In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 02-384 T

(Filed November 17, 2005)

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KHALIL HAMDAN AND *
LANA K. HAMDAN, *

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Plaintiffs, *

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v. *

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THE UNITED STATES, *

*

Defendant. *

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* *

MEMORANDUM OPINION AND ORDER

The Court has reviewed the papers filed in support of the defendant's motion to dismiss the remaining claims in this case, and the response filed by the plaintiffs. In the course of this review, the Court has come to realize that it had previously misunderstood, in part, plaintiffs' claims, a danger that is always attendant in matters ligated *pro se.*

After the September 30, 2004 Memorandum Opinion and Order, all that remained in this case were claims encompassed within "Issue 1" of the Complaint, for tax years 1990 and 1992. Regarding those relating to tax year 1992, the Court had believed that plaintiffs were basing their claim on the failure of the government to allow them to deduct their share of the $432,600 identified in the closing agreement. This sum allegedly represented the portion of previously-claimed (but disallowed) development fees that were recognized by the partnership in 1992 as having never been paid, and thus included in the partnership's income for that year. *See* Ex. A to Complaint.

Closer review of the Complaint and the response filed by plaintiffs regarding the government's first motion reveals, however, that the Hamdans base their claims under "Issue 1" solely on the portion of the $867,331 in developer fees, disallowed for the partnership in tax year 1989 as accrued but not yet paid, that were subsequently *paid* by the partnership. Although this claim is stated with less than crystal clarity, it now appears to the Court that plaintiffs are alleging that the partnership made $331,408 in fee payments in 1990 and $52,748 in fee payments in 1992, which were not deducted in those tax years because the partnership had already deducted them as accrued in 1989. *See* Complaint at 2. The Hamdans object that the partnership was not

allowed to deduct these fees in 1989 because of cash basis accounting, and should thus be allowed to deduct them in 1990 and 1992 "when actual cash was distributed." *Id*. at 3. The Hamdans in their response to the pending motion to dismiss do argue that the government "refuses to reduce Plaintiff[s'] 1992 tax year income as promised" in the closing agreement. Pl.s' Response at 3; *see also id.* at 5. But this claim was not among those brought to this forum by plaintiffs, and was instead accidentally injected into the case by the Court.

The government has moved to dismiss the remaining claims for tax years 1990 and 1992. Concerning tax year 1990, it argues that the closing agreement fully resolved the matter of the development fees which "were never paid," and that the agreement provides only for the 1992 tax year adjustment. *See* Motion at 5-6. This argument is based on a misreading of the closing agreement, which deals with two separate categories of fees. The first is the fees that were accrued and deducted in 1989, although they were not paid that year. This amount, totaling $867,331, was referred to as "unpaid . . . for 1989." Ex. A to Complaint. The closing agreement does not state that these were never paid. The second category of fees is those that the partnership allegedly included in income in tax year 1992 because the fees "were never paid." *Id.* The closing agreement provides that, because of the 1989 adjustment, the "never paid" fees need not be included in partnership income, or that of the partners. *Id.*

Defendant argues that the closing agreement states "that the developer fees which were accrued and deducted for 1989 were never paid," Motion at 6, but this is not so. The agreement reflects that a portion of these fees were alleged to have never been paid as of 1992 and thus were included in income in that year. This amount, totaling $432,600, is less than half the amount of the unpaid 1989 fees. The remainder, by necessary implication, had either been paid, or had been recognized as "never paid" and included in income prior to or after tax year 1992. The agreement is silent on this point. Accordingly, the Court rules that the motion to dismiss is DENIED as to tax year 1990. If plaintiffs can prove that the partnership paid developer fees in tax year 1990 that it failed to deduct because these were already deducted as accrued in 1989, and that the deduction of these fees in 1990 would result in a reduction of their 1990 income taxes, the closing agreement does not foreclose their recovery. A claim has been stated.

Concerning tax year 1992, however, the closing agreement constitutes the refund claim. As such, it only encompasses a tax refund based on the result of removing the $432,600 from the partnership income for tax year 1992. But the claim filed in this Court as to 1992 seeks a refund based on the $52,748 of accrued 1989 developer fees, which "was paid in 1992." Complaint at 2. The closing agreement could be the basis for a refund of taxes for tax year 1992 relating to the fees that "were never paid," but does not cover the treatment of those that *were paid*. The government motion to dismiss is GRANTED as to the claim for tax year 1992.

For the reasons stated above, defendant's motion to dismiss for failure to state a claim is **GRANTED-IN-PART** and **DENIED-IN-PART**. The only claim remaining in this case is that pertaining to taxable year 1990 under "Issue 1" of the Complaint. The parties shall file a Joint Status Report on or by December 19, 2005, recommending a schedule for further proceedings.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge