



United States Tax Court

Washington, DC 20217

LAKEPOINT LAND II, LLC,
LAKEPOINT LAND GROUP, LLC,
TAX MATTERS PARTNER,

Petitioner

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent

Docket No. 13925-17.

ORDER

This case is currently calendared for trial at a special session of the Court to commence on October 2, 2023, in Atlanta, Georgia.¹

On June 9, 2023, petitioner filed the following four motions relating to outstanding discovery disputes: (1) a Motion to Compel Responses to Interrogatories (Index No. 123), moving pursuant to Rules 70,² 71(b) and 104(b)–(d), that the Court order respondent to provide sufficient answers to Interrogatory No. 2 of petitioner's Third Interrogatories; (2) a Motion to Compel Production of Documents (Index No. 124), moving pursuant to Rules 70, 72(b), and 104(b)–(d), that the Court order respondent to provide sufficient answers to petitioners Second Request for Production of Documents, specifically Request Nos. 7 through 10; (3) a Motion to Review the Sufficiency of Answers or Objections to Request for Admissions (Index No. 125), moving pursuant to Rule 90(e) that the Court review respondent's deficient responses to petitioner's Second Request for Admissions, specifically Request Nos. 5, 11, and 14; and (4) a Motion to Compel Responses to Interrogatories³ (Index No. 126), moving

¹ Absent stipulation to the contrary, this case is appealable to the U.S. Court of Appeals for the Eleventh Circuit, and we thus follow its precedent. *See Golsen v. Commissioner*, 54 T.C. 742, 756–57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

² Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

³ Although not referenced in this motion, it is clear to the Court that petitioner is seeking additional relief pursuant to Rules 70 and 71(b), since petitioner indicated in its Motion to Compel

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pursuant to Rule 104, that the Court order respondent to provide true and complete answers to Interrogatory Nos. 8 and 10.

On July 20, 2023, respondent filed his responses to the above-referenced motions, requesting that the Court deny the relief sought by petitioner.

I. *Discovery Standard*

Under Rule 70(b), “discovery may concern any matter not privileged and which is relevant to the subject matter involved in the pending case.” *Bernardo v. Commissioner*, 104 T.C. 677, 682 (1995). It is up to the party opposing the production to show that the information is not discoverable. *Rutter v. Commissioner*, 81 T.C. 937, 948 (1983) (citing *Branerton Corp. v. Commissioner*, 64 T.C. 191, 193 (1975)). Rule 70(b) directs that the scope of discovery includes all information and responses that concern any nonprivileged matter that is relevant to the subject matter involved in the case. For purposes of discovery the standard of relevancy is liberal: our Rules permit discovery of any material relevant “to the entire ‘subject matter’ of the case.” *Zaentz v. Commissioner*, 73 T.C. 469, 471 (1979) (quoting Rule 70(b)). A party may seek discovery of information if that information is reasonably calculated to lead to admissible evidence or if it may assist that party in understanding relevant material. *Id.* at 471–72.

II. *Analysis*

A. *Motion to Compel Responses to Interrogatories*

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.” The Rule further specifies that an “answering party may not give lack of information or knowledge as an answer or as a reason for failure to answer,” unless the party states that it has made reasonable inquiry and that its information is insufficient to enable the person to provide an answer to the interrogatory. *Id.*

1. *Motion to Compel Responses to Interrogatories (Index No. 123)*

Pursuant to Rules 70 and 71(b), petitioner seeks to compel respondent to provide a response to Interrogatory No. 2 from its Third Interrogatories, which were served on respondent on May 5, 2023. Specifically, Interrogatory No. 2 requests that respondent “[i]dentify by name and title (if applicable), and provide the contact information, including phone number, email, and address, for any party including third party, with whom You have communicated since the issuance of the FPAA, either orally or in writing, in connection with this Matter and/or received information

Responses to Interrogatories (Index No. 123) that respondent bifurcated his response to petitioner’s Third Interrogatories, necessitating the need to separately file this motion.

or any Document directly or indirectly relating to or involving LakePoint's Easement Donation or Fee Simple Donation or the determination of any Tax Liability resulting, directly or indirectly, from said donations."

Petitioner avers that Interrogatory No. 2 is necessary since "[r]espondent has proven time and time again that his goal in cases involving conservation easements is to significantly expand the scope and cost of trial by issuing informal discovery requests to a wide variety of third parties without providing any notice to the relevant taxpayer," and argues that respondent has engaged in the same conduct in the case at issue.

In his response to Interrogatory No. 2, which was served on June 5, 2023, respondent makes general objections and argues that petitioner's interrogatories are "overly broad and burdensome." Respondent takes issue with petitioner's definition of "You" and "Yours," arguing that it requests "information from individuals who have no knowledge of or possession of materials relevant to this matter." Moreover, respondent specifically objects to Interrogatory No. 2 by responding that it "seeks attorney work product." In his Response to Motion to Compel Responses to Interrogatories, respondent further argues that the request is improper since it seeks "work product . . . [and] information about how respondent's counsel has gone about preparing the case for trial."

Without opining on the veracity of petitioner's contention regarding Interrogatory No. 2, we agree that respondent's objections are improper and that his reliance on the work product doctrine is misplaced. The work product doctrine protects documents, interviews, statements, memoranda, correspondence, briefs, mental impressions, and tangible things prepared by an attorney in anticipation of litigation or trial. *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947); *Branerton Corp. v. Commissioner*, 64 T.C. at 198; *P.T. & L. Constr. Co. v. Commissioner*, 63 T.C. 404, 408 (1974). Contrary to respondent's assertion that petitioner's motion is aimed at discovering respondent's trial preparation activities, we fail to see how petitioner's request for a "list of identities and contact information for witnesses contacted by [r]espondent" is tantamount to "unwarranted inquiries into the files and the mental impressions of [respondent's counsel]." See *Hickman*, 329 U.S. at 510. The Eleventh Circuit has held that the names and address of witnesses interviewed are "subject to discovery." See *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1984). Therefore we will grant petitioner's Motion to Compel Responses to Interrogatories, and direct respondent to supplement his response to Interrogatory No. 2.

Petitioner also moves pursuant to Rule 104(b)–(d), requesting that respondent be prohibited from entering evidence in this case related to Interrogatory No. 2 should he fail to provide the requested materials in response to an order from this Court. The relief sought by petitioner under Rule 104 is premature at this point, and we will deny petitioner's motion as it relates to precluding respondent from introducing evidence in this case.

2. *Motion to Compel Responses to Interrogatories (Index No. 126)*

Petitioner seeks to compel respondent to provide true and complete answers to Interrogatory Nos. 8 and 10 from its Third Interrogatories, arguing that the information sought is necessary to ensure that the Court has access to all facts relevant to its Motion to Impose Sanctions and Motion for Reconsideration, which were filed April 18, 2023.

Interrogatory No. 8 seeks an explanation for why respondent failed to timely inform the Court or petitioner of the false statements made in the Motion for Partial Summary Judgement (MPSJ) concerning respondent's compliance with the written supervisory approval requirements of section 6751(b)(1) and the First Brooks Declaration.

On June 5, 2023, respondent, without waiver of any privilege, provided a lengthy response to Interrogatory No. 8, notwithstanding his objection that it "contains multiple questions and is vague, ambiguous, misleading, and argumentative." Respondent further objected that Interrogatory No. 8 would elicit privileged information that is shielded by the work product doctrine and deliberative process privilege. In his Response to Motion to Compel Responses to Interrogatories, respondent avers that Interrogatory No. 8 is "inquiring into respondent's attorneys' mental impressions and thought processes and confidential communications between respondent's trial team members." We agree with respondent that to answer the question why respondent "failed to timely inform the Court or Petitioner of the false statements in the MPSJ and the First Brooks' Declaration" would necessarily disclose the discussions between and the strategies of respondent's trial team members, which amount to mental impressions protected by the work product doctrine. *See Hickman*, 329 U.S. at 510–11. Accordingly, we will not require respondent to supplement his response to Interrogatory No. 8.

Regarding Interrogatory No. 10, petitioner asks respondent to "[i]dentify by name and title all IRS personnel, including, without limitation, all members of the Office of Chief Counsel, who became aware of any misstatement in the MPSJ or the First Brooks Declaration before Petitioner's counsel contacted Respondent's counsel on March 27, 2023 to schedule a meeting and provide the date on which such person became aware of any such misstatement." In his response to Interrogatory No. 10, respondent objected to the term "misstatement" as being "vague, ambiguous, and overly broad," and, without waiver of any privilege, provided a list of eight IRS personnel who became aware of issues relating to the dating of penalty consideration lead sheet; however, respondent did not provide the date on which each individual became aware of the issues related thereto.

In his Response to Motion to Compel Responses to Interrogatories, respondent argues that he "cannot provide the exact date that these IRS personnel 'became aware of any misstatement in the MPSJ or the First Brooks Declaration' because the employees do not know the exact date . . . [and that] [i]t is impossible to provide specific dates." We agree with petitioner that the dates on which respondent's

personnel became aware of misstatements in the MPSJ or the First Brooks Declaration are relevant to its pending Motion to Impose Sanctions. *See* Rule 70(b).

We will therefore direct respondent to make a forthright and comprehensive response to Interrogatory No. 10, providing petitioner with the specific dates (or close approximation thereof). To the extent respondent asserts that the requested information does not exist or cannot be secured, he must certify that he made a reasonable search and/or request for the information and that, to the best of his knowledge, the response is complete. *See Dynamo Holdings v. Commissioner*, T.C. Dkt. Nos. 2685-11 and 8393-14, 2016 WL 4204067, at *5 (Aug. 15, 2016) (Order) (“[T]he Tax Court Rules require that the responding party make a ‘reasonable inquiry’ before submitting the response.”). Moreover, if respondent determines that he is not able to produce the requested information on the basis of a claimed privilege, he must provide the Court with a detailed privilege log.

We will deny the relief sought pursuant to Rule 104 for the same reason stated in subpart 1 relating to petitioner’s Motion to Compel Responses to Interrogatories (Index No. 123).

B. Motion to Compel Production of Documents (Index No. 124)

Pursuant to Rules 70, 72(b) and 104(b)–(d), petitioner moves to compel respondent to provide sufficient answers to Requests Nos. 7 through 10 from its Second Request for Production of Documents. Petitioner argues that its requests “seek documents that [r]espondent has received from third parties, including documents received from subpoenaed parties, potential witnesses, government officials, or other third parties, to understand [r]espondent’s contentions and the documents that provide the foundation thereof.”

Request No. 7 asks respondent to “[p]rovide all Documents, including all Communications, You have received from any person to whom you have issued a subpoena requiring such person’s appearance at the trial of this Matter.” In response to this request, respondent makes the objection that the request seeks attorney work product and notes that respondent has “not issued any subpoenas to date.” In his Response to Motion to Compel Production of Documents, respondent further indicates that he has “not issued any subpoenas, and [notes that] if he issues any, respondent will comply with . . . Rule 147(a)(3) by providing notice to petitioner.” On August 18, 2023, respondent filed a Motion for Document Subpoena Hearing, wherein he requests that this Court issue an order setting this case for a remote hearing for the return of third-party subpoenas duces tecum that respondent intends to issue.

Since the subpoenas respondent intends to issue are for documents and not for witnesses to appear at trial, we will not compel him to supplement his response to this request.

Request No. 8 seeks from respondent “all Documents, including all Communications, You have received from any potential fact or summary witnesses

in connection with this Matter.” In response, respondent objects that this information is protected under the work product doctrine. Despite respondent’s objection, he did provide petitioner with documents received from Athens Land Trust.

Request No. 9 states that respondent is to “[p]rovide all Documents, including all Communication, You received since the issuance of the FPAA from any federal, state, county, and/or city government officials (including, but not limited to, those pertaining to taxes, zoning, conservation, wildlife, property development, construction, water, sewage, electricity, and credits) in connection with this Matter.” Respondent objected to this request on the grounds that the information is protected under the work product doctrine.

Request No. 10 requests that “[t]o the extent not already provided [in Request No. 9], provide all Documents, including all Communications, from any and all parties from whom You received information or Documents since the issuance of the FPAA directly or indirectly related to or involving the Easement Donation the Fee Simple Donation or any Tax Liability resulting from, directly or indirectly, such donation.” Respondent again objects on the grounds that the information is protected under the work product doctrine.

In its Motion to Compel Production of Documents, filed June 9, 2023, petitioner argues that respondent is being selective in his “invocation of the work product doctrine” and argues that he “cannot show how documents received from third parties that are responsive to these requests were prepared in anticipation of litigation.” In his Response to Motion to Compel Production of Documents, respondent fails to show to the Court’s satisfaction that the information sought is irrelevant or otherwise not discoverable. *See* Rule 70(b); *Rutter v. Commissioner*, 81 T.C. at 948; *Branerton Corp. v. Commissioner*, 664 T.C. at 193; *Hospital Corp. of America v. Commissioner*, T.C. Memo. 1994-100.

It is unclear to the Court how the documents being requested in Request Nos. 8 through 10 (to the extent they are received from third parties) would be covered by the work product doctrine since it does not appear that they would have been prepared by an attorney in anticipation of litigation. *See Hickman*, 329 U.S. at 510–11. Consequently, we will direct respondent to supplement his responses to Request Nos. 8 through 10 and make responsive documents available to petitioner. We note to respondent that, if he withholds responsive documents based on a claim of privilege, he must supply a detailed privilege log establishing the basis for each privilege claimed. *See* Rule 70(d); *Pac. Mgmt. Group v. Commissioner*, T.C. Memo. 2015-94, at *2 (“Without an adequately detailed privilege log, neither a requesting party nor a court can adequately assess whether the privilege has been properly claimed or what the proper scope of the claimed privilege is.”).

Pursuant to Rule 104(b)–(d), petitioner moves that the Court enter an order prohibiting respondent from entering evidence related to petitioners requests, should he fail to comply with this Order. The relief sought by petitioner under Rule 104 is premature at this point, and we will deny petitioner’s motion as it relates to

precluding respondent from introducing evidence in this case.

C. *Motion to Review the Sufficiency of Answers or Objections to Request for Admissions*

Rule 90 provides that admissions are permissible after the parties attempt to fulfill their requests through informal consultation or communication first. The matter will be deemed admitted unless the party responding to the request admits or denies the matter, in whole or in part, or asserts why it cannot be truthfully admitted or denied or details the reasons for an objection. Rule 90(c). A party “may not give lack of information or knowledge as a reason for failure to admit or deny unless . . . the party has made reasonable inquiry” and the known information is insufficient for an admission or denial. *Id.* A party who has requested admissions under this Rule is permitted to file a Motion to Review. Rule 90(e). If the Court deems that an answer is noncompliant, the Court may order an amended answer or a deemed admission. *Id.*

Pursuant to Rule 90(e), petitioner moves for the Court to review the sufficiency of respondent’s responses to petitioner’s Second Request for Admissions served on respondent on May 5, 2023. Specifically, petitioner takes issue with respondent’s responses to Request Nos. 5, 11, and 14.

Request No. 5 asks respondent to admit that the “[a]ppraiser did not claim a deduction under [s]ection 170 for the contribution of the Conservation Easement or the Property.” Respondent responded that he cannot answer the question due to “lack of sufficient knowledge or information” while referencing section 6013, which protects the confidentiality and disclosure of return information. Petitioner argues that respondent’s response is improper and that he has sufficient information to admit or deny this request.

In his Response to Motion to Review the Sufficiency of Answers or Objections to Request for Admissions, respondent states that he is “unable to confirm or deny the information in this request without examining and revealing the return and return information of a third-party taxpayer, which respondent is prohibited from doing under section[] 6103(a) and (b)(2).” We agree with respondent that Request No. 5 seeks information whether a third party to this case, the appraiser who prepared the appraisal attached to LakePoint II LLC’s Form 1065, U.S. Return of Partnership Income, claimed or reported a deduction on his personal tax return. Section 6103 requires that return information, including a taxpayer’s “deductions,” be kept confidential. *See* I.R.C. § 6103(a) and (b)(2). Accordingly, we will sustain respondent’s objection to Request No. 5.

Request Nos. 11 and 14 are related to LakePoint’s donation of a purported conservation easement and its fee simple interest in real property located in Bartow County, Georgia, to the Atlantic Coast Conservancy (ACC) and Georgia Tuition Assistance Program (GTAP), respectively. Request No. 11 asks respondent to admit that the “ACC issued a letter to LakePoint dated December 12, 2013, that constitutes

a ‘contemporaneous written acknowledgement’ for the Easement Donation for purposes of [s]ection 170 and the underlying regulations.” While Request 14 asks that respondent admit that “GTAP issued a letter to LakePoint, dated December 20, 2013, that constitutes a ‘contemporaneous written acknowledgement’ for the Fee Simple Donation for purposes of Section 170.”

In response to Request No. 11 and 14, respondent sates that he “[d]enies for lack of sufficient knowledge or information.” Respondent further states that petitioner has presented no evidence that the donee organizations are organizations as described in section 170(c). In its Motion to Review the Sufficiency of Answers or Objections to Request for Admissions, petitioner argues that respondent’s responses to Request Nos. 11 and 14 were made in bad faith since it is respondent who determines whether an entity satisfies the requirements of a charitable organization contained in section 170(c) and that petitioner provided information supporting its contention that the ACC and GTAP are charitable organizations.

In his Response to Motion to Review the Sufficiency of Answers or Objections to Request for Admissions, respondent does not address petitioner’s arguments for why the ACC and GTAP are charitable organization in light of the fact that he states that respondent “considered whether the two organizations were valid donee organizations.” Consequently, we will direct respondent to supplement his responses to Request Nos. 11 and 14.

Upon due consideration of the foregoing, it is

ORDERED that petitioner’s Motion to Compel Responses to Interrogatories (Index No. 123), filed June 9, 2023, is *granted in part*, as it relates to Interrogatory No. 2, and is *denied in part*, as it relates to any preclusive effect failing to comply with this Order may have. Respondent shall serve supplemental or amended answers on or before September 8, 2023. It is further

ORDERED that petitioner’s Motion to Compel Production of Documents (Index No. 124), filed June 9, 2023, is *granted in part*, as it relates to Request Nos. 8 through 10, and is *denied in part*, as it relates to Request No. 7 and any preclusive effect failing to comply with this Order may have. Respondent shall supplement his responses and produce the requested documents on or before September 8, 2023. It is further

ORDERED that petitioner’s Motion to Review the Sufficiency of Answers or Objections to Request for Admissions (Index No. 125), filed June 9, 2023, is *granted in part* as it relates to Request Nos. 11 and 14, and is *denied in part*, as it relates to Request No. 5. Respondent shall serve supplemental or amended responses on or before September 8, 2023. It is further

ORDERED that petitioner’s Motion to Compel Responses to Interrogatories (Index No. 126), filed June 9, 2023, is *granted in part*, as it relates to Interrogatory No. 10, and is *denied in part*, as it relates to Interrogatory No. 8 and any preclusive

effect failing to comply with this Order may have. Respondent shall serve supplemental or amended answers on or before September 8, 2023.

(Signed) Christian N. Weiler
Judge