## UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-80456-MC-RYSKAMP/HOPKINS

(Consolidated with Cases 11-80457-MC-KLR/JMH, 11-80459-MC-KLR/JMH, 11-80460-MC-KLR/JMH, and 11-80461-MC-KLR/JMH)

UNITED STATES OF AMERICA,
Petitioner,
V.
MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., et al.,
Respondents,
And
DYNAMO HOLDINGS LIMITED PARTNERSHIP,
Intervenor.

## **ORDER ON REMAND**

THIS CAUSE comes before the Court on remand from the Eleventh Circuit Court of Appeals for the purpose of applying the standard set forth in *United States v. Clarke, et al.*, 134 S.Ct. 2361 (2014), that is, to determine whether Respondents point to specific facts or circumstances that plausibly raise an inference of improper purpose and to determine whether the improper purposes alleged by Respondents are improper as a matter of law.

The applicable standard the Supreme Court set forth in *Clarke* is as follows:

As part of the adversarial process concerning a summons's validity, the taxpayer is entitled to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith. Naked allegations of improper purpose are not enough: The taxpayer must offer some credible evidence supporting his charge. But circumstantial evidence can suffice to meet that burden; after all, direct evidence of another person's bad faith, at this threshold stage, will rarely if ever be available. And although bare assertion or conjecture is not enough, neither is a fleshed out case demanded: The taxpayer need only make a showing of facts that give rise to a plausible inference of improper motive.

*Id.* at 2367.

Respondents requests leave to replead and to provide evidence not presented in their original briefing, including evidence Respondents obtained subsequent to the original briefing. This Court's November 14, 2014 [DE 58] order informed the parties that Respondents could brief their arguments and evidence under this standard but that said briefing was not to include any evidence not already presented to this Court. That order also informed the parties that the Court would not conduct a status conference in this matter. Respondents' request to present additional evidence on remand is denied.

The Government examined the tax returns of Dynamo Holdings Limited Partnership ("DHLP") for the years ended December 31, 2005, 2006 and 2007 and proposed adjustments to debt and interest items claimed on those returns. The IRS requested and received an agreement from DHLP to extend by two year-long extensions the three year limitations period for determining tax liability. In 2010, DHLP refused to grant a third extension. The IRS issued summonses to the respondents on September and October 2010. In December 2010, still within the extended limitation period, the IRS issued a Final Partnership Administrative Adjustment ("FPAA") that proposed changes to DHLP's returns that would increase DHLP's tax liability. DHLP filed suit in the United States Tax Court in February 2011 to challenge the adjustments.

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Respondents challenge the propriety of the summons on multiple grounds, none of which are improper as a matter of law. That a secondary use of the requested information may exist, that is, opening a second examination of Beekman Vista, Inc., does not render the request for the information improper. *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 322-23 (1985); *U.S. v. First Nat'l Bank in Dallas*, 635 F.2d 391, 396 (5th Cir. 1981). In any event, the IRS did not need or use the summoned material, which it did not have, to "justify" opening a second examination of Beekman Vista, Inc.

Respondents argue that the IRS issued the summons to punish DHLP for declining to extend the statute of limitation period for a third time. This allegation is unsupported by any evidence. If information remains to be gathered and the statute of limitation has expired, the IRS has no alternative but to institute a formal summons process.

Respondents argue that the Government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because such could allow the Government to obtain more information than it could by Tax Court discovery rules. The validity of a summons is tested at the date of issuance, and events occurring after the date of issuance but prior to enforcement should not affect enforceability. *See United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681 n.1 (11th Cir. 1984); *Garpeg, Ltd. v. United States*, 583 F.Supp. 799, 802 (S.D.N.Y. 1984). Here, the Tax Court proceeding commenced after issuance of the summons.

Respondents also argue that enforcement of the summonses would offend comity because enforcement of the summons is the same proceeding pending before the Tax Court. This proceeding and the Tax Court proceeding are not identical, however. The Tax Court proceeding

involves a challenge to the adjustments to DHLP's partnership items under IRC § 6226. The Tax Court does not have jurisdiction to consider summons enforcement proceedings, IRC § 7604(a); *Ash v. Comm'r*, 96 T.C. 459, 462 (1991), and the district court, in a summons enforcement proceeding, does not have jurisdiction to consider the FPAA adjustments to DHLP's tax reporting. *United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008) (holding a court in a summons enforcement proceeding does not have authority over the validity of a tax assessment). The Tax Court was aware of the pendency of this action in that the IRS relied upon this summons enforcement proceeding as one of its grounds for requesting a continuance of the Tax Court trial involving DHLP, which was scheduled for January 2012. The Tax Court granted the continuance on October 13, 2011.

Respondents suggest that the issuance of the summons may have violated the intent of the Internal Revenue Manual ("IRM"). The summons was issued before the FPAA was issued or the commencement of the Tax Court proceedings, as the IRM permits. Nevertheless, Respondents claim that the mere timing of the enforcement proceedings relative to the issuance of the FPAA and the initiation of the Tax Court case is suspicious. Respondents offer no evidence to support this suspicion, however. Even if some evidence were offered on that score, the IRM itself confers no rights on Respondents. *Matthews v. Comm'r*, T.C. Memo. 2008-126, 2008 WL 1946817, \*11 (U.S.Tax Ct.) (citing *Fargo v. Comm'r*, 447 F.3d 706, 713 (9th Cir. 2006) affg. T.C. Memo.2004–13 ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers."); *Carlson v. United States*, 126 F.3d 915, 922 (7th Cir. 1997); *Tavano v. Comm'r*, 986 F.2d 1389, 1390 (11th Cir. 1993), affg. T.C. Memo. 19910237; *Marks v. Comm'r*, 947 F.2d

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983, 986 n.1 (D.C. Cir. 1991), affg. T.C. Memo. 1989-575.

Respondents again ask the Court to create a new rule akin to Bankruptcy Rule 2004 that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. Respondents' implication that the "pending adversary" rule is a strict prohibition of a non-judicial inquiry once other litigation is commenced is incorrect, and its application to Bankruptcy Rule 2004 overstated. The "pending adversary" rule involves a more nuanced consideration of bankruptcy issues and other policy concerns and in many circumstances a Rule 2004 examination is allowed even after an adversary proceeding or other litigation is commenced. *See In re Pan Am. Hosp. Corp. and Pan Med. Ctr., Debtors*, Nos. 04–11819–BKC–AJC, 04–11820–BKC–AJC, 2005 WL 2445907 (Bankr. S.D. Fla. Feb. 25, 2005); *In re Washington Mut., Inc. et. al., Debtors*, No. 08-12229 (MFW), 408 B.R. 45 (Bankr. D. Del. 2009); *In re Southeastern Materials, Inc., Debtor*, No. 09-52606, 2010 WL 5128608 (Bankr. M.D. N.C. Dec. 10, 2010). This Court has already declined to create such a rule.

Respondents' final argument is that "[e]vidence from the IRS is likely to show that they had in internal policy requiring that they always maintain a two year statute of limitations cushion, and, when they could not arrange for that, it was their practice to finalize an FPAA and then serve dragnet IRS summonses asking for things they knew they did not need for no apparent reason." [DE 60, p. 18]. Respondents offer no factual support for the statement, which does not rise above the level of a naked allegation of improper purpose. As the Supreme Court made clear, "naked allegations of improper purpose are not enough" to justify an evidentiary hearing. *Clarke*, 134 S.Ct. at 2367.

The Court has reviewed the submissions Respondents presented on original briefing and

has concluded that these submissions do not show facts giving rise to a plausible inference of

improper motive regarding issuance of the summons. Respondents rehash prior arguments that

this Court has already considered and found to fail as a matter of law. Respondents' request for

an evidentiary hearing fails under both the prior standard and the standard annunciated by the

Supreme Court. The summonses shall be enforced. It is hereby

ORDERED AND ADJUDGED that the above styled case is CLOSED and that all

pending motions are DENIED as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 18th day of

February, 2015.

S/Kenneth L. Ryskamp
KENNETH L. RYSKAMP

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UNITED STATES DISTRICT JUDGE