United States Tax Court
Washington, DC 20217

The Coca-Cola Company and Subsidiaries,	)	
Petitioner	)	Docket No. 31183-15.
v.	)	
Commissioner of Internal Revenue,	)	
Respondent	)	

ORDER

On November 18, 2020, the Court issued an Opinion in this case. Coca-Cola Co. & Subs. v. Commissioner, 155 T.C. 145 (2020). On June 2, 2021, petitioner filed, at docket entry #747, a Motion for Leave to File Out of Time a Motion for Reconsideration of Findings or Opinion Pursuant to Tax Court Rule 161 (Motion for Leave) and concurrently lodged, at docket entry #748, a Motion for Reconsideration. The Commissioner of Internal Revenue (IRS or respondent) filed a response to petitioner's Motion for Leave on August 23, 2021, and petitioner replied to that response on September 22, 2021. We will deny the Motion for Leave.

Under Rule 161,[1] a party shall file a motion for reconsideration of an opinion or findings of fact within 30 days after the opinion is served "unless the Court shall otherwise permit." Petitioner filed its Motion for Leave 196 days after our Opinion was served. Whether to grant a party's motion for leave to file a motion for reconsideration in such circumstances is within the Court's discretion. Louisville & Nashville R.R. Co. v. Commissioner, 641 F.2d 435, 443-444 (6th Cir. 1981), aff'g on this issue 66 T.C. 962 (1976); Thompson v. Commissioner, T.C. Memo. 1989-303, 57 T.C.M. (CCH) 783, 784.

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[1]Unless otherwise indicated, all statutory references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Served 10/26/21

In prior opinions and orders we have considered several factors in evaluating motions for leave to file a pleading out of time. These factors include how late the pleading was sought to be filed, the reasons for the delay, whether the moving party had a previous opportunity to raise the matter, and whether granting the motion would prejudice the nonmoving party. See Dixon v. Commissioner, 60 T.C. 802, 806 (1973); Watkins v. Commissioner, T.C. Memo. 2014-197, 108 T.C.M. (CCH) 337, 340.

These factors favor respondent. First, petitioner's Motion for Leave was not filed a few days after the normal 30-day deadline. Petitioner filed its Motion for Leave 196 days after we served our Opinion.

Second, the reasons petitioner gives to justify its delay are not compelling. Petitioner states that it hired new lawyers, "including a preeminent constitutional scholar," who had to study "numerous issues of exceptional complexity" and the "massive" record of the case. Petitioner has been represented by numerous attorneys from two highly regarded law firms since filing its petition in 2015. It is not entitled to a do-over merely because it has hired more lawyers. If hiring a new team of lawyers were sufficient to justify granting a motion for leave, a party could string litigation out indefinitely if its pockets were deep enough.

Even if hiring new attorneys were relevant, petitioner's new counsel had evidently formulated the company's new legal strategy by January 6, 2021, when the company issued a press release outlining the same arguments advanced in its lodged Motion for Reconsideration. See The Coca-Cola Company Names the Honorable J. Michael Luttig Counselor and Special Advisor, The Coca-Cola Company (Jan. 6, 2021, 8:00 AM), https://investors.coca-colacompany.com/news-events/press-releases/detail/1009/the-coca-cola-company-names-the-honorable-j-michael-luttig. Petitioner has not explained why it nonetheless failed to file its Motion for Leave for another five months.

Third, petitioner clearly had the opportunity to raise, long before now, the arguments it seeks to advance via the Motion for Leave. This is not a case in which a party has discovered new evidence or been buffeted by forces beyond its control. This case already has more than 750 docket entries. The trial lasted eight weeks, and petitioner submitted well over a thousand pages of post-trial briefing. Every argument petitioner seeks to raise now could have been raised at some earlier point by its able counsel. Indeed, every argument in the lodged Motion was raised earlier, although clothed in slightly different garments and unencumbered by the constitutional baggage that petitioner's new attorneys seek to inject into the case.

For these reasons alone, we would be inclined to exercise our discretion to deny petitioner's Motion for Leave. But we think another factor points to the same conclusion, namely, the futility of the positions petitioner seeks to advance. When considering motions for leave on prior occasions, we have evaluated, at this threshold stage, the merits of the underlying motion the party seeks leave to file. We have denied motions for leave to file a motion for reconsideration when the argument sought to be presented was meritless and would not change the outcome. See Bedrosian v. Commissioner, 144 T.C. 152, 161 (2015) ("Because the motion for reconsideration would not yield a different result, we will deny the motion for leave."); Estate of Essex v. Commissioner, T.C. Memo. 1993-220, 65 T.C.M. (CCH) 2728, 2729 ("In deciding whether to grant or deny the motion for leave, we may consider the merits of the underlying motion to reconsider."); Thompson, 57 T.C.M. (CCH) at 784 (denying a motion for leave because "we have reviewed the motion for reconsideration and * * * would not grant that motion * * * in any event.").

It is the Court's policy to try all issues raised in a case in one proceeding to avoid piecemeal and protracted litigation. Accordingly, we generally do not exercise our discretion to grant reconsideration absent a showing of substantial error or unusual circumstances. Robin Haft Trust v. Commissioner, 62 T.C. 145, 147 (1974), aff'd on this ground, 510 F.2d 43, 45 n.1 (1st Cir. 1975). Reconsideration under Rule 161 serves the limited purpose of correcting substantial errors of fact or law and allows the introduction of newly discovered evidence that the moving party could not have introduced, by the exercise of due diligence, in the prior proceeding. Estate of Quick v. Commissioner, 110 T.C. 440, 441 (1998). It is not the appropriate forum for rehashing previously rejected legal arguments or tendering new legal theories to reach the end result desired by the moving party. Id. at 441-442. "The parties cannot try their cases with hindsight." Long v. Commissioner, 71 T.C. 724, 727 (1979), remanded on another issue, 660 F.2d 416 (10th Cir. 1981).

The principal argument petitioner advances in its Motion for Reconsideration is that "the IRS acted unlawfully in retroactively changing the tax-calculation method on which it had induced Coca-Cola to rely * * * through its course of conduct for over a decade." Petitioner bases this argument on the 1996 closing agreement, which the parties executed to settle a dispute involving petitioner's 1987-1995 tax years. The closing agreement employed a formula apportionment method (the 10-50-50 method) to settle that dispute.

Petitioner contends that the closing agreement, coupled with the IRS's acquiescence in petitioner's use of the 10-50-50 method on post-1995 tax returns, created legitimate "reliance interests" for petitioner. By upholding respondent's use of the comparable profits method (CPM) to determine transfer-pricing adjustments for 2007-2009, our Opinion is said to sanction "impermissible retroactivity" in contravention of petitioner's reliance interests. Drawing on cases interpreting the Administrative Procedure Act, petitioner contends that it was arbitrary and capricious for the IRS to insist on a different transfer-pricing method when examining petitioner's returns for 2007-2009. Petitioner also contends that the IRS's actions violated the Due Process Clause of the Fifth Amendment.

Our Opinion addressed and rejected an earlier (if less heavily freighted) version of the same arguments. See Coca-Cola Co. & Subs., 155 T.C. at 204-207. As we explained there, the premise for petitioner's arguments--that the IRS violated petitioner's legitimate reliance interests--is erroneous. Petitioner had no legitimate reliance interests in believing that the IRS would adhere to the 10-50-50 method indefinitely.

The closing agreement embodied a settlement of petitioner's 1987-1995 tax years. That agreement said nothing whatsoever about the transfer-pricing methodology that was to apply for years after 1995. Indeed, the closing agreement made clear that the IRS could make future transfer-pricing adjustments regardless of the method petitioner adopted on post-1995 returns. That is because the closing agreement gave petitioner penalty protection "with respect to the portion of any underpayment that is attributable to * * * [any future] adjustment of such Product Royalty." Id. at 207.

The penalty protection clause put petitioner on notice that the IRS might well make transfer-pricing adjustments for post-1995 tax years. And that clause shows that the parties knew how to make the closing agreement conclusive for future years when they wished to do so. Closing agreements are strictly construed to encompass only the issues enumerated in the closing agreement itself. See Analog Devices, Inc. & Subs. v. Commissioner, 147 T.C. 429, 446-447 (2016). The parties' closing agreement plainly did not address the appropriate transfer-pricing methodology for years after 1995.

Petitioner urged in its post-trial briefs, as it urges in its Motion for Reconsideration, that "it relied to its detriment on a belief that the IRS would adhere to the 10-50-50 method indefinitely." Coca-Cola Co. & Subs., 155 T.C. at 207. We rejected that argument, noting that "petitioner cannot estop the Government on the basis of a promise that the Government did not make." Ibid. Petitioner acknowledges in its Motion for Reconsideration that it has no plausible estoppel argument here. Assuming arguendo that equitable estoppel is available against the Federal Government, "it is warranted only if affirmative and egregious misconduct by government agents exists." Sanz v. U.S. Sec. Ins. Co., 328 F.3d 1314, 1320 (11th Cir. 2003). Petitioner has neither alleged nor proven misconduct of any kind.

The argument advanced in petitioner's Motion for Reconsideration differs from the argument advanced in its post-trial briefs only in terms of the legal authorities adduced to support it. Petitioner now relies chiefly on judicial decisions interpreting the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment. But this is precisely the type of new legal theory that a party may not properly urge at the reconsideration stage. See Estate of Quick, 110 T.C. at 442. The U.S. Court of Appeals for the Eleventh Circuit, when considering whether to exercise its own discretion to allow a taxpayer to make a new legal argument, has previously declined to do so, describing this as an attempt to "sandbag the IRS" with "the benefit of hindsight." See Finnegan v. Commissioner, 926 F.3d 1261, 1273 (11th Cir. 2019), aff'g T.C. Memo. 2016-118.

Petitioner urges that we consider not only the explicit terms of the closing agreement (which supply no support for petitioner's position) but also respondent's "course of dealing with petitioner." By "course of dealing" petitioner means the IRS's failure to notify petitioner in advance that the IRS was going to use a different method to determine appropriate transfer-pricing adjustments for 2007-2009. But this "course of dealing" argument has been part of this case from the outset, and we have already considered and rejected it.

As the IRS explained in its opening post-trial brief, it is well established that each tax year stands on its own, and the Commissioner's position in a prior audit does not bar him from later taking a different position. That is so for many reasons, including the possibility that the relevant facts have changed with the passage of time. Inaction by the IRS confers on the taxpayer no vested rights. "The mere fact that * * * [a taxpayer] may have obtained a windfall in prior years does not entitle it to like treatment for the taxable year[s] here in issue." Union Equity Coop. Exch. v. Commissioner, 58 T.C. 397, 408 (1972), aff'd, 481 F.2d 812 (10th Cir. 1973); see also Knight-Ridder Newspapers, Inc. v. United States, 743 F.2d 781, 793 (11th Cir. 1984) (holding that the IRS may challenge in a later year a tax reporting position in which it acquiesced in an earlier year); Harrison v. Commissioner, 138 T.C. 340, 347-348 (2012) ("[R]espondent's position in prior audits does not bar him from taking a different position * * * in later years."); Pekar v. Commissioner, 113 T.C. 158, 165-166 (1999) (rejecting taxpayer's argument that the IRS "tacitly sanctioned" a reporting position by failing to make adjustments in earlier years).

Nor is the IRS required to give a taxpayer prior notice that it is planning to revise its stance. Until the completion of an audit, the IRS has no duty to respond to a taxpayer's return position. See, e.g., Allred v. Commissioner, T.C. Memo. 2014-54, 107 T.C.M. 1289, 1292 ("[T]he Commissioner had no affirmative duty to notify taxpayers of noncompliance with statutory requirements."); Rocovich v.

United States, 18 Cl. Ct. 418, 425 (1989) (holding that the IRS has no duty to respond to the taxpayer's return position until an audit has been completed), aff'd, 933 F.2d 991 (Fed. Cir. 1991).

The most relevant Supreme Court opinion addressing reliance and retroactivity in tax law is emphatic on these points. As the Court observed 37 years ago, "it is well established that the Commissioner may change an earlier interpretation of the law, even if such a change is made retroactive in effect." Dickman v. Commissioner, 465 U.S. 330, 343 (1984). "This rule applies," the Court ruled, "even though a taxpayer may have relied to his detriment upon the Commissioner's prior position." Ibid. And "[t]he Commissioner is under no duty to assert a particular position as soon as the statute authorizes such an interpretation." Ibid.

Petitioner's new legal authorities (chiefly Administrative Procedure Act cases) address reliance interests created when an agency publishes formal rules (or other official guidance) on which the agency clearly intends the public to rely. See, e.g., Encino Motorcars, LLC v. Navarro, 579 U.S. 211 (2016) (discussing a regulation); PPH Corp. v. Consumer Financial Protection Bureau, 839 F.3d 1, 44 (D.C. Cir. 2016) (discussing guidance that an agency "widely disseminated" to industry participants and on which it expected them to rely). Petitioner's only tax-related citation is to Estate of McLendon v. Commissioner, 135 F.3d 1017 (5th Cir. 1998), rev'g T.C. Memo. 1996-307. That opinion addresses a revenue ruling, an official form of IRS published guidance. Taxpayers are explicitly authorized to rely on IRS revenue rulings. See sec. 601.601(d)(2)(v)(e), Statement of Procedural Rules.

The IRS has published no guidance, formal or informal, to petitioner or anyone else, suggesting that the 10-50-50 method was the "best method" for determining an arm's-length price. See sec. 1.482-1(c)(1), Income Tax Regs. Quite the contrary, that method "was simply a formula to which the parties agreed in settling the dispute before them at that moment." Coca-Cola Co. & Subs., 155 T.C. at 205. The closing agreement made clear that the IRS could make transfer-pricing adjustments for post-1995 years regardless of what method petitioner chose to use. At bottom, petitioner's argument is that the IRS forfeited its right to make future adjustments without prior notice unless it made such adjustments immediately. Petitioner has supplied no authority, in law or logic, to support that proposition.

It seems clear that petitioner desired the certainty that would arise from indefinite future application of the 10-50-50 method. But if it wished to secure certainty it had two obvious options at its disposal. First, it could have attempted to negotiate a closing agreement that (unlike the agreement it signed) made the 10-50-50 method applicable, not only for 1987-1995, but also for specified future years.

Second, if petitioner truly believed that the 10-50-50 method would be accepted by the IRS as the "best method" for determining an arm's-length royalty, it could have applied for an "advance pricing agreement" (APA). See generally Eaton Corp. & Subs. v. Commissioner, 140 T.C. 410, 413 (2013). An APA is "a binding agreement" between the taxpayer and the IRS "on the best method, within the meaning of the regulations, for determining arm's length prices, and the proper application of the best method to the taxpayer's specific facts and circumstances." Rev. Proc. 96-53, secs. 3.02, 10.01, 1996-2 C.B. 375, 376, 383. IRS guidance available around the time the closing agreement was signed suggested that such agreements might last for "three years" or longer and be renewable. Id. secs. 5.09(1), 11.08, 1996 C.B. at 379, 385. If the 10-50-50 method were designated as the best transfer pricing method, the IRS would have been obligated to accept that method during the term of the APA and any successor agreements. The IRS is permitted to cancel or revoke an APA only in exceptional circumstances, e.g., for fraud or malfeasance by the taxpayer, misrepresentation of material facts, or lack of good faith compliance with the APA's terms and conditions. Id. secs. 11.05(1), 11.06(1), 1996 C.B. at 385.

Had petitioner successfully pursued one of these options, it would have had genuine reliance interests grounded on a binding contract. As it was, petitioner chose to take its chances with the IRS examiners, hoping that they would not disturb the status quo. But that was only a hope, and hope is not something that gives rise to legal or constitutional entitlements.

Finally, we briefly address petitioner's second argument--that we should reconsider our analysis regarding the supply points' asserted ownership of billions of dollars' worth of "marketing intangibles" or "IP associated with trademarks." This was the central argument that petitioner advanced at trial and in its post-trial briefs. We comprehensively considered and rejected this argument. See 155 T.C. at 239-264. A motion for reconsideration "is not the appropriate forum for rehashing previously rejected legal arguments." Estate of Quick, 110 T.C. at 441.

In sum, we conclude that granting petitioner's Motion for Leave would be futile because we would deny its Motion for Reconsideration in any event. For this reason and the other reasons set forth above, we will deny petitioner's Motion for Leave. It is accordingly

ORDERED that petitioner's Motion for Leave to File Out of Time a Motion for Reconsideration of Findings or Opinion Pursuant to Tax Court Rule 161, filed June 2, 2021, at docket entry #747, is denied.

(Signed) Albert G. Lauber
Judge