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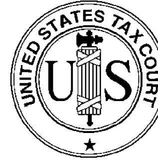

US TAX COURT
FILED

SEP 02 2020

WESTERN DIGITAL CORPORATION AND
SUBSIDIARIES, ET AL.,
Petitioners,

ELECTRONICALLY FILED

v.

Docket No. 18984-18, 4818-19

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITIONERS' SUR-REPLY TO REPLY TO RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT

SERVED Sep 04 2020

UNITED STATES TAX COURT

WESTERN DIGITAL CORPORATION AND SUBSIDIARIES,	)	
Petitioner,	)	Docket Nos. 18984-18, 4818-19
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	Filed Electronically
Respondent	)	

PETITIONER'S SUR-REPLY TO RESPONDENT'S REPLY TO PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Respondent filed a motion for partial summary judgment ("Respondent's MPSJ") on April 29, 2020, in which he seeks a ruling that Treas. Reg. § 1.482-2(a)(1)(iii)(B) "does not apply" to section 956(c)(2)(C).[1] On June 15, 2020, petitioner filed a response ("Petitioner's Response") in accordance with the Court's May 1, 2020 order, which set deadlines for a response and reply. On July 15, 2020, respondent filed his reply to Petitioner's Response ("Respondent's Reply"). Respondent's Reply contains several material false or inaccurate assertions.

[1]"Section" references are to the Internal Revenue Code, as amended and in effect for the years in issue. "Treas. Reg." references are to the Federal income tax regulations in effect for the years in issue.

Petitioner files this sur-reply for the limited purpose of identifying those assertions so that the Court does not rule on Respondent's MPSJ based on misinformation.

I. GRANTING RESPONDENT'S MPSJ WILL NOT SPARE THE COURT THE BURDEN OF REVIEWING ANYTHING.

Respondent urges the Court to grant Respondent's MPSJ to relieve the Court of "the burden of reviewing hundreds of thousands of pages of invoices" in order "to determine which if any of Petitioner's accounts payable owed to its foreign subsidiaries fall within" the interest-free period specified in Treas. Reg. § 1.482-2(a)(1)(iii)(B). Respondent's Reply at 5. Respondent might "shudder in horror" at his imagined exercise, id. at 6, but his factual premise is false.

The Court (and the parties) will *not* have to review any invoices to determine compliance with Treas. Reg. § 1.482-2(a)(1)(iii)(B). The section 956 issue in this case will involve evidence of payment information to which the "ordinary and necessary" standard in section 956(c)(2)(C) will apply. The scope and breadth of that evidence will remain the same regardless of whether the Court grants or denies Respondent's MPSJ.[2] Because the section 956 inquiry looks to transactions

[2]That evidence is likely to include information gleaned from invoices. To the extent the underlying data are voluminous, the Court should never have to review all of that data directly because petitioner would rely on Federal Rule of Evidence 1006 to streamline its presentation and ease the Court's review. Although respondent presumably is aware that the Federal Rules of Evidence provide for methods of simplifying and summarizing voluminous material, Respondent's Reply ignores this.

between unrelated parties in determining the proper tax treatment of intercompany transactions—precisely the construct under section 482—the cited section 482 regulation is relevant as a potential interpretive tool the Court can utilize in considering the ultimate issue. As respondent knows, that is *all* that petitioner has claimed about the cited section 482 regulation. See Petitioner's Response at 4, n.2 ("[T]ucked away in Respondent's MPSJ . . . is respondent's acknowledgment that petitioner merely contends that the referenced regulation is relevant to the Court's interpretive inquiry and that the Court should ultimately consider it in ruling on the section 956 issue."); Respondent's Reply at 12 (characterizing the issue that is the subject of Respondent's MPSJ as "whether the 482 Interest Free Exception is relevant to Section 956(c)(2)(C)"). Given respondent's knowledge, the imagined exercise to which Respondent's Reply alludes and that causes respondent to "shudder in horror" is merely an attempt to misdirect the Court into granting an improper motion.

Stripped of this premise, Respondent's MPSJ amounts to nothing but a request that the Court constrain itself prematurely by narrowing the legal authorities it ultimately can consider before it hears any evidence or the parties' arguments on the section 956 issue. Granting such a motion would establish dangerous precedent: If respondent were correct that the relevancy of a potential legal authority is the proper subject of a partial summary judgment motion, then a

party could compel the Court to rule early in any case on the relevance of any legal authorities the party might cite in post-trial briefs. That invites waste and inefficiency. In short, it is nonsensical.[3]

II. RESPONDENT'S DISCOURSE ON CHANGES TO FEDERAL RULE OF CIVIL PROCEDURE 56 IS A RED HERRING.

Respondent dedicates a section of Respondent's Reply to explaining a 2010 amendment to the Federal Rules of Civil Procedure ("FRCP"). Respondent's Reply cites Rule 121(a) of the Tax Court Rules of Practice and Procedure (providing that parties may move for summary judgment on all or "any part of the legal issues in controversy"), a 2010 revision to FRCP 56 (allowing parties to move for summary judgment on part of an issue), and Tax Court opinions

[3]Respondent's nonsensical contentions do not end there. It is evident that respondent does not like the legislative history underlying section 956. But respondent's argument attempting to demonstrate that Respondent's MPSJ is consistent with Congressional purpose (part II. of Respondent's Reply) is incoherent. Respondent asks the Court to disregard the legislative history without explicitly disagreeing that the "ordinary and necessary" language in section 956 is ambiguous. Respondent's Reply at 12–13. Instead, respondent simply notes that the phrase "facts and circumstances" (which is contained in Treas. Reg. § 1.956-2(b)(1)(v) but not in section 956(c)(2)(C)) is present in other regulations and then declares those regulations irrelevant. It is entirely unclear why any of what respondent says should lead the Court to disregard Congress's intent underlying section 956—to exclude "normal commercial transactions without intention to permit the funds to remain in the United States indefinitely." S. Rept. No. 87-1881, at 88 (1962).

supporting the proposition that "a motion for partial summary judgment is appropriate to dispose of any part of the legal issues." Respondent's Reply at 2–3.

Petitioner disputes none of that. Respondent's MPSJ would be improper under the FRCP before or after the 2010 revision. This is because granting Respondent's MPSJ would dispose of nothing that in any way would affect the scope of the trial on the section 956 issue. Supra at 2–3. The opinions respondent cites are all easily distinguishable because in those cases the Court addressed issues that would affect the scope of the trial (or whether a trial was even necessary). See Shepherd v. Commissioner, T.C. Memo. 2020-45 (granting an IRS motion for partial summary judgment against a pro se taxpayer that disposed of the entire case); N. Cal. Small Bus. Assistants, Inc. v. Commissioner, 153 T.C. 65 (2019) (denying a taxpayer's motion for partial summary judgment in which the taxpayer argued that a statute the IRS had applied to deny deductions was invalid); Yarish v. Commissioner, 139 T.C. 290 (2012) (granting the IRS's motion for partial summary judgment regarding the retroactive disqualification of an Employee Stock Ownership Plan in a case in which the parties filed cross-motions for partial summary judgment on the same legal issue and agreed that resolving that issue would allow them to resolve the remaining issues in the case (and in two related cases)); Countryside, Ltd. Pship. v. Commissioner, T.C. Memo. 2008-3 (granting a tax matters partner's motion for partial summary judgment that asked

the Court to determine that a liquidating distribution did not result in a taxable event and that there were no income adjustments to the partnership or its partners); Naftel v. Commissioner, 85 T.C. 527 (1985) (denying an IRS motion for partial summary judgment seeking a determination that the Court lacked jurisdiction to consider one of the taxpayer's claims).

If respondent were addressing petitioner's actual position (rather than a strawman), supra at 3, then respondent would realize that those cases involved proper motions, that the 2010 amendments to the FRCP are irrelevant, and that Respondent's MPSJ could amount to an improper request for an advisory opinion.[4] It is telling that respondent does not cite a single case in which any judge thought it prudent to rule on summary judgment on the relevance of a legal authority that had no bearing on the scope of the evidence to be presented at trial.

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[4]Respondent incorrectly states that the 2010 FRCP amendment "diminishes any value of Mazzocchi, if not rendering it moot as overridden." Respondent's Reply at 11. To begin with, changes to the FRCP do not diminish the value of, moot, or override Tax Court precedent. More importantly, when this Court decided Mazzocchi Bus. Co., Inc. v. Commissioner, T.C. Memo. 1990-292 in 1990, Rule 121(a) of the Tax Court's Rules of Practice and Procedure provided (as it still does today) that a party may move for summary judgment "upon all or *any part of the legal issues* in controversy." (Emphasis added.) This Court's conclusions in Mazzocchi are as sound today as they were three decades ago—the Court should not grant motions for partial summary judgment that do not serve the objective of summary judgment and instead foster piecemeal litigation.

III. CONCLUSION

For the reasons explained above and in Petitioner's Response, petitioner respectfully requests that the Court deny Respondent's MPSJ.

Respectfully submitted,

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