

In the United States Court of Federal Claims

No. 06-844T

(Filed: January 6, 2009)

(Unpublished)

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AUSTIN INVESTMENT FUND, LLC, *
by and through its Tax Matters Partner, *
RICOBENE LLC, *
*
Plaintiff, *
and *
*
BRUCE ELIEFF and *
KATHY ABRAHAMSON, *
*
Plaintiff-Intervenor, *
*
v. *
*
THE UNITED STATES, *
*
Defendant, *
*
***** *

Thomas A. Cullinan, Sutherland, Asbill & Brennan, LLP, Atlanta, Georgia, for Plaintiff.

Edward O.C. Ord, Ord & Norman, San Francisco, California, for Plaintiff-Intervenor.

Robert J. Higgins, with whom were *John A. DiCicco*, Acting Assistant Attorney General, *Steven Frahm*, Acting Chief, United States Department of Justice, Tax Division, Court of Federal Claims Section, Washington, D.C., *Mary M. Abate*, Of Counsel, for Defendant.

OPINION AND ORDER

WHEELER, Judge

Plaintiff Austin Investment Fund, LLC, by and through its Tax Matters Partner, Ricobene LLC, brought this tax refund suit seeking readjustment of partnership items set

forth by the Commissioner of Internal Revenue in his Notice of Final Partnership Administrative Adjustment of Austin with respect to the tax year ending on December 31, 2002. On September 16, 2008, Plaintiff-Intervenor Bruce Elieff and Kathy Abrahamson filed a motion for an order compelling the return of the notice of the final partnership administrative adjustment (“FPAA”) to the Internal Revenue Service (“IRS”) for rewriting in compliance with the Administrative Procedures Act (“APA”). For the reasons stated below, Plaintiff-Intervenor’s motion is DENIED.

Background

After an investigation, the IRS, on September 12, 2006, issued an FPAA to Ricobene adjusting partnership items for the tax year 2002. Plaintiff subsequently filed a complaint in this Court seeking a readjustment of the partnership items set forth in the FPAA. Compl. at 1 (Dec. 14, 2006); see also Am. Comp. at 1 (June 6, 2007). On August 13, 2007, Mr. Elieff and Ms. Abrahamson filed a motion to intervene pursuant to RCFC 24(a). This Court granted the motion to intervene, Order at 1 (Sept. 14, 2007), and on October 27, 2008, denied the Plaintiff-Intervenor’s motion to reconsider Mr. Elieff’s and Ms. Abrahamson’s status as a single party.

Plaintiff-Intervenor, on September 16, 2008, filed a motion for an order compelling the return of the FPAA to the IRS for rewriting in compliance with the APA. Plaintiff-Intervenor contends that the IRS violated the APA by failing to include information and explanations in the FPAA related to the IRS’s determinations. Pl.-Int.’s Mem. at 7-10 (Sept. 16, 2008). Plaintiff-Intervenor requests that the Court “remand the FPAA to the IRS with instructions to write the FPAA to include sufficient information as to why and how the IRS arrived at its . . . determinations in the FPAA.” Id. at 10.

Discussion

Plaintiff-Intervenor argues that remand of the FPAA to the IRS is necessary to reveal the reasons for the conclusions reached by the IRS in the FPAA. See Id. at 7-9. However, such an action is unnecessary to determine the propriety of the IRS’s partnership adjustments in the present case.

In cases seeking a readjustment of partnership items in a FPAA, the Court of Federal Claims makes de novo determinations regarding such items. See Jade Trading, LLC v. United States, 80 Fed. Cl. 11, 43 (2007) (“This Court makes a de novo determination regarding the partnership items of [the plaintiff] that were adjusted by the FPAA.”); see also Atlantic Richfield Co. v. Dept. of the Treasury, No. 96-2867, 1996 WL 788366 at *1, 1996 U.S. Dist. LEXIS 19891 at *3 (D.D.C. 1996) (“A court hearing plaintiff’s [FPAA]

readjustment petition would have jurisdiction to determine de novo [a partnership's] taxable income, deductions, and credits . . ."). "The [C]ourt tries factual issues de novo in tax refund suits; no weight is given to the factual findings made by the IRS during administrative proceedings." Stobie Creek Invs., LLC. v. United States, 82 Fed. Cl. 636, 663 (2008).

Here, Plaintiff has filed suit requesting that this Court review the adjustments in the FPAA, seeking a determination that no such adjustments are warranted for the applicable tax year. When undertaking this review, this Court will make de novo determinations regarding Plaintiff's partnership items. See Jade Trading, 80 Fed. Cl. at 43; see also Atlantic Richfield, 1996 WL 788366 at *1, 1996 U.S. Dist. LEXIS 19891 at *3. As such, this Court will determine whether adjustments to Plaintiff's partnership items are warranted without deference to the IRS. Rewriting of the FPAA by the IRS to include its underlying reasons is therefore unnecessary.

While Plaintiff-Intervenor argues that this Court is required to remand the FPAA to the IRS with instructions to the IRS to comply with the APA, Pl.-Int.'s Mem. at 4, Plaintiff-Intervenor fails to provide any precedent to support this contention. Accordingly, this Court will exercise its jurisdiction over petitions for readjustments of partnership items pursuant to 26 U.S.C. § 6226 and 28 U.S.C. § 1508 and make de novo determinations as to Plaintiff's partnership items.

Plaintiff-Intervenor's motion to remand the FPAA thus is DENIED.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge