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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff

v.

JAMES LESLIE READING, CLARE L. READING, FOX GROUP TRUST, MIDFIRST BANK, CHASE, FINANCIAL LEGAL SERVICES, STATE OF ARIZONA
Defendants

2:11-cv-00698-FJM

REPLY MEMORANDUM IN SUPPORT OF READINGS' AND FOX GROUP TRUST'S MOTION TO COMPEL DISCOVERY
(ORAL ARGUMENT BY TELEPHONE REQUESTED)

MAY IT PLEASE THE COURT:

Prior to discussion of the issues presented by the instant motion counsel is compelled to address a matter appearing in his Memorandum In Support of Readings' and Fox Group Trust's Motion to Compel Discovery (Doc. 43). Upon reviewing defendant's response in opposition and referring back to the memorandum in support counsel was surprised to see an appreciable amount of the memorandum emphasized by bold and italic fonts. While counsel often uses such emphasis in quotations of court holdings and recitation of statutes, he has never considered it appropriate to do so with respect to his own text.

Counsel apologizes to the Court for what he considers inappropriate use of emphasis and in some instances emphatic tone and asks the Court to take into account the fact that at the time

counsel composed that memorandum he was extremely ill, was often febrile, was struggling to breathe and on large doses of a number of medications, including steroids, a side effect of which was to prevent counsel's from sleeping for six to eight days and nights.

In reviewing the points and authorities discussed therein, however, counsel stands by those arguments as a correct and valid account of the facts and law applicable to the motion.

The Government's Response

In response to the Readings' motion the government has filed a memorandum (Doc. 45) that is not responsive to the issues. First, the memorandum sets out on a diatribe detailing and cataloging various disagreements between the IRS and the Readings, but being in sync with the government's various positions relative to the income tax laws is not a precondition for being entitled to conduct discovery in this case. Nor does calling the Readings names, like "tax defier" disqualify a defendant from seeking and obtaining relevant and discoverable information and documentation.

In addition to reliance on totally irrelevant facts, such as the Readings' views, the government's response, rather than addressing the issues raised in the motion and its memorandum, instead mischaracterizes those arguments, preferring to respond to its own version of defendants' position. For example, the government claims that movers' motion is based upon their disagreement with the holdings of the court in *Hughes v. United States*, 953 F.2d 531, 539-40 (9th Cir. 1992); and *Farr v. United States*, 990 F.2d 451, 454 (9th Cir. 1993). In fact, however, the memorandum in support gives full sway and deference to those holdings and acknowledges that they are controlling. Even more importantly, the Readings are actually relying on the applicability of those holdings, which impose upon them a burden of disproving the correctness of the government's Form 4340's, as one of the reasons it is necessary for them to obtain the information and documentation sought.

Another example of misstating the movers' position is to state that "The Readings/Trust attack the United States for relying on the Form 4340's to evidence that the notices and demand were sent instead of producing copies of the actual notices." (Government Response, Doc. 45, p. 8) That contention, however, is absolutely incorrect in that in its memorandum in support the Readings acknowledge that the government cannot be blamed for availing itself of the benefit of the current treatment of Form 4340's in such cases. The government also contends that the 4340's it provided instead of the documents requested (or a response admitting it had no such documents) are evidence of its having made timely § 6303 notice and demand on the assessments, yet those certificates are not evidence, but merely certificates that evidence exists. If the government has no such evidence that would surely be relevant to rebut the presumption that those certificates are correct.

In still another instance, the government misrepresents a question as an argument. Interrogatory 7 asks what basis was assigned to Mr. Reading's gross receipts. That is a question, not a position. Only the government knows how it determined what portion of those gross receipts were gain and all Interrogatory 7 asks is how and why it made that determination. To call a question a "frivolous argument" is inexplicable. The interrogatory goes on to state that if the government determined 100% of those gross receipts to be gain, then on what authority it did so. That is not an argument, it is a simple question.

The government complains that the Readings' request for information and documentation proving a valid and properly served Notice of Deficiency is improper because some of the assessments are penalty assessments, which require no such notices, but the Readings do not seek that information relative such notices other than those actually issued, yet another misconstruction of the Readings' position.

In addition, the government contends that cases like this one are considered *de novo*, and that is true. But the government fails to explain how any trial of issues *de novo* would preclude a party's examination of the assessment process beyond a government "certificate", particularly where that party is burdened with the task of proving the certificates are not correct. The instant suit is to reduce assessments to judgment and the validity of those assessments is dependent upon whether the assessment process was valid. Indeed, as noted in the memorandum in support, in *United States v. Camejo*, 666 F.Supp 1542, 1545 (S.D.Fla. 1987), the court stated:

> "When the government seeks the aid of the Courts in enforcing an assessment, it opens the assessment to judicial scrutiny in all respects... Thus, in an action instituted by the Government to enforce its tax liens under [section] 7403, the merits of the claim are clearly open to challenge. *United States v. O'Connor*, 291 F.2d 520 (2nd Cir. 1961); *Quinn v. Hook*, 231 F. Supp. 718 (E.D.Penn. 1964)."

"De novo" would, then, at least suggest that all issues from the inception of the process through its end are subject to scrutiny.

In order to obtain judgment recognizing the assessments there must first be a valid assessment. *Crompton & Knowles Loom Works v. White*, 65 F2d 132 (1st Cir. 1933) (collector has no authority to collect unassessed interest); *Radinsky v. U.S.*, 622 FSupp 412 (D Colo, 1985) (cannot collect unassessed tax).

In passing, it should be noted that the effecting of valid assessments for the years in question is even more essential in this case, since no suit for taxes may be brought more than three years after the assessment period unless a valid assessment has been made. 26 U.S.C § 6501. See also *U.S. v. Berman*, 825 F.2d 1053 (6th Cir. 1987); and *Anuforo v. C.I.R.*, 614 F.3d 799 (8th Cir. 2010). Thus after three years the government cannot press a suit for a tax due and owing unless it has a valid assessment. All of the information and documentation sought in this discovery bears directly on the issue of whether the government has valid assessments, thus are clearly relevant.

In order to have a valid tax assessment, one worthy of reduction to judgment, the absolute necessity for a properly mailed Notice of Deficiency pursuant to § 6212(a), and in order to have a lien interest as claimed the necessity for a properly issued and served notice and demand pursuant to § 6303 is well recognized by the courts. In *United States v. Ball*, 326 F.2d 898, (4th Cir. 1964) the court stated at 900-901:

> "In the usual case, § 6212(a) of the Code, 26 U.S.C.A. § 6212(a), requires the Government, as a first step, to send a notice of deficiency to the taxpayer, by registered mail.[fn2] Thereafter, the Government may make an assessment of unpaid tax (26 U.S.C.A. § 6201), provided that the assessment is made within the period of time after the notice of deficiency prescribed by 26 U.S.C.A. § 6213. Once the assessment has been made, § 6303(a) of the Code, 26 U.S.C.A. § 6303(a), requires notice and demand for payment of the tax as a condition precedent to the taking of additional steps to enforce its collection and payment.
>
> "Thus, in the usual case the Code contemplates the giving of two notices by the Government, first, the notice required by § 6212(a) of a deficiency, and the notice required by § 6303(a) of assessment and demand for payment. The notice of deficiency is specified to be by registered mail (26 U.S.C.A. § 6212(a)), while no such restriction is applicable to the notice of assessment and demand for payment (26 U.S.C.A. § 6303(a)).
>
> " . . .

> " . . . **The validity of the tax lien to serve as a basis for the judgment granted here depends upon whether the notice requirements of § 6212(a) were met, because 26 U.S.C.A. §§ 6321 and 6322, which create tax liens, require, *inter alia*, a valid assessment**." (Emphasis added)

See also *Steiner v. Nelson*, 259 F2d 853 (7th Cir. 1958), and *Enochs v. Muse*, 270 F2d 528 (5th Cir. 1959): Assessment void if no 90 day letter sent; *Heinemann Chemical Co. v. Heiner*, 92 F2d 344 (3rd Cir. 1937): 90 day letter is mandatory; *Wiley v. United States*, 20 F3d 222 (6th Cir. 1994); *Robinson v. United States*, 920 F.2d 1157, 1158 (3rd Cir. 1990) (the notice of deficiency is a pivotal feature of the Code's assessment procedures, because it serves as a prerequisite to a valid assessment by the IRS); *Holif v. Commissioner*, 872 F.2d 50, 53 (3rd Cir. 1989) (same); *Goldston v. United States*, 97-1 U.S.T.C. ¶50,148 (D.Kansas 1995) ("If an assessment is void, the IRS is prohibited from proceeding administratively..."); *Luhring v. Glotzbach*, 304 F.2d 560 (4th Cir. 1962); *Schreck v. United States*, 301 F.Supp. 1265, 1268 (D. Maryland 1969) ("Reduced to essentials, section 6213(a) makes injunctive relief available against the assessment, levy or collection of a tax when the IRS does not send to the taxpayer a deficiency notice as required by the tax laws."). Section 6213(a) of the Internal Revenue Code is clear that "no assessment of a deficiency ... and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer...."). See also *Laing v. United States*, 423 U.S. 161, 184 n. 27 (1975) (Section 7421(a) does not forbid suits to enjoin the assessment of a deficiency, or a levy or proceeding in court for its collection, if the taxpayer has not been mailed a notice of deficiency and afforded an opportunity to secure a final Tax Court determination.)

Thus the Readings' inquiry into the validity of the notices of deficiency (NOD), which would include whether the person issuing and sending such notices was duly authorized to do so, is certainly relevant. Mere copies of the NOD's does not identify the position and grade (authority) of the person issuing it nor does it prove that the NOD was properly mailed, but the information and documentation sought in discovery does so . . . if it exists. If not, however, that absence can only be established of record by responses to that effect.

The government further relies on *United States v. Chila*, 871 F.2d 1015 (11th Cir. 1989), claiming that case held that a § 6303 notice and demand are not prerequisites for the existence of a lien under § 6321 or levy power under § 6331, but that is not the case. In *Chila*, the suit was strictly to reduce an assessment of a "responsible person" penalty for failure to withhold. There was no recognition or enforcement of lien interest claimed or sought, which is why § 6303 had no bearing on the case. In this case, however, the government is claiming a lien interest and is seeking enforcement of that interest, and without a proper and timely § 6303 notice of assessment and demand for payment, no lien interest has been perfected. *U.S. v. Berman*, 825 F.2d 1053 (6th Cir. 1987); *Bauer v. Foley*, 408 F.2d 1331, 1333 (2nd Cir. 1969); *Anuforo v. C.I.R.*, 614 F.3d 799 (8th Cir. 2010); *U. S. v. Sarubin*, 507 F.3d 811 (4th Cir. 2007). The Readings do not contend that the government's action to reduce its assessments to judgment are affected by the absence of a § 6303 notice, but insofar as the government is claiming a lien interest in the property belonging to Fox Group Trust, that notice, timely made and properly mailed, is an essential element and, therefore, relevant.

What the government's memorandum does not do, however, is to provide any plausible authority for its objections to the interrogatories and requests for production as seeking irrelevant information or material.

The Government's Objections Are Not Timely

When government counsel contacted the undersigned regarding an extension for providing the information and documentation sought the extension was granted in anticipation of receiving that information and documentation. The undersigned intended to extend the time to provide answers to the discovery sought, but never intended to extend the time within which to make objections to those interrogatories and requests for production. Nor did opposing counsel ever reveal that he intended to object to any of the discovery nor did he request that the time to object to the discovery be extended. See Exhibit "A", Sworn Declaration of Tommy K. Cryer, attached hereto and made a part hereof by reference.

Federal Rules of Civil Procedure, Rule 33(b)(4) provides:

> "The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure."

The discovery in this case was served on January 3 and 4, 2012, so in order to be timely the objections had to be filed by February 2 and 3, 2012. Even if one were to consider counsel's agreement to extend the time to provide answers as extending the time to file objections, that extension of "a week or so", which would be 7-10 days, would make any objections made after February 12 and 13, 2012, untimely. Even if one were to extend that to the fullest possible stretch, two weeks, which were not requested or granted, objections made after February 16 and 17, 2012, would be untimely. But in this instance the objections were not made until March 2, 2012, well beyond any conceivable interpretation of an extension of "a week or so".

Since the government did not request or obtain any agreed extension until May 2, 2012, nor did it seek or obtain any similar extension from the Court, its objections are waived. See

Linnebur v. United Telephone Association (D.Kan., Case No. 10-1379-RDR, 4-9-2012), wherein the court stated at p. 13-14:

> Nevertheless, the fact remains that Ms. Linnebur did not stipulate to this extension, and UTA did not seek an extension from the court. The fact that Ms. Linnebur's counsel had previously agreed to certain extensions should not have left defense counsel with the impression they could unilaterally extend their own deadlines. And importantly, defense counsel *did not* in fact deliver the discovery responses by the date promised. In short, UTA waived its objections to these discovery requests.

Likewise, the government waived its objections to the Readings' discovery requests and should be compelled to comply with them.

CONCLUSION

The Readings and the Trust have diligently pursued the discovery of relevant and material information and documentation, they have made a sincere and earnest effort to persuade the government to comply, while the government has engaged in dilatory tactics, requesting an extension to obtain responses when its intention was to merely make boilerplate, stonewalling, unfounded objections and delaying those until far beyond any extension granted. By failing to file its objections timely it has waived those objections.

The Readings and Trust have been injured far beyond mere delay in that their opportunity for follow-up discovery has been consumed by the government's delays and necessitating this motion and the government's evasive and obstructive actions have forced them into the dilemma of either having to move the Court to delay the trial so that they can complete both initial and follow-up discovery, extending this ordeal, or go to trial without the full benefit of discovery, allowing the government to succeed in defeating the purpose and intent of our discovery process and obtaining an unfair advantage at trial.

Accordingly, the Readings and the Trust respectfully urge the Court to order the government to provide full and complete answers to interrogatories as expeditiously as the Court deems reasonable. In addition, Federal Rules of Civil Procedure, Rule 37(b)(2)(A)(2), by virtue of Rule 37(c)(1)(c), permits and the Readings and the Trust urgently suggest that the Court impose as further sanction for plaintiff's failure and refusal to comply with discovery order and direct that the introduction of Form 4340's in this case by the government shall not result in any presumption of correctness on their part and that the Plaintiff shall bear the burden of proof to establish the validity of alleged assessments and purported liens; and that the Readings and the Trust be granted leave to file dispositive motion on or before May 26, 2012.

Dated this 17th day of April, 2012.

Respectfully submitted,

/s/ Tommy K. Cryer

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CERTIFICATE OF SERVICE

I hereby certify that I have on this date electronically filed the foregoing Reply Memorandum In Support of Motion to Compel Discovery pursuant to FRCP 37 with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel for the parties:

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Shreveport, Louisiana, this 29th day of March, 2012.

/s/ Tommy K. Cryer

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UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA,
Plaintiff

v.

JAMES LESLIE READING, CLARE L. READING, FOX GROUP TRUST, MIDFIRST BANK, CHASE, FINANCIAL LEGAL SERVICES, STATE OF ARIZONA
Defendants

2:11-cv-00698-FJM

Exhibit "A"

SWORN DECLARATION OF TOMMY K. CRYER

I, Tommy K. Cryer, do hereby declare as follows:

1. I am the attorney of record in the captioned cause for James Leslie Reading, Clare L. Reading and Fox Group Trust, (hereinafter "Readings and Trust") and in that capacity I did on their behalf on January 3 and 4, 2012, serve upon plaintiff, United States of America (hereinafter "government" or "the government"), my clients' first and second interrogatories and requests for production, respectively.

2. Approximately one week later I received a call from Mr. Charles M. Duffy, counsel for the government, who informed me that assembling and compiling the information and documentation sought in those discovery requests would require longer than the thirty (30) days allotted by the rules and requested I agree to an extension. I asked how much longer and was told "a week, maybe a little longer". Knowing that some of the documents would have to be

ordered and some of the information would not be expected to be in the case file, the request appeared to be reasonable and warranted and I agreed to the extension of a week or so for the government to assemble, compile and provide the information and documentation sought.

3. At no time during the conversation did government counsel indicate that any of the Readings' and Trust's discovery was objectionable, nor did he request any extension of time within which to compose and make any objections to those discovery requests. Likewise, at no time did declarant intend to, nor was he ever requested to, agree to extend the government's allotted time to make objections to the interrogatories and requests for production of documents.

4. Declarant had timed his discovery requests in anticipation of obtaining responses in time to make an additional set of requests, depending upon the information and documentation received, such as requests for admission of authenticity of certain Delegation Orders and possible depositions of persons identified in interrogatory responses, as well as other additional interrogatories and requests for production of documents necessary to complete discovery of evidence necessary to present the Readings' and Trust's case in rebuttal of the government's anticipated introduction of Form 4340 certificates and presumptions afforded them.

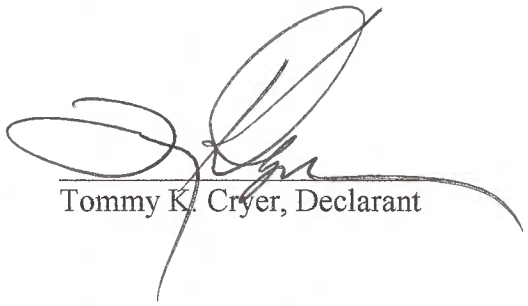
5. Declarant was not served with the government's responses, which consisted of objections to every interrogatory and every request for production until March 2, 2012, consuming nearly a month of declarant's time for follow-up discovery.

6. Declarant provided the government with numerous authorities and explanations of the relevance and necessity for the requested discovery and made an earnest effort to persuade the government to provide the information and documentation sought, but the government has refused to relent on even one request necessitating the filing of Motion to Compel, incurring even further delays and precluding any follow-up discovery by the Readings and Trust.

7. The delay in responding to discovery and the additional delays attributable to having to bring Motion to Compel have virtually exhausted declarant's discovery window,

irreparably and severely compromising the ability of the Readings and Trust to properly prepare for trial under the present scheduling order and trial date.

I, Tommy K. Cryer, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing facts are true and correct.



Tommy K. Cryer, Declarant