

Sub-Haines  
Ans, due 5-12-08

UNITED STATES TAX COURT

WASHINGTON, DC 20217

ESTATE OF ERMA V. JORGENSEN, )  
 DECEASED, JERRY LOU DAVIS, )  
 EXECUTRIX AND JERRY LOU DAVIS AND )  
 GERALD R. JORGENSEN, CO-TRUSTEES, )  
 )  
 ) Petitioner, )  
 )  
 ) v. )  
 )  
 ) COMMISSIONER OF INTERNAL REVENUE, )  
 )  
 ) Respondent. )

Docket No. 21936-06

ADM.	
RECORDED	
<i>Em</i>	
SERVICE	
<i>Em</i>	
CAL.	
STAM.	
S.T. JUDGE	
<i>Haines</i>	
FILES	

ORDER

On March 7, 2008, the Court filed petitioner's motion for leave to amend original petition and the Court lodged petitioner's first amendment to petition. On March 31, 2008, the Court filed respondent's objection to petitioner's motion for leave to amend original petition. On April 4, 2008, the Court filed petitioner's memorandum in support of its motion for leave to amend and rebuttal of respondent's objection to petitioner's motion for leave to amend. On April 4, 2008, hearing was held on this motion in Washington, D.C.

Rule 41 governs amended and supplemental pleadings.<sup>1</sup> Rule 41(a) covers amendments generally and provides in effect that after a responsive pleading is served or after 30 days if no responsive pleading is permitted, "a party may amend a pleading only by leave of Court or by written consent of the adverse party, and leave shall be given freely when justice so requires." Rule 41(a) reflects "a liberal attitude toward amendment of pleadings." 60 T.C. 1089 (explanatory note accompanying promulgation of Rule 41).

Leave to amend may be inappropriate when there is undue delay, bad faith, prejudice resulting from the amendment, or a dilatory motive of the movant. See Foman v. Davis, 371 U.S. 178, 182 (1962); Russo v. Commissioner, 98 T.C. 28, 31 (1992). "Unless there is a substantial reason to deny leave to amend, the

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<sup>1</sup>Unless otherwise indicated, section references are to the Internal Revenue Code as amended. Rule references are to the Tax Court Rules of Practice and Procedure.

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discretion of the trial court is not broad enough to permit denial." Curr-Spec Partners, LP v. Commissioner, T.C. Memo. 2007-289 (citing Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 (5th Cir. 1981)). A motion to amend may be granted after trial. See Pinson v. Commissioner, T.C. Memo. 2000-393.

Petitioner asks this Court for leave to amend its petition in order to add a claim of equitable recoupment. Equitable recoupment is an equity-based affirmative defense against an asserted deficiency. Estate of Mueller v. Commissioner, 101 T.C. 551 (1993). Petitioner seeks to offset a time-barred overpayment of income tax against the estate tax deficiency.

Respondent argues that petitioner's motion for leave to amend is unreasonably delayed. Petitioner's motion was filed 14 months after the filing of its original petition and 4 months after trial. There is no question that petitioner could have moved to amend its petition earlier. The issue the Court must determine is whether the delay is unreasonable and whether respondent will be prejudiced by the delay.

One of the requirements of equitable recoupment is that a refund claim be time barred. Petitioner alleges that the related claims for refund became time barred in this case on April 16, 2007. Therefore, the equitable recoupment claim became ripe on April 16, 2007. At any time thereafter, petitioner could have amended its petition to raise the equitable recoupment claim, but the motion was made more than 10 months later. Petitioner claims that it did not discover that protective claims for refund were not filed by the related individuals until after trial in this case. Petitioner's reason for the delay is reasonable.

Respondent will not suffer prejudice if leave is granted. The amendment to the petition does not affect the primary issue in this case. Equitable recoupment would serve merely as an offset to any deficiency determined by the Court. Respondent will still have the opportunity to argue the merits of the equitable recoupment claim in his briefs.

Respondent argues that the untimely assertion of equitable recoupment prejudices respondent because timely assertion would have increased the desirability of settlement. See Manzoli v. Commissioner, 904 F.2d 101, 106 (1st Cir. 1990). However, the desirability of settlement would have been equally affected had the related parties timely filed refund claims, which taxpayers would ordinarily do in a situation such as this where the basis of assets may be increased due to a judicial proceeding. Petitioner alleges that timely refund claims have been made or will be made for subsequent years. Furthermore, the failure to receive unjust double taxation does not qualify as prejudice.

The doctrine of equitable recoupment was judicially created to preclude unjust enrichment of a party to a lawsuit. Estate of Mueller, supra at 551-552. If petitioner's motion to amend is not granted there is the possibility that respondent will be unjustly enriched and petitioner and related individuals will be unjustly double-taxed. Considering the potential for injustice, the Court will grant the motion to amend petition.

The Court is aware that the parties dispute the amount of evidence needed to supplement the record in order to establish a claim for equitable recoupment. Petitioner asserts that the majority of evidence needed is already in the record and that the only additional evidence needed is the confirmation of the dates of the filing of the partners' returns. Respondent asserts significantly more evidence is needed.

The Court ordered the parties to submit a fourth stipulation of facts on or before April 15, 2008. Petitioner argues that the parties can include all evidence needed for the equitable recoupment claim in the fourth stipulation of facts. To the extent possible, the Court directs the parties to stipulate to that evidence. If the parties are unable to stipulate to the necessary evidence, and the Court determines that additional evidence is necessary, the record will be re-opened and the Court will direct the submission of whatever evidence is needed at that time.

Upon due consideration and for cause it is

ORDERED that petitioner's motion for leave to amend original petition is granted. The Court directs that the amendment to petition previously lodged with the Court be filed as of the date of this Order. It is further

ORDERED that respondent shall have 30 days from the date of this Order in which to file his answer under Rule 36.

**(Signed) Harry A. Haines  
Judge**

Dated: Washington, D.C.  
April 10, 2008