

ILLINOIS INDEPENDENT
TAX TRIBUNAL

John E. and Frances L. Rogers,)	
)	
Petitioners,)	
)	14 TT 153
v.)	
)	
ILLINOIS DEPARTMENT)	Judge Brian F. Barov
OF REVENUE,)	
)	
Respondent.)	

PETITIONERS' OBJECTION TO THE DEPARTMENT'S: (1) OBJECTION TO MOTION TO STAY PROCEEDINGS PENDING FINAL ORDER AND JUDGMENT IN GOVERNING UNITED STATES TAX COURT PROCEEDINGS DOCKET NO. 20882-14; (2) MOTION FOR SUMMARY JUDGMENT; AND (3) MOTION FOR BOND

Petitioners, John E. Rogers and Frances L. Rogers, husband and wife, hereby respond to the department's: (1) objection to the petitioners' motion to stay these proceedings pending the issuance of a final order and judgment in United States Tax Court case Docket No. 20882 – 14; and object to the department's: (2) motion for summary judgment; and (3) motion for bond. This filing is made pursuant to this honorable tribunal's orders of December 9 and 18, 2014.

RESPONSE TO OBJECTION TO MOTION FOR STAY

The department's objection to petitioners' motion for stay misses the point that the department's and this tribunal's empowerment to determine petitioners' 2002 Illinois income tax liability rests upon a final determination of petitioners 2002 federal adjusted gross income by the federal government. Final resolution of the federal litigation is the sine qua non precondition to these proceedings. Petitioners' case for a stay is stronger than the petitioners'

case in Khan v. BDO Seidman, LLP et. al., 2012 IL App (4th) 120359, 977 NE2d 1236, 365 IllDec 137. In Khan, supra, there were overlapping issues with a logical priority to decision of the appellate division. Here final resolution of the federal litigation is a necessary condition to enable the department to act.

The federal case raises a serious legal matter over which the initial federal court is deliberating, access to judicial review of IRS actions. The department misinterprets the federal law effect of the 2002 Form 870-LT, Exhibit 3 of the department's document submission dated December 1, 2014. That document deals only with the partnership items of Wacker Madison Fund, LLC, ("Wacker Madison"). Form 870-LT does not make a final determination of the effect of Wacker Madison items at the member level of Abingdon, the actual entity of which petitioner husband was purportedly a member. Only after a final allocation of Abingdon partnership items among the members of Abingdon may petitioners' federal adjusted gross income become final. See Regulation Section 1.702 – 1(ii).

Petitioners stand by their original motion and its statement of facts and legal arguments. Those materials are included herein by reference.

Illinois provides statutory guidelines for motions to stay proceedings. Petitioners have dealt with them but the department has not even attempted to do so. See 735 ILCS 5/3 – 111(a)(1). Accordingly petitioners believe this honorable court should find that petitioners have met the requirements for a stay of proceedings and the department's objection to the stay should be dismissed.

The department cites to this tribunal's enabling act which merely provides a criminal stay as a clear matter of right in certain limited circumstances within the Illinois court system. Such a stay is necessary to protect the taxpayer's constitutional privileges in such a case which is not the case here. The enabling act does not attempt to limit general statutory rules applicable to all courts such as those found in 735 ILCS 5/3 – 111(a)(1). The department's reference to a federal case in Maryland is irrelevant to a determination of petitioners' rights in this tribunal under an Illinois statute. The department cites to no relevant Illinois statute, case or regulation in support of its position. The department ignores the priority of application of *Landis v. North American Company*, 299 U.S. 248, 254 (1936). In *Landis*, supra, the United States Supreme Court ruled that federal law does not even require the other court's decision to be dispositive in order to justify a stay.

Illinois common law also authorizes this court to issue a stay and may require that a stay be issued. In *Khan v. BDO Seidman, LLP et. al.*, 2012 IL App (4th) 120359, 977 NE2d 1236, 365 IllDec 137, the Illinois appellate court ruled that when the same or overlapping issues were already on appeal to the Supreme Court of Illinois it was appropriate to stay proceedings at the trial court level until the final determination was made by the Supreme Court. Petitioners believe that a comparable situation of duality of jurisdiction with a superior court on the merits arises in this case. The Khan court also relied on existing case law found in *Shaw v. Citizens State Bank of Shipman*, 185 Ill App. 3d 79 (1989) in which the appellate court ruled that a stay of proceedings until resolution of an appeal to the Illinois Supreme Court was appropriate and not an abuse of discretion. The Khan court also relied on its prior decision in *Wiseman v. Law Research, Inc.*, 133 Ill. App. 2d 790 (1971) in enforcing the stay to avoid contradictory decisions.

Federal common law buttresses this court's authority to issue a stay in these proceedings. Federal law does not even require the other court's decision to be dispositive in order to justify a stay. See *Landis v. North American Company*, 299 U.S. 248, 254 (1936). Here the dispositive nature of the United States Tax Court hearing requires a stay of these proceedings at least until the Tax Court has ruled.

In footnote 1 to its objection the department makes erroneous claims as to federal tax procedure. Petitioners enjoy no adequate remedy at law. The federal refund procedure is based on equitable (not legal) unjust enrichment concepts. In order to claim a refund petitioners are required to first pay the federal tax at issue and sue for a refund in federal district court after a claim for refund is denied. The United States Tax Court procedure is necessary to petitioners for an equitable answer to their pleas for due process and to avoid unjust enrichment of the United States and the State of Illinois.

The transcript offered by the department does not show a final determination has been made. The entry in question was sent to petitioners as a mere clerical computational adjustment in violation of Regulation Section 1.702 – 1(ii).

Frances L. Rogers filed requests for innocent spouse relief for the 2002 tax year which is not on the transcript. Neither these Illinois proceedings nor the federal proceedings have yet dealt with the effect of a federal innocent spouse ruling for 2002 on this case.

Partner level determinations are to be made at the Abingdon level not the level of petitioners. See Regulation Section 1.702 – 1(ii). Those rules of partnership level determinations are amplified in Code Section 704(a) and (b) together with the regulations thereunder. See particularly Regulations Sections 1.704 – 1(a) and b(1)(v) and (vii), b(2)(4)(l), b(2)(r)(3) and (4).

The IRS' own rulings and prior decisions of the Tax Court court require that an FPAA be issued at the Abingdon level. Such an issuance may be blocked by the traditional three year statute of limitations. See *Roberts v. Commissioner*, 94 T.C. 853, 860-862 as cited in a recent CCA. The CCA relied upon TEFRA authority Section 6222. Petitioners assert that the same answer arises from Code Sections 701 – 705.

The federal petition's statement of the facts and its exhibits clearly show that petitioners only claimed a \$495,000 loss from Abingdon, that Abingdon filed a Form 8082 as an amended return, and that petitioner never shared in the cash receipts of Abingdon.

The IRS has ignored the Abingdon level in its computations contrary to its own rulings and regulations. Abingdon's operating agreement and course of conduct made clear that special allocations as to income, deductions, and cash flow were being made at the Abingdon level. See Code Sections 701 – 705 clearly mandating computations at the Abingdon level and the issuance of an FPAA to Abingdon. The facts show that the IRS' reliance on the percentages stated on K-1's rather than all the facts and circumstances in Abingdon's 2002 partnership agreement special allocations is a clear and gross abuse of discretion by the IRS.

The mere fact of the filing of Form 8082 requires an audit at the Abingdon level and the issuance of an FPAA to Abingdon.

Petitioner husband enjoyed no right to share in cash receipts as cash receipts were diverted directly to the Kahn brothers, the other two purported partners in Abingdon. That statement of fact mandates separate investigation at the Abingdon level pursuant to Section 704(b)'s facts and circumstances and substantial economic effect regulations. Without access to cash there can be no income present as income requires an accession to wealth not merely a paper entry.

Alternatively, petitioner husband asserts that under relevant partnership law he was not a partner in Abingdon because he did not share in the cash income of Abingdon and that he had no intent to share in the cash receipts of Abingdon contrary to the fundamental requirements of partnership law.

Abingdon agreed to the settlement in Wacker-Madison and nothing more. Abingdon relied on the IRS respondent's duty to make Sections 702 and 704(b) Abingdon level specific calculations and issue an FPAA to Abingdon taking into account the special allocations of cash gross receipts to the Kahn brothers at the Abingdon level. Following Sections 702 and 704(b) is not optional for the IRS.

Petitioners are entitled to the stay based on the conduct of the department. The Notice attempts to tax petitioners on "net income" of \$1,184,185 from Abingdon when they had not received any such income. Petitioners offer to settle on the basis of a straight forward disallowance of 75% of petitioners' -\$495,000 reported loss from Abingdon in 2002. Petitioners offered to settle the case on that basis in written interchanges prior to issuance of the Notice.

Petitioners pursued a Collection Due Process hearing at which the miscalculations of the IRS would be reviewed and corrections made. See the notice of hearing which the petitioners received over two years ago which is attached to the petition. Numerous telephone calls to the appeals officer in Fresno went unanswered. The IRS adjustments are not final until the hearing is held and the appeals officer issues a notice of final determination which is appealable to the US Tax Court.

Lastly, the stay of proceedings enables petitioners to pursue their sole remedy at law, their petition to the United States Tax Court without distraction.

OBJECTION TO MOTION FOR SUMMARY JUDGMENT

The department dissembles the meaning of a 2008 Form 870-LT as a fact that petitioner husband agreed to an amount of 2002 federal adjusted gross income when he signed such form on behalf of Abingdon and not personally. No amount of 2002 petitioners' adjusted gross income is even identified in the 2008 document. Petitioner husband did not agree to

something which is not even stated in the document. Petitioner husband was not a member of Wacker Madison. Abingdon as an entity stood between petitioner husband and Wacker Madison.

The amount of petitioners' 2002 adjusted gross income remains an open issue. No final determination of petitioner husband's 2002 income from Abingdon can be said to have been made until the IRS examines the effect of the Wacker Madison settlement at the Abingdon level and issues a report subject to judicial review. The department assumes that when Abingdon (not petitioner husband as an individual) agreed to a Wacker Madison settlement that petitioner husband agreed to an amount of petitioners' 2002 adjusted gross income which is not stated or referred to in the 2008 Wacker Madison settlement. Petitioner husband was not even a party to the 2008 Form 870 – LT. Petitioner husband cannot be bound by a contract between third parties in which he is not mentioned, his 2002 adjusted gross income (the department claims it is the key fact) is not mentioned, and he is not a personal signatory. To bind petitioner husband it is necessary to posit an agreement by Abingdon on its own partnership items not those of Wacker Madison.

The department also attempts to endow entry of a number on a taxpayer transcript as proof of a fact. The only fact proven is that the number was entered on the transcript, nothing more. The proof a number on a transcript requires demonstration that the IRS followed proper procedures. The department offers no such proof.

The department fares no better in its memorandum of law in support of its motion for summary judgment. The memorandum goes off track at item 5 on page 2 and then goes downhill with a series of nonsequiters ending in footnote 1 on page 2. It is a legal impossibility for

the IRS to examine a taxpayer transcript. The IRS examines tax returns or other filings and makes final determinations subject to Tax Court review.

The IRS transcript is mere hearsay and is not sufficient evidence of the finality of the petitioner's 2002 adjusted gross income. The transcript is a statement of the result of administrative calculations by mere clerks which are subject to review on the merits. That process is called collection due process hearing where the correctness of the IRS calculations is subject to attack. Petitioner is entitled to a tax court hearing on the merits and a Tax Court Rule 155 calculation process before the amounts of 2002 adjusted gross income are to be treated as final. At a minimum petitioners are entitled to examine a responsible IRS agent on the transcript before it can be accepted as proof of its contents.

The department's position is capable of reduction to absurdity. The income the department claims from the Wacker Madison adjustment would constitute first a recapture of the 2002 deduction actually claimed and the creation of a receivable due petitioner husband from Abingdon. The receivable so calculated would be uncollectible and petitioner husband would be entitled to an immediate bad debt deduction for the amount of such receivable as petitioner husband enjoyed no claim to cash from Abingdon to settle the receivable. The subject cash was already distributed to Jonathan and Ethan Kahn who also claimed the Abingdon losses against it. Most of the clerical computation of 2002 adjusted gross income would disappear with the bad debt deduction.

In footnotes 5 through 7 on page 7 of the memorandum the department makes general statements of TEFRA procedures without applying those procedures to the facts of this case. The department and the IRS attempt to tax petitioner husband on cash he did not receive and

accretions to wealth which did not in fact occur. Abingdon did not and could not distribute cash to petitioner husband and he enjoyed no accession to wealth. On that basis petitioner husband was in fact not a partner in Abingdon as he did not participate in the millions of dollars of cash which ran through Abingdon accounts. Cash collection and distribution was the key activity of Abingdon and with hindsight petitioner husband did not participate. The United States Supreme Court and the Tax Court have previously ruled that intention not to share and failure to share in the material items of the partnership such as cash receipts and disbursements blocks partnership treatment despite the check the box rules. *Culbertson v. Commissioner*, 337 US 733 (1949) and *Luna v. Commissioner*, 42 T.C. 1067 (1964).

On page 7 of its memorandum the department ignores that separate Abingdon level computations of partner items have not been made to deal with requirement as to petitioner husband's participation in the Wacker Madison adjustment as a partner in Abingdon. Separate partnership level computations are required at the Abingdon level to deal with special allocations of cash and other items at the Abingdon level. The parties remain far from a final determination of petitioners' 2002 adjusted gross income. Only the federal courts enjoy jurisdiction to make a final determination of petitioners' 2002 adjusted gross income.

On page 8 of its memorandum the department misstates the effect of the Form 870-LT(AD) as it is only between the IRS and Abingdon as a partner in Wacker Madison. Petitioner husband is finally bound only after final calculation of Abingdon partnership special allocations.

On page 9 of its memorandum the department misstates federal law as to CDP hearings. The federal taxpayer is entitled to attack assessments on the merits in CDP hearings with exceptions not applicable here. The department's citation to *Coleman v. Commissioner*, 791

F.2d 68 (7th Cir. 1986) is totally inappropriate and misleading. Coleman, supra, was a tax protester case. The full paragraph cited is as follows:

The purpose of 26 U.S.C. Secs. 6673 and 6702 is to compel taxpayers to think and to conform their conduct to settled principles before they file returns and litigate. A petition to the Tax Court, or a tax return, is frivolous if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law. This is the standard applied under Fed.R.Civ.P. 11 for sanctions in civil litigation, and it is a standard we have used for the award of fees under 28 U.S.C. Sec. 1927 and the award of damages under Fed.R.App.P. 38. See Indianapolis Colts v. Mayor and City Council of Baltimore, 775 F.2d 177 (7th Cir.1985); In re TCI, supra; Lepucki v. Van Wormer, 765 F.2d 86 (7th Cir.) (attorneys' fees awarded), cert. denied, --- U.S. ---, 106 S.Ct. 86, 88 L.Ed.2d 71, damages awarded, --- U.S. ---, 106 S.Ct. 403, 88 L.Ed.2d 355 (1985); Steinle v. Warren, 765 F.2d 95, 102 (7th Cir.1985) (\$2,500 damages awarded); Oglesby v. RCA Corp., 752 F.2d 272, 279-80 (7th Cir.1985). The inquiry is objective. If a person should have known that his position is groundless, a court may and should impose sanctions. See Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir. 1986).

OBJECTION TO MOTION FOR BOND

The department's motion for bond must also fail.

The petitioners' petition is neither legally insufficient nor filed for purposes of delay, threshold requirements for a motion for bond by the department.

As to purpose of delay there is a substantial amount of tax, penalty and interest at stake to which petitioners are entitled to challenge and are challenging under existing law without any need to extend the law into new areas. Indeed petitioners claim under the aegis of the IRS's failure to follow clear statutes, regulations, and its own procedures in this matter.

Petitioners have not been the source of any delay. The IRS delayed from 2008 to 2011 in issuing any proposed assessment to petitioners. Petitioners promptly filed their claims at every level. Indeed it is the IRS which has delayed dealing with the 2002 issue.

Petitioners intend to vigorously prosecute this case and the department's claim of delay is without merit. Petitioners documented their vigorous prosecution of this matter in pages 4 – 8 of the tax court petition attached as Exhibit I.

The department's claim of legal insufficiency starts with a misstatement of the law. Abingdon is not a taxpayer. Partnerships do not pay tax. Partners pay tax.

The department then attempts to overreach on the effect of waivers included in the 2008 Form 870-L. The waivers only provide that Abingdon will accept its appropriate portion of the Wacker Madison settlement. The waivers do not encompass the partner K-1s to be issued by Abingdon for reporting by the members of Abingdon which is the root of this case. Abingdon filed a 2002 amended return which requires an audit of Abingdon for 2002. The audit then requires issuance of an FPAA or not. The IRS has continuously refused to deal with the 2002 Abingdon amended return.

Petitioners filed the tax court case to force the IRS to deal with the 2002 Abingdon amended return. The CDP hearing is a second approach to force the IRS to deal with petitioners on 2002 matters. See petitioners' 2002 tax court petition attached as Exhibit I. The Abingdon amended return, Form 8082, is included in the exhibits to Exhibit I.

Petitioners filed their tax court petition on September 4, 2014, to secure their day in court. Petitioners have survived several IRS motions to dismiss. Were the matter frivolous the tax court, Judge Goeke presiding, would have said so. If the tax court smelled a sense of delay it would have spoken by now. The tax court petition itself demonstrates its materiality. The issues raised in the tax court petition are quite complex and invoke black letter law in petitioners' favor. Taxpayer recourse to tax court review of administrative action is possibly the most serious issue facing the tax court today. It is very complex as it deals with both TEFRA and partnership issues, both of which are hyper-lexis in their own rights.

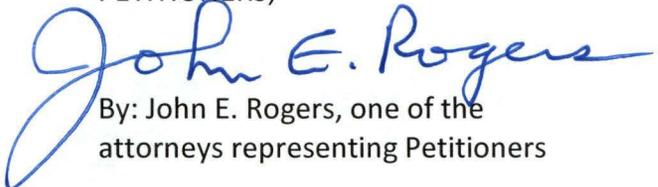
It is the petitioners who have pushed this case continuously since 2011. Petitioners present no badges of delay. It is the IRS who refuses to let the arbitrary and capricious actions of its executives see the light of day.

CONCLUSIONS AND PRAYER FOR RELIEF

For the foregoing reasons Petitioners respectfully request that this honorable court stay all proceedings in this case pending a final determination of petitioners 2002 adjusted gross income by the federal courts and deny the department's objection to petitioners' motion to stay these proceedings.

For the foregoing reasons Petitioners also respectfully request that this honorable court deny the department's motion for summary judgment as well as the department's motion for bond.

RESPECTFULLY SUBMITTED,
JOHN E. AND FRANCES L. ROGERS,
PETITIONERS,



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