the concession and we would not have considered the merits of the deduction. Although Berwind's concession was not made on the record, it has the indicia of formality and intentionality necessary to give it binding effect. Therefore, we will not consider the merits of the deduction.

We observe that there are gaps in the factual record regarding the parties' attempts to negotiate a stipulated decision and a stipulation of settled issues in January 2021 and April 2021. (For example, the record does not reveal what were the "proposed decision documents" attached to Berwind's January 5, 2021, 7:07 a.m., email to Mr. Hansen.) These negotiations are not relevant to the binding nature of Berwind's earlier concession made on December 23, 2020.

The scope of the government concession of the case on December 23, 2020, was to allow the abandonment-loss deduction. Given that the government has conceded the all other deductions the disallowance of which gave rise to the deficiency, we deem admitted the portion of the first disputed sentence in the Hansens' Rule 91(f) motion, stating that there is no deficiency of income tax. The remainder of the first disputed sentence is that there is no overpayment of income tax. The IRS does not dispute that this statement should be deemed admitted. Therefore, the entire first sentence--that there is no deficiency or overpayment--will be deemed admitted.

The second sentence is that the Hansens are not liable for the section 6662(a) penalty. The IRS does not dispute that this sentence should be deemed admitted. Therefore, the second sentence will be deemed admitted.

The IRS does not dispute the third sentence, except that it says that the deficiency is still at issue. But in our view, the deficiency has been conceded. Therefore, the third sentence will be deemed admitted.

We do not see the need to determine whether the fourth sentence should be deemed admitted.

It is therefore

ORDERED that the Court's July 20, 2021 Order to Show Cause is made absolute in part, in that sentences 1, 2, and 3 in part B of the Hansens' April 12, 2021 Rule 91(f) motion are deemed admitted. It is further

ORDERED that the Court's July 20, 2021 Order to Show Cause is discharged in part, in that sentence 4 in part B of the Hansens' April 12, 2021 Rule 91(f) motion is not deemed admitted.

(Signed) Richard T. Morrison
Judge