United States Tax Court
Washington, DC 20217

CFM Insurance, Inc.,	)	
	)	
Petitioner	)	
	)	
v.	)	Docket No. 10703-19.
	)	
Commissioner of Internal Revenue,	)	
	)	
Respondent	)	
	)	
	)	

O R D E R

This is one of two microcaptive-insurance cases assigned to this division of the Court and that we recently consolidated. Before that consolidation, there were two discovery motions pending: one in which CFM sought documents that it argues are relevant to the issue of the Commissioner's compliance with IRC section 6751(b)(1)'s requirement for supervisory approval of penalties, and one in which a third party that received a subpoena *duces tecum* from the Commissioner seeks a protective order or order quashing the subpoena.

CFM's Motion to Compel

On June 16, 2021, we denied the Commissioner's motion for a partial summary judgment that he had complied with section 6751's penalty-approval requirements. We held that the evidence he proffered left a triable issue as to who made the initial determination to impose penalties on CFM and whether that person's immediate supervisor approved that determination in writing. Included in the record of that motion were redacted documents -- documents that piqued CFM's curiosity.

CFM had already known about these documents and had already moved to get unredacted versions even before we acted on respondent's summary-judgment motion. These documents are all communications to or from IRS lawyers about this case. The Commissioner objects to producing unredacted copies of portions of Revenue Agent Van Nguyen's Form 9984, Examining Officer's Activity Record, and of emails exchanged between Nguyen and Senior Attorney Michael Harrel of the Office of Chief Counsel, which are mentioned in that form.

He claims the redacted information is both irrelevant and protected by the attorney-client privilege.

We try cases using the Federal Rules of Evidence, *see* Rule 143(a), which makes evidence relevant if it tends to make a fact "more or less probable than it would be without the evidence," and if it "is of consequence in determining the action," Fed. R. Evid. 401. One of the issues in this case when CFM filed its motion was whether the Commissioner satisfied the penalty-approval requirements of section 6751(b). The Commissioner asserted in his privilege log that the redacted portions of the Form 9984 and emails "describe communications between revenue agent Van Nguyen and Chief Counsel attorney Michael Harrel about penalties." This led us to conclude that CFM raised a colorable argument that Harrel is the one who made the initial determination to impose a 20% penalty, which would make the redacted portions of those documents relevant to the section 6751(b) issue.

Until August 18, 2021, that is. On that date, the Commissioner filed what we characterized as a status report. In it the Commissioner conceded the penalty issue in this case. He also suggested that his concession made CFM's motion moot.

We agree, and will therefore deny CFM's motion as moot.

Arthur J. Gallagher's Motion For a Protective Order

We will need to rule on non-party Arthur J. Gallagher & Co.'s motion for a protective order against the Commissioner's subpoena of some of its documents.

Gallagher wants us either to quash the subpoena altogether under Rule 147(b) or issue a protective order limiting its scope under Rule 103(a). Our test for both types of relief is "essentially the same." *See Amazon.com, Inc. v. Commissioner*, 108 T.C.M. (CCH) 588, 590 (2014). Gallagher bears the burden of proving that the subpoena imposes an "undue burden," meaning one that outweighs the value of the subpoenaed information to the serving party. *See id.* "Factors to be considered include the relevance of the information sought, the serving party's need for that information, the breadth of the request, the time period covered by the subpoena, the particularity of the request, and the burden imposed." *Id.* "Relevance" for this purpose means "likely to be useful in the case." *Bane v. Commissioner*, 30 T.C.M. (CCH) 125, 128-29 (1971). We are also more sensitive to the costs that Gallagher would be subject to in responding to the subpoena, as it isn't a party to this case. *See Watts v. SEC*,

482 F.3d 501, 509 (D.C. Cir. 2007) (interpreting Fed. R. Civ. P. 45, which is "substantially the same" as Rule 147(b), *Stern v. Commissione*r, 74 T.C. 1075, 1084 (1980)).

The Commissioner requests three categories of information:

- all emails in the account of Steven Gabinski -- a Gallagher commercial insurance broker -- that date from 2010 to 2015 and include the search terms Caputo, CFM, Gazzano, Iovino, Mischoice, and Presta;

- all documents created by Gabinski from 2010 to 2015 that "mention or relate to Caputo's," and

- all communications from August to October 2020 that are "to or from Caputo's, Robertino Presta, James Iovino, CFM Insurance, Inc., or anyone acting on behalf of or in concert with any of them."

Gallagher argues that these requests are overly broad and irrelevant, and that the Commissioner has set sail on a prohibited fishing expedition. *See Bane*, 30 T.C.M. (CCH) at 128.

Some context is helpful. It is the Commissioner's position that CFM Insurance is part of an abusive microcaptive insurance arrangement. He alleges that Robertino and Antonella Presta, who own a chain of Chicago-area grocery stores named Caputo's Fresh Markets, created CFM in 2012 and then had their stores buy insurance from CFM. Gallagher had a subsidiary named Artex Risk Solutions, Inc. that helped form and manage CFM. Artex is no stranger in our microcaptive caselaw, where we've sometimes found it to have promoted microcaptive arrangements that didn't work under the Code. *See Caylor Land & Dev., Inc. v. Commissioner*, No. 17204-13 (T.C. Mar. 10, 2021).

But Gallagher says this doesn't mean that the Commissioner should get discovery of other provinces of its insurance empire. Caputo's did buy various commercial insurance policies from Gallagher through its broker Gabinski during and before the years at issue. The notice of deficiency that CFM challenges, however, is one in which the Commissioner determined to include in *CFM's* gross income the premium payments that *it* received from the Caputo's stores from 2012 through 2015.

Gallagher suggests that we should limit the subpoena to only those communications and documents relating to "the captive insurance business that was conducted by [CFM]." It also objects that the Commissioner's requests are way too broad, and should be more focused on the years at issues and more limited in their subject matter.

We disagree.

The Commissioner's theory appears to be that CFM didn't have a "substantial purpose (apart from federal income tax effects) for entering into the captive insurance transaction," and that it didn't act in good faith. Comparing the captive insurance that CFM provided to the more traditional commercial insurance that Gallagher provided would likely shed light on any value CFM added to the Caputo's stores, and therefore its purpose. And examining the Caputo's stores' insurance arrangements in the years before CFM's formation could do the same.

This kind of compare-and-contrast analysis is one that we've done in every other microcaptive-insurance case we've had. *See Caylor*, slip op. at 10-13; *Syzygy Ins. Co. v. Commissioner*, 117 T.C.M. (CCH) 1165, 1172-74 (2019); *Reserve Mech. Corp. v. Commissioner*, 115 T.C.M. (CCH) 1475, 1484-85 (2018); *Avrahami v. Commissioner*, 149 T.C. 144, 185-87 (2017). Because part of the test for finding an arrangement to be "insurance" is "whether an arrangement looks like commonly accepted notions of insurance," *Caylor*, slip op. at 10, a comparison of Caputo's insurance purchases from Gallagher slightly before and during the years at issue is therefore relevant, and we think that the Commissioner's first and second requests for information are reasonably tailored to discover them.

The Commissioner's third request seeks communications between Gallagher and Caputo's, Mr. Presta, CFM, and James Iovino (CFO of Caputo's) between August 26 and the date the subpoena was received (i.e., a few days to a few weeks later). This is a request aimed at getting information relating to this phase of the litigation. It may be aimed at impeachment evidence or evidence of preparation of a response to the subpoena. It's not overly burdensome, and Gallagher may of course respond with a privilege log (as the subpoena states) if it or CFM wants to invoke an exemption to discovery.

It is therefore

ORDERED that CFM's March 11, 2021 motion to compel is denied as moot. It is also

ORDERED that nonparty Arthur J. Gallagher & Co.'s October 6, 2020 motion to quash and October 7, 2020 motion for protective order are denied. It isalso

ORDERED that the Clerk of the Court, in addition to her usual service on the parties, is directed to serve a copy of this order on Mr. Lawrence Hill, Winston & Strawn, LLP, 200 Park Avenue, New York, NY 10166 on behalf of Arthur J. Gallagher & Co. It is also

ORDERED that on or before September 20, 2021 the parties file a joint status report on the status of their pretrial preparation; including the state of their informal and formal discovery, and any updated estimates of their readiness for trial at some point after mid-March of next year, as well as the length of trial once it begins.

(Signed) Mark V. Holmes
Judge