United States District Court, N.D. Illinois, Eastern Division.
Lawrence **BEALL**, Plaintiff,
v.
The **UNITED STATES** of America, and John Does, Defendants.
No. 89 C 6500.
Aug. 2, 1990.

MEMORANDUM OPINION AND ORDER

LINDBERG, District Judge.

*1 Defendant, the United States of America, has filed a document entitled "United States' Objection to Magistrate's Proposed Findings and Recommendations in Order of May 25, 1990 Granting Plaintiff's Motion to Compel Further Discovery." Defendant objects to the magistrate's order of May 25, 1990:

[G]ranting, in part, plaintiff's motion to compel further discovery, to the extent that the order requires the United States to further substantiate an assessment against the plaintiff for the tax years 1980 and 1981, in so far as the United States has already produced presumptive proof of a valid assessment.

Without leave of court, defendant has filed a memorandum in support of this objection. Although this court would be warranted in striking that memorandum, the procedurally erroneous filing will be overlooked and the court will at this time allow the filing of the memorandum.

The court will not overlook footnote 2 in the memorandum, which states:

The United States is compelled to bring this discovery problem to the Court's attention because attempted burdensome discovery against the government appears to be the latest tax protester tactic and it is therefore important that we ask the Internal Revenue Service to undertake such discovery only where it is actually appropriate.

There is no evidence offered for any of the factual matter asserted in this footnote, by way of affidavit or otherwise. It appears to find a place in the memorandum solely for the purpose of prejudicing the court against plaintiff. The court therefore, *sua sponte,* strikes footnote 2 from defendant's memorandum. The court notes that, as will be evident later in this opinion, a complaint that the United States is being harassed by burdensome discovery is peculiarly inappropriate in the context of the objection now before the court.

This court's review of the objection is limited to determining whether the magistrate's order has been shown to be "clearly erroneous or contrary to law." 28 USC § 636(b)(1)(A); FRCP 72(a). The order defendant objects to provides:

Mr. Beall's motion is granted in part as set forth in the remainder of this order. By June 21, 1990 the government shall answer interrogatories 2; 10 insofar as it calls for identification of documents required for recording an assessment against a taxpayer; 11 if the documents identified differ in any respect from those identified in 10; 13; 15; and 16. The government shall also identify any allegedly privileged documents and justify its claim of privilege in response to interrogatory 9 and request for production 3. The government shall produce any additional documents in its possession that are responsive to request for production 4 (certain documents are identified but I cannot determine from the answer whether all responsive documents are being produced); and documents responsive to request for production 6, 7, 8, and 9. I agree with the government that information and documents that deal with any period prior to the tax court judgment are irrelevant to this action. So far as I can determine, however, from both the statute and government counsel's statements in court, the government must still provide the taxpayer notice and otherwise make a valid assessment pursuant to 26 U.S.C. § 6203, and of course, follow proper notice requirements and any other requirements in executing on the assessment. Accordingly, some of the government's answers to interrogatories and requests for production of documents, in which plaintiff seeks information regarding the Section 6203 assessment, notice of that assessment and related information, to

which the government responded by citing to its answer to interrogatory 3, fail to either provide relevant information or to give an adequate justification for making an objection. It does appear that many of the interrogatories and requests for production overlap. To the extent that is true, the government need provide the information only once.

*2 Defendant argues that this order should "be clarified to limit or amended to hold that production of the Form 4340 (Certificate of Assessments and Payments) is fully responsive to the plaintiff's request to produce all documents utilized to create the assessments against the plaintiffs." The order could by no means be "clarified" to do this, because the language of the order simply will not permit such a construction. It also will not be amended to do this, because defendant has failed to show that the order is clearly erroneous or contrary to law.

Defendant's claim is that, because the Form 4340 by itself is enough to establish a prima facie case that an assessment has been properly made and because the Form 4340 is a self-authenticating document, see FRE 902(4), defendant should not be required to produce all of the documents utilized to create the Form 4340. Defendant's arguments are wholly frivolous and meritless.

The motion before the magistrate, which led to the order to which defendant objects, concerned discovery. Federal Rule of Civil Procedure 26 provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.... It is not ground for objection that the information will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FRCP 26(b)(1). Defendant's arguments that plaintiff is entitled to only the Form 4340 is based upon rules concerning the admissibility of the Form 4340 and the sufficiency of the Form 4340 to establish prima facie its own contents.

The meritlessness of defendant's arguing based on the self-authenticating document rule that plaintiff is not entitled to discover the basis for the entries on the Form 4340 will first be established. In the preamble to FRE 902, which defendant says "specifies that certain types of documents are self- authenticating" but does not include in its quotation, it is stated:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following....

FRE 902. This is all that the self-authenticating document rule means-- that for the documents to which it applies, it is unnecessary to present extrinsic evidence of authenticity in order to have them admitted into evidence. There is not the slightest hint that a self-authenticating document may not be shown by other evidence to be inaccurate, or even "unauthentic." Whether or not the pro se plaintiff inartfully stated the reason he is entitled to the discovery, FRE 902 provides no basis for giving Form 4340 such conclusive effect that it may not be impeached by other evidence. And if it may be impeached by other evidence, such other evidence or evidence likely to lead to such other evidence, including the documents on which the entries in the Form 4340 are ultimately based, is discoverable.

*3 Defendant has cited several cases, none of which stands for the proposition that the documents on which a Form 4340 is based are not admissible, let alone that they do not meet the broad standard of relevance applicable in discovery. See *United States v. Chila, 871 F.2d 1015 (11th Cir.1989)*; *United States v. Zolla, 724 F.2d 808 (9th Cir.1984)*; *United States v. Lorson Electric Company, Inc., 480 F.2d 554 (2d Cir.1973)*; *Psaty v. United States, 442 F.2d 1154 (3d Cir.1971)*; *United States v. Miller, 318 F.2d 637 (7th Cir.1963)*; *United States v. Sato,* 90-1 USTC ¶ 50,278 (N.D.Ill.1990); *United States v. Hart,* 63 AFTR2D 89-632, 89-1 USTC ¶ 9255 (C.D.Ill.1989); *United States v. Dixon, 672 F.Supp. 503 (M.D.Ala.1987)*; *Baily v. United States, 355 F.Supp. 325 (E.D.Pa.1973)*; *In re O'Leary,* 72-1 USTC ¶ 9287 (W.D.Wis.1972). Three of the cases cited by defendant are at the very least strongly suggestive that the basis for the entries on a Form 4340 is admissible. *United States v. Chila, 871 F.2d 1015, 1018 (11th Cir.1989)*, quoting *United States v. Dixon, 672 F.Supp. 503, 506 (M.D.Ala.1987)* ("[T]his Court accepts the document 'Certificate of Assessments and Payments' submitted by the government as presumptive proof of a valid assessment. Given that the defendant has produced *no* evidence to counter this presumption, the Court is satisfied that the government has established that the claimed tax liability was

properly assessed against the defendant."); *United States v. Zolla, 724 F.2d 808, 810 (9th Cir.1984)* ("[T]hese official certificates are highly probative, and are sufficient, in the absence of contrary evidence, to establish that the notices and assessments were properly made.") Two of the cases cited by defendant are more than strongly suggestive; they can only be construed as standing for the proposition that evidence of the basis for the entries on a Form 4340 is admissible.

In *Psaty,* the court said:

The machinery prescribed by Congress to determine the amount due the Government is the *assessment* of the administrative agency charged with its collection. Once the tax is assessed a rebuttable presumption arises.... We hold ... that when the Government offers in evidence the certification of the Commissioner's assessment ..., the presumption of correctness operates to place upon the taxpayer both the burden of going forward and the burden of persuasion.... Thus, the trial judge correctly held that the presumption placed upon this appellant the burden of going forward with the evidence and also the obligation to " * * * establish by the greater weight or by the preponderance of the evidence that the Commissioner's determination was erroneous * * * "

Psaty v. United States, 442 F.2d 1154, 1160 (3d Cir.1971) (citations omitted). In *Hart,* the court said:

The United States, in its motion for summary judgment and the supporting documents, asserts that it has established a prima facie case of liability against John Hart and that Defendant John Hart cannot meet the burden placed on him by law to show that the tax assessments at issue are incorrect and the correct amount of tax liability....

***4** The Government establishes its prima facie case of liability by introducing into evidence certified copies of the federal tax assessment.... The certificate of assessments and payments establishes the Government's prima facie case and places the burden of proof on the taxpayer. The certificated is self-authenticating under Fed.R.Evid. 902(4).

Once the Government has established its prima facie case of liability, the burden of proof is placed on the taxpayer to show that the assessment is incorrect and to show the correct amount of tax due....

The majority of courts to have considered the question have ruled that a taxpayer's uncorroborated testimony alone is insufficient to meet the taxpayer's burden of proof.... Defendant John Hart has introduced no evidence to suggest that the certificates of assessment are invalid. Furthermore, it appears that Defendant John Hart could not introduce any such evidence. In his response to Plaintiff's request for production of documents, Defendant asserts that any records he may have had that pertain to his financial status "have long been disposed of via the Litchfield landfill."

The Court finds as a matter of law that Defendant John Hart has failed to meet his burden of proof to show that the assessments involved herein are incorrect and has failed to show the correct amount of the taxes involved. Thus, summary judgment in favor of Plaintiff, the United States of America, will be allowed as to this issue.

United States v. Hart, 63 AFTR2D 89-632, 89-1 USTC ¶ 9255, 1989 WL 69882, *2, 1989 US Dist. LEXIS 13675, *4-6 (C.D.Ill.1989). It is interesting that defendant apparently believed, when it was the plaintiff in *Hart,* that evidence of the information underlying a Certificate of Assessments and Payments is discoverable when the assessment's correctness is challenged, since it sought discovery of such information from Hart.

More important, however, is that the cases cited by defendant, especially *Psaty* and *Hart,* stand for the propositions that (1) the certificate of assessment is only rebuttably presumed correct and (2) when challenging an assessment, the taxpayer has the burden of proving that the assessment is incorrect. Evidence about the information underlying the entries on the certificate of assessment is obviously relevant to the issue of whether the assessment is incorrect and is therefore plainly discoverable.

Defendant's position, that it need only produce the Form 4340 because that is sufficient to prove its prima facie case, is absurd and wholly without support in the authority defendant has cited. Indeed, the objection defendant has made to the magistrate's order coupled with defendant's earlier practice in this case of not appearing at hearings and having plaintiff deliver messages to the court indicate that if anyone is being harassed in this litigation it is plaintiff rather than defendant. The court suggests that defendant be more cautious and restrained about keeping its advocacy within permissible bounds. See FRCP 11.

*5 ORDERED: Defendant's objection to the magistrate's order of May 25, 1990, is overruled.
N.D.Ill.,1990.
Beall v. U.S.
END OF DOCUMENT