



United States Tax Court

Washington, DC 20217

ALAN MICHAEL BERKUN,

Petitioner

v.

Docket No. 22550-17.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent

ORDER

This case is calendared for trial at the Court's Miami, Florida special session, scheduled to begin April 7, 2025. Petitioner, Alan Michael Berkun, challenges a notice of deficiency issued by the Internal Revenue Service (IRS) that determined deficiencies as well as civil fraud penalties under section 6663(a)¹ for his 2001 through 2005 tax years. Pending before us are the Commissioner's motions to review the sufficiency of answers or objections to request for admissions [Doc. 197] and to compel responses to interrogatories [Doc. 196].

Motion To Review Sufficiency of Answers

Rule 90(a) permits a party to serve upon another party written requests to admit the truth of any nonprivileged matter relevant to the pending action, so long as the matter is "set forth in the request and relate[s] to statements or opinions of fact or of the application of law to fact." Generally, Rule 90(c) contemplates the responding party will either admit, deny, or object. To encourage straight shooting, Rule 90(e) provides: "If the Court determines that an answer does not comply with the requirements of this Rule, it may order either that the matter is admitted or that an amended answer be served."

The Commissioner challenges Mr. Berkun's answers to 31 requests for admission (Nos. 1–23, 26–30, 35, 40, 41). Mr. Berkun denies the vast majority of the requests, often pairing those denials with an objection to the relevance of the matter sought or on the grounds that the request called for a legal conclusion. [Doc. 197 at

¹ Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C. (Code or I.R.C.), in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure. "Doc." references are to the documents in this case as numbered by the Clerk of this Court, using .pdf pagination.

67–83.] The Commissioner argues that Mr. Berkun’s flat denials conflict with the parties’ stipulations [*id.* at 4–13] or represent evasive, incomplete, or bad faith answers [*id.* at 9–10, 13–21].

We do not believe that Mr. Berkun’s answers violate Rule 90. Although Mr. Berkun has provided responses to the first request for admissions, the Commissioner wants Mr. Berkun to go a step further and reconcile his denial in light of stipulations and other information adduced during the course of proceedings in this Court (and sometimes before). Rule 90 does not impose such a requirement, however, and a motion to review is not an occasion for the Court to make a pretrial adjudication of a factual dispute.

Lest there be any confusion, we note that should Mr. Berkun’s flat denials meet the high bar of “unjustifiabl[e]” failures to admit, the Commissioner “may apply to the Court for an order imposing any sanction on the other party or the other party’s counsel as the Court may find appropriate.” Rule 90(g); *see also* Rule 104(c). The sanctions available to the Court include (i) an order taking the matter as established, (ii) an “order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence,” and (iii) requiring “the party failing to obey the order or counsel advising such party, or both, to pay the reasonable expenses, including counsel’s fees, caused by the failure.” Rule 104(c).

Motion To Compel Responses to Interrogatories

Rule 70(b) permits discovery concerning “any matter not privileged that is relevant to the subject matter involved in the pending case.” The party objecting to discovery has the burden of establishing that the information sought is not relevant or otherwise not discoverable. *See Rosenfeld v. Commissioner*, 82 T.C. 105, 112 (1984); *Rutter v. Commissioner*, 81 T.C. 937, 948 (1983); *Branerton Corp. v. Commissioner*, 64 T.C. 191, 193 (1975). The Court may limit discovery where “the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.” Rule 70(c)(1)(A).

Rule 71(b) provides that answers to interrogatories “shall be made . . . as completely as the answering party’s information shall permit” subject to the requirement that the answering party “make reasonable inquiry and ascertain readily obtainable information.” “An answering party may not give lack of information or knowledge as an answer or as a reason for failure to answer, unless such party states that such party has made reasonable inquiry and that information known or readily obtainable by such party is insufficient to enable such party to answer the substance of the interrogatory.” *Id.*

The Commissioner moves to compel responses to interrogatories 1–7, 9, 10, and 11. [Doc. 196 at 1–12.] Interrogatories 1–7 and 10 requests specific factual information [*id.* at 32–38], focusing on the financial relationship between Mr. Berkun

and Bran, Ltd., a company that he owned and controlled during taxable years 2001 through 2005 (according to the parties' stipulation [Doc. 158 at 7]). Mr. Berkun argues that he has no independent recollection and that any documents relating to Bran, Ltd. are in the possession of the United States Attorney's Office for the Eastern District of New York. [Doc. 196 at 32–39.] We will take Mr. Berkun at his word that he has no readily obtainable information that would allow him to answer the interrogatories. We remind Mr. Berkun of his ongoing duty to supplement his interrogatory answers with any responsive information that he uncovers in his trial preparations. We further will grant the Commissioner the alternative relief that he requests, barring Mr. Berkun from offering or producing at trial any testimony or documents responsive to these interrogatories that was not previously produced during discovery (aside from expert reports and supporting materials).

The Commissioner further requests that Mr. Berkun state whether he contends that he is an employee or a nonemployee of Med Gen, Inc. (Interrogatory 9) and identify “the nature, amount, year, and facts concerning the associated transaction or event for any deduction, loss, or tax credit to which [Mr. Berkun] contends he is entitled that was not reported or claimed on his original income tax return[]” (Interrogatory 11). [Doc. 196 at 37–38.] We will grant the motion to compel as to these two interrogatories. Contentions interrogatories, as were propounded here, are well within the bounds of discovery, serving to clarify and narrow the issues in dispute. *See Zaentz v. Commissioner*, 73 T.C. 469, 477–78 (1979); *Woods v. DeAngelo Marine Exhaust, Inc.*, 692 F.3d 1272, 1280 (Fed. Cir. 2012). We will give Mr. Berkun 14 days to fully respond to these interrogatories.

Upon due consideration, it is

ORDERED that the Commissioner's motion to review sufficiency of answers or objections to request for admissions [Doc. 197], filed September 18, 2024, is denied. It is further

ORDERED that the Commissioner's motion to compel responses to interrogatories [Doc. 196], filed September 18, 2024, is denied in part as it relates to interrogatories 1–7 and 10. Mr. Berkun is prohibited from offering or producing at trial any documents responsive to this request that he did not produce during discovery (aside from expert reports and supporting materials). It is further

ORDERED that the Commissioner's motion to compel responses to interrogatories [Doc. 196], filed September 18, 2024, is granted in part as it relates to interrogatories 9 and 11. Mr. Berkun is directed to serve on counsel for the Commissioner, within 14 days from the date of service of this Order, the full, complete, and responsive answers, made under oath and in good faith, to interrogatories 9 and 11.

(Signed) Patrick J. Urda
Judge