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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Pursuant to DUCivR 7-1, Defendants hereby respond to Plaintiff's opposition to Defendants' motion to dismiss the present action, in full, because of the absence of a current case and controversy. Plaintiff's claims against Defendants are not ripe for judicial determination because there is no recognized presumption involving fraudulent tax shelters or tax schemes and there are nearly 200 pending cases awaiting the US Tax Court's determination of the identical issues raised by Plaintiff in this case. Unlike this case, the Tax Court cases have taxpayers whose individual returns and the merits of each taxpayer's claimed deduction will be separately

examined. Here the government is making a general claim involving their general arguments hoping the solar technology efforts of Defendants can be hindered, damaged or destroyed. This Court should await the decision of whether there is an illegal tax scheme by the Tax Court in cases involving the actual taxpayers and their returns before considering the general arguments of the government. Until those are resolved the Court should dismiss this action. Otherwise this case will require a redundant examination and testimony from nearly 200 taxpayers to determine whether any one of them may qualify—because if even a single taxpayer's can claim a tax benefit it will vindicate the Defendants in this case.

Plaintiff's opposition to Defendants' motion relies on the unproven presumption that an illegal tax scheme exists. Yet, Plaintiff offers no proof of an illegal tax scheme, only its own biases and conclusions. Defendants are developing alternative solar energy technology and are selling solar lenses that are currently being used in developing and testing new solar technologies. What a purchaser bases the decision to purchase upon is internal to that purchaser. RaPower-3 has no control over the motivation or decision making of the purchaser. The government cannot hold RaPower-3 (or the other Defendants) liable for what a buyer of lenses thinks, or his/her subjective intent, when purchasing the solar lens.

A solar tax credit is available to taxpayers. IRC, Section 48.

The "Investment Tax Credit" or IRC section 48 allows project owners or investors to be eligible for Federal business energy tax credits for renewable energy equipment placed in service during an applicable tax year. Qualification for the investment tax credit depends on the taxpayer's circumstances, not RaPower-3's ability to create electricity. Plaintiff has failed to plead or prove in this case that the taxpayers have relied on RaPower-3's explanation of the

availability of tax benefits. But more fundamentally, Plaintiff has not established that purchasers of solar lenses do not qualify for the tax benefits. Plaintiff has not, because it cannot.

On the other hand, Defendants have relied on the advice of legal counsel since the very beginning of their business activities in determining the availability of tax benefits associated with the purchase of solar lenses from RaPower-3. Legal counsel advised Defendants that solar lens purchases qualify under the current (then in effect) tax laws.

Furthermore, Defendants rely on, and have provided in this case, the opinions of expert witnesses with backgrounds and education in tax preparation and interpretation of the United States Internal Revenue Code to support their belief and understanding of the tax implications for purchasers of the solar lenses. Plaintiff has not identified or offered a single expert opinion or legal authority to support its assertion there is an illegal tax scheme.

Plaintiff's opposition relies on two legal theories for all of its claims. On page 8 of its opposition, Plaintiff defines who is "subject to penalty" under § 6700 of the tax code. To be liable under § 6700 a person must either organize or assist in the organization of a plan or arrangement or participate in the sale of any interest in a plan or arrangement AND make or furnish or cause to be furnished certain statements. Plaintiff alleges that the statements making these Defendants liable for violating § 6700 is "a statement with respect to the securing of a tax benefit by reason of holding an interest in an entity or participating in a plan or arrangement that the person knows or has reason to know is false or fraudulent as to any matter."[1]

Plaintiff asserts that the second basis for liability is "a gross valuation overstatement as to any material matter."[2]

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[1] Doc. 262, page 8, citing to 26 U.S.C. § 6700(a)(2)(A).

[2] *Id.*

Both of those bases rely on a determination that Defendants have organized or participated in a fraudulent tax scheme—or as Plaintiff calls it throughout its opposition, an "*abusive tax shelter*." Yet, Plaintiff can point to no authority or decision that reaches the conclusion that the sale of solar lenses is an abusive tax shelter. Even Plaintiff's second point (gross valuation overstatement) must be tied to an illegal tax scheme.[3]

Plaintiff obviously cannot take the legal position that any profit mark-up on goods offered for resale constitutes *ipso facto* a violation of the tax code, even a 500% mark-up. That position, if adopted by this Court, would clearly trigger a whole host of other commercial activities suddenly becoming illegal. Such an intrusion into the economy would violate the Commerce Clause and would empower the IRS to interfere with all pricing practices in the US. The valuation overstatement must be connected to a fraudulent tax scheme.[4]

Plaintiff stresses that the government is empowered to enforce the IRS code sections upon which they rely. Defendants do not disagree. But that proves nothing in this case. The lack of jurisdiction arises from a lack of ripeness of the claim, not in the government's right to ultimately enforce the law if there ever proves to be a violation. That does not resolve whether the claimed violations by Defendants are ripe for adjudication. On the question of ripeness Plaintiff relies only on unproven presumptions and conclusions. Defendants have not violated §§ 6700, 7408 or 7402.

In this case there are laws and procedures that must be followed. Defendants are entitled to a determination of *whether* there is an abusive tax shelter *before* they are subject to injunction

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[3] See IRC § 6700(a)(2). The Code proscribes a statement with respect to tax benefits which the promoter defendant "knows or has reason to know is false or fraudulent as to any *material* matter" or alternatively "a gross valuation overstatement as to any *material* matter." (emphasis added).

[4] Id.

and damages. To hold otherwise and allow this case to proceed to trial gives the government a preemptive tool to interfere with every business in the open market. It is tantamount to an *ex post facto* law that punishes a party (like these Defendants) for doing something that was clearly lawful when first done. Defendants consulted with competent legal counsel before proceeding. They received advice from competent legal counsel that allowed them to proceed with lens sales. Now the IRS disagrees. The IRS' disagreement does not negate the opinions of competent legal counsel. If only the opinion of the IRS mattered, it would sideline the US Tax Court, this Court and tax attorneys and accountants. That is too much power to concede to Plaintiff and not what the code intends.

There are 193 cases pending at this moment in the Tax Court on the particular issue of whether the buyers of solar energy lenses from RaPower-3 qualify for the solar tax credit and/or depreciation.[5] Until a Tax Court judge makes a determination on those actual controversies involving taxpayers and decides that there was an abusive tax shelter, this Court has no reason to abstractly interpret the tax code to resolve whether there has been a violation of 26 U.S.C.S. § 6700(a). Until the Tax Court decides actual taxpayer liabilities on actual tax returns, there is no way to know whether Defendants made statements as to material matters that were false or fraudulent. How can the IRS base taxability, deductibility or a violation of the tax code on what the taxpayer's intent was/is without requiring every single taxpayer to appear and answer questions about their intent? That is something that will not happen in this case,[6] but will necessarily happen in the individual taxpayer cases pending in Tax Court.

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[5] See Doc. 257-1, Declaration of Paul Jones.

[6] The IRS has not disclosed or identified any taxpayer as a witness in this case.

Lastly, the burden is on Plaintiff to prove an abusive tax shelter. Without precedent from the Tax Court, where the 193 cases are pending, the conclusion there was an abusive tax shelter requires specialized knowledge and, Defendants believe, expert testimony. Plaintiff has not designated any expert on the question of whether there is an abusive tax shelter. Dismissing this case at this point would be a favor to Plaintiff. It would allow Plaintiff to reconsider its position and focus its efforts on the tax court cases. Then, if there should be a determination from the Tax Court that an abusive tax shelter was organized, planned or participated in by Defendants, Plaintiff can bring an action to enjoin the conduct. But until there is a determination by a court specifically established to hear and presently examining related tax cases, this case should be dismissed.

In *United States v. Buttorff*, 563 F.Supp 450 (N.D. Tex. 1983)[7], the court emphasized that the injunctive relief available under 26 USC § 7408 was appropriate to prevent the recurrence of the defendant's conduct.[8] There, defendant had previously been convicted of crimes involving illegal tax protester activities similar to those involved in that injunction action.[9] And the tax avoidance scheme was well known to the government and was the subject of prior judicial determinations.[10] There is no similar history here. There has been no determination that the tax benefits believed to be available by RaPower-3 are in fact not available to buyers of solar lenses. An earlier criminal case filed against a Defendant here was dismissed.

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[7] (*Aff'd*, *United States v. Buttorff*, 761 F.2d 1059 (9th Cir.)).

[8] See 563 F. Supp 450 at p. 451.

[9] *Id*. at 455.

[10] *Id*. at 454. ("The courts have also found that pure equity trusts, such as the one promoted by Buttorff, run afoul of the grantor trust provisions of the Internal Revenue Code, 26 U.S.C. §§ 671-677. Under these provisions, a grantor of a trust who has retained certain powers which may be exercised without the approval or consent of an adverse party is treated as the owner of the trust and taxed individually. Buttorff's attempt to distinguish his trust from the trust examined in *Vnuk v. Commissioner*, 621 F.2d 1318 (8th Cir.1980), is without merit. A trust is not sheltered from the operation of the grantor trust provisions by an artificial construction of adversity between parties.")

Without a decision by the Tax Court on actual controversies over the tax deductions taken by taxpayers (a federal court that was established to decide this question), this Court is not in the best position to determine whether there is an abusive tax shelter that should be enjoined under 26 U.S.C. § 6700. Therefore, this action should be dismissed because it is not yet ripe for a decision.

CONCLUSION

For the reasons stated herein, this case should be dismissed for lack of subject matter jurisdiction. Specifically, this Court should find that there is no current case or controversy that this Court is empowered to decide.

Dated this 12th day of January, 2018

NELSON SNUFFER DAHLE & POULSEN

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2018, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION** was sent to counsel for the United States in the manner described below.

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