

UNITED STATES TAX COURT

JANET MAVIS MARCUSSE,)
)
 Petitioner,)
)
 v.) Docket No. 14234-09
)
 COMMISSIONER OF INTERNAL REVENUE,) Filed Electronically
)
 Respondent.)

MOTION FOR ENTRY OF DECISION

RESPONDENT MOVES, pursuant to the provisions of Tax Court Rule 50, that the Court enter a decision in this case reflecting the following tax deficiencies:

<u>Year</u>	<u>Deficiency</u>	<u>Additions to Tax/Penalties</u>		
		<u>6651(a)(2)</u>	<u>I.R.C. §§ 6654</u>	<u>6651(f)</u>
1999	\$0.00	\$0.00	\$0.00	\$0.00
2000	\$0.00	\$0.00	\$0.00	\$0.00
2001	\$0.00	\$0.00	\$0.00	\$0.00

IN SUPPORT THEREOF, respondent respectfully states:

1. Respondent's counsel has reviewed the evidence available to him for the defense of this civil tax controversy and determined that due to the passage of time, and respondent's

inability to rely on the evidentiary foundations established in petitioner's criminal case, certain essential evidence may not be deemed admissible at trial over an appropriate objection.

2. Specifically, the age of bank records at issue has hindered respondent's ability to effectively litigate this civil tax controversy. Due to the seven year record retention period applicable to financial institutions at issue, respondent is unable to acquire new copies of the records at issue. Further, as the records at issue are no longer retained by the banks in question, respondent lacks the ability to secure appropriate certifications from custodians of records concerning new records, or validating that his current records are accurate.

3. Respondent notes that if this civil tax controversy had been litigated within the seven year bank retention period, authentication of the records would have been readily accomplished.

4. As such, respondent's counsel believes that, while sufficient evidence to support the issuance of respondent's notice exists, he does not have sufficient admissible evidence to pursue the adjustments contained within the March 12, 2009 Notice of Deficiency at trial at this time.

5. Respondent's counsel notes that this position represents his internal evaluation of his defense of this

particular civil tax controversy for petitioner's 1999, 2000, and 2001 taxable years.

6. Respondent's position in this case is not to be construed as a comment on any other possible, current, or future litigation in relation to petitioner involving the United States, any Federal agency, or any third parties, including Marcusse v. United States, 1:09-CV-913 (U.S. Dist. Ct. W.D. Mich.), which is currently pending.

7. Respondent has not contacted petitioner to determine her position with regard to this motion as this motion effectively represents respondent's concession of this civil tax controversy due to evidentiary concerns.

WHEREFORE, it is prayed that this motion be granted.

WILLIAM J. WILKINS
Chief Counsel
Internal Revenue Service

Date: JAN 06 2012

By: 

JONATHAN M. HAUCK
Attorney
(Small Business/Self-Employed)
Tax Court Bar No. HJ1560
455 Massachusetts Avenue, NW
Suite 500
Washington, DC 20001
Telephone: (202) 874-1319

OF COUNSEL:
THOMAS R. THOMAS
Division Counsel
(Small Business/Self-Employed)
NANCY B. ROMANO
Area Counsel
(Small Business/Self-Employed:Area 2)
NANCY C. CARVER
Associate Area Counsel
(Small Business/Self-Employed)


Docket No. 14234-09

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing MOTION FOR ENTRY OF DECISION was served on petitioner by mailing the same on JAN 06 2012 in a postage paid wrapper addressed as follows:

Janet Mavis Marcusse
#17128-045
Federal Correctional Inst.
501 Capital Circle, N.E.
Tallahassee, FL 32301

Date: JAN 06 2012



JONATHAN M. HAUCK
Attorney (Washington, Group 1)
(Small Business/Self-Employed)
Tax Court Bar No. HJ1560

UNITED STATES TAX COURT

JANET MAVIS MARCUSSE,)
)
 Petitioner,)
)
 v.) Docket No. 14234-09
)
 COMMISSIONER OF INTERNAL REVENUE,) Filed Electronically
)
 Respondent.)

RESPONDENT'S MOTION TO VACATE
THE COURT'S NOVEMBER 30, 2011 ORDER

RESPONDENT MOVES to have the Court vacate its Order dated November 30, 2011, and states the following in support:

1. On November 30, 2011, the Court issued an Order in this matter granting petitioner's motion to compel with regard to petitioners requests for specific items mentioned in (1) and (1)(a), (4), (5), (6) and (6)(a), (9), and (14).

2. Contemporaneous with the filing of this Motion, respondent is filing a Motion for Entry of Decision which effectively represents respondent's concession of this civil tax controversy due to evidentiary concerns.

3. Respondent believes that the granting of his Motion for Entry of Decision would obviate the need for further discovery in this matter.

4. In the event that the Court finds that the Motion for Entry of Decision does not remove the need for further discovery

in this matter, respondent offers the following explanation of his efforts to provide petitioner with her discovery.

5. In its November 30, 2011 Order, the Court mentioned that respondent's responses describing his efforts in providing discovery to petitioner were assumed to be given in good faith, but were recounts, without detail, of the hearsay statements of unidentified persons. Further, the Court overruled respondent's objections finding there was inadequate support.

6. As mentioned in RESPONDENT'S SUPPLEMENTAL RESPONSE TO PETITIONER'S MOTION TO COMPEL, respondent has been in contact with the United States Attorney's Office for the Western District of Michigan, respondent's own Criminal Investigation Division, respondent's personnel, the Federal Bureau of Investigation, various banks, and others.

7. In an effort to adequately demonstrate respondent's efforts in producing discovery in this matter, the following is an abbreviated timeline of the efforts made by respondent's counsel with regard to the discovery items remaining in dispute that have been sought from respondent (inclusive of respondent's counsel, Criminal Investigation Division and other business units), the United States Attorney's Office for the Western District of Michigan, the Federal Bureau of Investigation, and banks:

12/22/2009 Petitioner's Request for Production of Documents

1/5/2010 Letter from respondent's counsel Andrew Stroot to petitioner indicating that petitioner's discovery requests were premature.

1/9/2010 Letter from petitioner requesting the formal discovery request be considered informal requests.

1/19/2010 Email from respondent's counsel Andrew Stroot to Donald Kempf, the Revenue Agent who issued the Statutory Notice of Deficiency regarding documents requested by petitioner.

1/20/2010 Respondent's counsel Andrew Stroot had contact with Darline Goeman, the Revenue Agent on criminal trial. Ms Goeman subsequently sent respondent's counsel some trial exhibits and trial transcripts.

1/21-25/2010 Respondent's counsel Andrew Stroot contact with Darline Goeman. Respondent's counsel Andrew Stroot received 5 binders of all trial exhibits and discs (with electronic copies) from Darline Goeman and mailed the discs back to Goeman.

- 2/1/2010 Darline Goeman had contact with the United States Attorney's Office for the Western District of Michigan and discovered that the Assistants who prosecuted the case, Tom Gezon and Mike Schipper.
- 2/10/2010 Letter from petitioner with discovery requests
- 3/8/2010 Respondent's counsel Andrew Stroot sent an email to Darline Goeman with a copy of informal discovery requests.
- 3/9/2010 Respondent's counsel Andrew Stroot had numerous email contacts with Darline Goeman regarding informal discovery requests which indicated that petitioner was given a copy of all exhibits at her criminal trial and also received a copy of the trial transcript. Darline Goeman's email also contained responses and/or comments on the informal discovery requests.
- 3/10/2010 Respondent's Response to Petitioner's Informal Discovery Requests. Provided: GX-219; GX-219a; Checks and wire transfers used to construct Form 886-A; GX-98a and GX-98b; GX-94, GX-145; GX-146, GX-147; GX-307; GX-91, GX-92, GX-90, GX-95, GX-119, GX-120, GX-121, GX-122, GX-10, GX-11, GX-12, GX-13, GX-134, GX-148, GX-138, GX-135, GX-149,

GX-139, GX-136, GX-150, GX-140, GX-137, GX-151;
GX-160; GX-1; GX-31, GX-33; GX-32, GX-34;

5/5/2010 Received Petitioner's Motion to Compel Production of Documents.

5/25/2010 Respondent's Objection to Petitioner's Motion to Compel Production of Documents.

6/11/2010 Court Order that respondent should treat the Motion to Compel Production of Documents as a formal request for production of documents and respondent should serve on petitioner a substantive response or objection. Response ordered by July 13, 2010.

7/13/2010 Letter from respondent's counsel Erin Hines to petitioner with responses to formal discovery requests.

8/9/2010 Petitioner's Motion to Compel Production of Documents.

9/2/2010 Respondent's counsel Erin Hines sent petitioner a letter responding to petitioner's "Informal Request for the Production of Documents & Things".

9/3/2010 Respondent's Objection to Petitioner's Motion to Compel Production of Documents.

- 11/16/2010 Respondent's counsel Erin Hines had contact with Darline Goeman to locate boxes of exhibits from criminal trial.
- 11/16/2010 Email from Darline Goeman to respondent's counsel Erin Hines indicating respondent's counsel should contact Stephen Corcoran with respondent's Criminal Investigation Division.
- 11/30/2010 Email from Stephen Corcoran to respondent's counsel Erin Hines indicating he was sending nine boxes containing "bulk exhibits" from Criminal Investigation Division.
- 12/2/2010 Respondent's counsel received the nine boxes.
- 12/17/2010 Respondent's counsel Erin Hines emailed Darline Goeman regarding Forms 886-A for Besser and Flynn, hotel receipts, Western Union wire transfers, and a L&J oil lease.
- 12/17/2010 Emailed response from Darline Goeman, who spoke with Stephen Corcoran, to respondent's counsel Erin Hines regarding questions above: (1) no 886-As prepared for Flynn or Besser with respect to criminal trial; (2) does not recall getting any receipts from hotels; (3) the only wire transfers were those going into Marcusse's

personal accounts and the wires to WorldWide Capital E for approximately \$800,000; (4) payment from Exhibit 208 Accounting ending 4060 with respect to payments to Bruce Marcusse - no other information, but referred to Bruce Marcusse's trial testimony.

1/11/2011 After a number of previous attempts in the days preceding, respondent's counsel Jonathan Hauck made his first substantive contact with the United States Attorney's Office for the Western District of Michigan after the telephone conference with the Court and petitioner on January 5, 2011, and contact with Kristina Zelasko (who is the person responsible for maintaining petitioner's records at that office as neither of the original prosecutors were still with the office).

2/14/2011 Respondent's counsel Erin Hines contacted Darline Goeman regarding the existence of Forms 886-A for George Besser and William Flynn.

2/14/2011 Respondent's counsel Jonathan Hauck made specific requests for information from Kristina Zelasko United States Attorney's Office.

- 2/16/2011 Respondent's counsel Jonathan Hauck was contacted by the Criminal Chief of the United States Attorney's Office the Western District of Michigan, Brian Delaney, regarding our requested information. In short, he stated that some of the file had been "purged", that purged documents would likely remain with their original investigative agencies, and that he lacked sufficient staff to produce the specific information requested. He offered to allow respondent's personnel search their records at their office in Michigan (excluding grand jury material).
- 2/17/2011 The United States Attorney's Office informs respondent's counsel that it will send materials via disc.
- 2/18/2011 Received three discs from Kristina Zelasko which contained electronic copies of Trial Exhibits, Trial Transcript, and Charts. These discs were identical to those received by respondent's counsel in January of 2010 from Darline Goeman.
- 2/23/2011 Respondent's counsel Erin Hines emailed Darline

Goeman and Stephen Corcoran requesting additional material.

2/24/2011 Darline Goeman responded to respondent's counsel's request by stating that counsel has all the materials available.

3/3/2011 Respondent's counsel Jonathan Hauck contacted Stephen Corcoran to follow up on the February 23, 2011 request for additional materials.

3/3/2011 Respondent's counsel Jonathan Hauck contacted Kristina Zelasko. Respondent's counsel clarified what was in the United States Attorney's Office's file with Ms. Zelasko, and was informed that the office did not have any responsive documents other than what was sent on discs. Ms. Zelasko stated that the United States Attorney's Office for the Western District of Michigan had transcripts, individual case files (which would not contain documents like those being sought), pleadings, and copies of exhibits, and that any other material should be with the investigating agencies.

3/4/2011 Stephen Corcoran indicated he found additional

documents and that he would send them to respondent's counsel.

3/4/2011 Respondent's counsel Jonathan Hauck contacted Sam Moore with the Federal Bureau of Investigation to seek out responsive documents. Mr. Moore states that he does not have any responsive records.

3/4/2011 Respondent's counsel Jonathan Hauck contacted respondent's Revenue Agent Donald Kempf with regard to existence of a Forms 886-A with regard to Mr. Besser and Mr. Flynn. Mr. Kempf's initial response is that he believes there are none.

3/4/2011 Email from Darline Goeman to respondent's counsel Erin Hines providing transcripts Mr. Besser and Mr. Flynn.

3/7/2011 Donald Kempf provided additional information on the 886-A issue for Mr. Besser and Mr. Flynn. Mr. Kempf is still making inquiries.

3/7/2011 Contacted Sam Moore who informed respondent's counsel that the Federal Bureau of Investigation had no responsive records.

3/8/2011 Donald Kempf consulted with other personnel within the respondent, and provided additional confirmation on the 886-A issue for Mr. Besser.

3/10/2011 Video Tapes arrived.

3/10/2011 Respondent's counsel Jonathan Hauck contacted Wells Fargo, and spoke to "Noreen" who stated that they have a seven year record retention schedule, and as such, had no responsive records.

3/10/2011 Respondent's counsel Jonathan Hauck contacted PNC bank (National City became PNC) and spoke to "Robin" and subsequently "David" who stated that they have a seven year retention schedule, and as such, had no responsive records.

3/16/2011 Contacted Sam Moore regarding Gerard Forrester.

3/31/2011 Respondent's counsel sent petitioner the documents that were responsive to her requests to the extent that they were in respondent's possession and to the extent allowed by law.

8. In addition to the external contacts listed above and the numerous phone calls and emails not specifically listed, respondent's counsel reviewed all of the documents available, mostly in March of 2011, and produced copies to petitioner of all the relevant documents that were available.

9. Respondent's position continues to be that he has provided petitioner with all the documents he was able to discover, or that were in his possession, that appeared to be

responsive to petitioner's requests and that he was authorized to provide by law.

10. With regard to REQUESTS (1) and (1)(a), the Court has granted petitioners motion to compel, and ordered respondent to produce the second page of a Business Account application, the Certificate of Authority, transaction receipts for withdrawals, and a transaction receipt for an \$800,000 deposit. With regard to REQUEST (5) the Court has granted petitioners motion to compel, and ordered respondent to produce wire transfers made by Gurmail Sidhu, and a copy of a search warrant with regard to Mr. Sidhu. With regard to REQUEST (6) and (6)(a), the Court has granted petitioners motion to compel, and ordered respondent to produce checks numbered 1001, 1024, 1070, and 1079. In an effort to locate and produce these documents, respondent, as noted above, has contacted respondent's Criminal Investigation Division and other business units, the United States Attorney's Office for the Western District of Michigan, the Federal Bureau of Investigation, and banks. Respondent's counsel has reviewed the documentation available, and has not been able to locate the documents that he has been ordered to produce.

11. With regard to REQUEST (4), the Court has granted petitioners motion to compel, and ordered respondent to produce all Western Union transfers made by petitioner in 1999-2001.

Respondent has been, and continues to be, of the position that these documents do not exist. This being said, were there responsive documents to this request in the materials available to respondent, respondent's counsel would have produced them to petitioner.

12. With regard to REQUEST (9) the Court has granted petitioners motion to compel, and ordered respondent to produce any "Tax Chart", Form 866-A, Form 8821, and bank records showing George Besser's unreported income derived from the same sources from which income was attributed to petitioner. Preliminarily, respondent believes that the Court mistakenly ordered respondent to produce a Form 866-A which is an "Agreement as to Final Determination of Tax Liability" in stead of a Form 886-A which is what petitioner requested. Additionally, a Form 8821 is "Tax Information Authorization" which respondent sent to petitioner so that she could provide it to Mr. Besser. Respondent was not of the understanding that the Form 8821 was an item at issue as it was not part of petitioner's REQUEST (9). Respondent previously stated to petitioner the following when he sent petitioner the documents on March 31, 2011:

"As for the Form 886-A for George Besser, respondent has searched his records and been in contact with his agents, and has been

informed that there are no documents responsive to this request. We note that we have not received a Form 8821 from Mr. Besser. However, we also note that receipt of Form 8821 from Mr. Besser would not have changed respondent's production with regard to this request as it is respondent's understanding that Forms 886-A were not prepared for Mr. Besser as part of the criminal trial or at any other time for the years at issue."

On April 18, 2011, after respondent's counsel had mailed his production of documents to petitioner, respondent's counsel received Mr. Besser's Form 8821. Per the Court's order respondent has mailed a copy of Mr. Besser's Form 8821 to petitioner, but as noted above, the receipt of the Form 8821 did not change respondent's production of documents.

13. With regard to the bank records requested by petitioner and which the Court has ordered production with regard to REQUEST (9) respondent has provided GX-91, GX-92, GX-90, GX-95, GX-119, GX-120, GX-121, GX-122, GX-10, GX-11, GX-12, GX-13, GX-134, GX-148, GX-138, GX-135, GX-149, GX-139, GX-136, GX-150, GX-140, GX-137, and GX-151 which was every exhibit requested by


petitioner. Respondent's counsel notes that petitioner assumes in "Petitioners Response to Respondent's Supplemental Response to Petitioner's Motion to Compel" that a "Tax Chart" for Mr. Besser exists apparently because one was created for Mr. Flynn. Respondent has not been able to find any evidence that such a document ever existed. Respondent's counsel has reviewed the documentation available, and has not been able to locate the documents that he has been ordered to produce.

14. With regard to REQUEST (14), the Court has granted petitioners motion to compel, and ordered respondent to produce shorthand notes or other original records as requested. Petitioner's REQUEST (14) mentions the testimony of Leonard Zawistowski of the Federal Reserve who testified at petitioner's criminal trial. Petitioner's request appears to be in an effort to correct her transcript for her criminal trial and may be requesting the notes of Mr. Zawistowski or those of the court reporter. As petitioner cites to 28 U.S.C. § 753, which regulates court reporters, respondent believes that petitioner is requesting documents expected to be within the possession of the court reporter for her criminal case. Respondent's counsel believes that he previously contacted the court reporter for petitioner's criminal case, but as he could not locate his notes for this call, he made contact with the court reporter again on

January 3, 2012. Respondent's counsel spoke with Kevin Gaugier who was the court reporter for petitioner's criminal trial. Mr. Gaugier stated that he did not have, nor would he have access to, any of Mr. Zawistowski's notes from petitioner's trial. Further, Mr. Gaugier stated that he would not produce a copy of his stenographic short hand notes without a court order. Respondent's counsel has reviewed the documentation available, and has not been able to locate the shorthand notes and other original records of either Mr. Zawistowski or Mr. Gaugier that he has been ordered to produce.

WILLIAM J. WILKINS
Chief Counsel
Internal Revenue Service

Date: JAN 06 2012

By: 
JONATHAN M. HAUCK
General Attorney
(Small Business/Self-Employed)
Tax Court Bar No. HJ1560
P.O. Box 50585
Washington, DC 20091
Telephone: (202) 874-1319

OF COUNSEL:
THOMAS R. THOMAS
Division Counsel
(Small Business/Self-Employed)
NANCY B. ROMANO
Area Counsel
(Small Business/Self-Employed:Area 2)

NANCY C. CARVER
Associate Area Counsel
(Small Business/Self-Employed)


Docket No. 14234-09

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing
RESPONDENT'S MOTION TO VACATE THE COURT'S NOVEMBER 30, 2011
ORDER was served on petitioner by mailing the same on
JAN 06 2012 in a postage paid wrapper addressed as
follows:

Janet Mavis Marcusse
#17128-045
Federal Correctional Inst.
501 Capital Circle, N.E.
Tallahassee, FL 32301

Date: JAN 06 2012



JONATHAN M. HAUCK
Attorney (Washington, Group 1)
(Small Business/Self-Employed)
Tax Court Bar No. HJ1560