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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 **DEFENDANTS' RULE 52(c) MOTION FOR JUDGMENT AS A MATTER OF LAW NO FRAUDULENT TAX SCHEME** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Defendants RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC., R. Gregory Shepard, and Neldon Johnson (hereinafter collectively "Defendants"), pursuant to Rule 52(c), respectfully submit this motion to resolve the single issue of whether Plaintiff has proven a sufficient evidentiary basis for the Court to find a fraudulent tax scheme.

Although this case has been pending since 2015, the Plaintiff has never provided a cogent statement of what it claims comprises an "illegal tax scheme." During discovery Defendants attempt to discover what the Plaintiff contended ran afoul of the revenue code. The discovery

was thwarted because Defendants were prevented from taking the deposition of a designated representative of the IRS. Instead of a witness to identify the basis for their claim, Plaintiff filed United States' Motion For Protective Order Prohibiting Defendants From Deposing United States' Trial Counsel, in which they argued that these topics should be protected from discovery. (ECF 170.) Even though Defendants explained they did not want to depose trial counsel, this Court sided with Plaintiff and granted the Protective Order. (ECF 195, 196).

Throughout the trial, Plaintiff's counsel has raised Rule 37(c) to object to defense evidence. (See Trial Tr. P. 1183:17-18, 1825:14-15, 1835:24, 1842:8, 1866:10-11, 1925:9, 1974:11, 1989:1, 1992:14, 2036:7-8, 2066:17-18, among other places). Plaintiff's counsel explained its objection was that if evidence was not disclosed in discovery or initial disclosures, it could not be used at trial. See Trial Tr. P. 1836:1-3. Defendants objected to Plaintiff's witnesses who were not disclosed in discovery or initial disclosures, nor identified until the pretrial witness list. (ECF 296). The Plaintiff was allowed by the Court to call these witnesses, despite the failure to comply with Rule 37. (ECF 342; see also Trial Tr. p. 823-851 (testimony of Jo Anna Perez and Amanda Reinken).) Defendants have been required to respond to surprise testimony and exhibits throughout the trial, even though Defendants attempted to obtain this information during discovery, and despite all these surprises and tactical disadvantages imposed on them, Defendants have never been told what the alleged “illegal tax scheme” involved. Nothing in Plaintiff's case in chief has clarified the alleged "scheme".

Rule 52(c) provides as follows:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim

> or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.[1]

USCS Fed Rules Civ Proc R 52.

1. Plaintiff has been fully heard on the issue of whether Defendants have promoted or participated in a Fraudulent Tax Scheme.

Plaintiff has been fully heard on the issue of whether there is a fraudulent tax scheme promoted or promulgated by Defendants. Plaintiff's case occupied this Court's time from April 2, 2018 through April 26, 2018. Plaintiff rested its case the afternoon of April 26, 2018. (TR. 2297).

2. Defendants are entitled to judgment as a matter of law that Plaintiff has failed to prove a fraudulent tax scheme based on the following law and facts.

Under the Internal Revenue Code, the court "may enjoin [a] person from engaging in . . . activity subject to penalty under this title." *United States v. Hartshorn*, No. 2:10-CV-0638, 2012 U.S. Dist. LEXIS 32179, at *6, 109 A.F.T.R.2d (RIA) 1346 (D. Utah Mar. 9, 2012) (citing I.R.C. § 7408(b)). "Such activity includes the promotion of abusive tax shelters under I.R.C. § 6700." *Id.* "The government must prove five elements to obtain an injunction under these statutes: (1) the defendants organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement; (2) they made or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) they knew or had reason to know that the statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction is necessary to prevent recurrence of this conduct." *Id.*

[1] According Advisory Committee on 1991 amendment notes the following: "[Rule 52(c)] parallels the revised Rule 50(a), but is applicable to non-jury trials. It authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence." It is also worth noting that according to the Committee on 2007 amendments, "The standards that govern judgment as a matter of law in a jury case have no bearing on a decision under Rule 52(c)."

In this case, Plaintiff seeks injunctive relief under § 7408 for Defendants' alleged 26 U.S.C. § 6700 violations, claiming Defendants have organized or participated in a plan or arrangement for which Defendants know or have reason to know is false or fraudulent as to any material matter. Yet, during Plaintiff's case in chief, there has been no evidence to establish what makes the energy tax program promoted by Defendants false or fraudulent as to any material matter.

Plaintiff apparently only asserts the "false or fraudulent" statements arise in telling customers they were in a trade or business; could deduct expenses against active income; and, were "at risk" for the full purchase price of each lens. (Doc. 334, p. 73).

Plaintiff has not shown that the energy tax credits promoted by Defendants are not available to qualifying taxpayers. There can be no doubt that a tax credit under 26 U.S.C.S §§ 46 or 48 is available to a qualifying taxpayer, or that one who qualifies for a tax credit under section 48 can also claim a depreciation expense under 26 U.S.C.S. § 36. Those provisions are part of the tax code. There is no evidence that Defendants misrepresented the application or interpretation of those provisions. There is no rule or law that prevents Defendants from alerting the public to the existence of these tax code provisions. Nor is any "scheme" involved when Defendants consistently recommended purchasers consult with their own tax professional to determine if they qualify for the identified tax benefit.

There can be no doubt that the solar lenses purchased by taxpayers exist. Plaintiff has not put on evidence that the solar lenses are not in existence. Indeed, a solar lens in is evidence (DEX 1522); a video of the solar lens fields has been received in evidence (DEX 1500) and numerous other exhibits contain photographs or descriptions of the solar lenses. Testimony has been received that there is a warehouse full of lenses (TR. 1082 (Preston Olsen testimony); TR.

1321 (R. Jameson testimony); TR. 1549 (M. Shepard testimony)). There is no contrary evidence that the RaPower-3 Fresnel lenses do not exist in sufficient numbers to cover all lens sales to customers.

Defendants represented that the RaPower solar lenses are "placed in service" during the taxable year for which the credit is claimed by a taxpayer. Numerous copies of the "placed in service" letters are in evidence before the Court (PLEX 103, 104, 105, 313, 321, 322, 327, 466, 534, etc). However, there is no evidence before the court that the representation is false. Witnesses testified that the placed in service requirement is met when an item is "on site and it works and that someone can use it. " (TR.345, Mr. Oveson testimony). Mr. Oveson also explained "placed in service" as "the equipment had to be produced, had to be delivered in some way to the customer and it had to have the ability to function as it was supposed to function. " *Id.* Mr. Oveson testified that the placed in service issue was the biggest problem his firm faced in providing an opinion to IAS. In testifying on that point he said, "If it was determined that it was placed in service that they qualified we felt for the credit and [depreciation]." *Id*. At 346.

In response to questions from the Court, Mr. Jameson testified that the Internal Revenue Code contains three comments on how an item can be placed in service. He said, "comment number one is the asset is available and ready for use and in case there is a down time or a broken one that's considered placed in service. " (TR. 1315). Mr. Jameson continued by saying, "the third one states that if the asset is being used in the research and development or some other aspect of the business, like say advertising or something that, but the main thing is research and development to further produce or advance the technology." *Id*. Although Mr. Jameson relied on the "placed in service" letters received by his tax clients, he did not do so exclusively. He also researched the requirements for placed in service and satisfied himself that the representation by

RaPower was worthy of reliance. (TR. 1320-1322). The testimony supports the conclusion that the solar lenses sold by RaPower3 were "placed in service." Government witness Cody Buck only said he did not think they were, but when asked if he knew how the IRS defined "placed in service" he said he did not know and did not research that question. Nor did he know or research how the courts interpreted "placed in service." (TR 306-307). Witness Kenneth Oveson said "placed in service" only required the equipment to be available and on site, like the lenses in this case, to qualify. (TR 344-345, 394). Oveson said they never finished researching the question of "placed in service" for the lenses. (TR 348, 351, 356-357). Witness Jessica Anderson similarly found the Code definition of "placed in service" only required the equipment be available for use. (TR 657). Kenneth Birrell testified equipment qualified as "placed in service" if used in research and development or marketing. (TR 702). Witness Richard Jameson cited the Internal Revenue Code and explained if the lenses were available for use or used in research and development or used in marketing they qualify as "placed in service." (TR 1315, 1320-1321). Jameson visited the site and saw the lenses were indeed available for use and therefore "placed in service." (TR 1321-1322).

Because the representations by Defendants that the lenses (1) existed and (2) were placed in service at the time of sale were true, there was no false or fraudulent statement to justify the claim there is a tax scheme. Plaintiff has not shown any contrary evidence that the lenses do not exist nor are available for use; therefore, the Court must find against the Plaintiff on this issue and enter judgment against the Plaintiff.[2]

Similarly, there is no evidence that the solar lenses do not qualify as solar energy property under Section 48. Solar energy property is "any equipment which uses solar or wind energy to generate electricity, to heat or cool or provide hot water for use in a structure, or **to**

[2] See Rule 52(c).

provide solar process heat." (Emphasis added.) Dr. Mancini testified that "solar process heat is basically a way of taking thermal energy that you collect and applying it to some other application, other than generating power, using the heat." (TR.105). Dr. Mancini added, "I suppose if you were doing research and development and as part of the process where heating water for a site that could be considered process heat." (TR. 200). Dr. Mancini stated that the lenses concentrated solar energy sufficient to generate at least 750°. (TR. 199). There is no place on earth where sunlight naturally generates 750°. To accomplish that requires significant solar energy concentration, which the Fresnel lenses RaPower sells have accomplished. This concentrated solar energy was then used in research and development of patented new concentrators, patented new heat exchangers, and in connection with a turbine engine. All of this meets the government expert witness' description of "solar process heat" –the term used in Section 48.

Other witnesses testified to their observations of the concentrated solar heat, including Dr. Mancini (TR 104:25-105:3; 198:21-199:11), Lynette Williams (TR 1009:10-20), Preston Olsen (TR 1161:16 – 1162:13), Richard Jameson (TR 1234:11-20), Matt Shepard (TR 1545:20-25), and Greg Shepard (TR 1666:7-1667:5; 1750:13-1752:1). This Court has stated that "the record is pretty clear that there has been some experimental generation of process heat." (TR 2195:12-14).

There is no evidence or testimony that the solar process heat generated by the RaPower-3 Fresnel lens does not qualify as energy property under Section 48.

The government contends in its proposed findings of fact that a component of the "false or fraudulent statement" is that customers were in a "trade or business" (Doc. 334, page 73). Defendants contend that such a statement cannot be the basis for a tax scheme for at least three

reasons: first, the statement is a true statement of the law; second, the statement was at all times supported by advice from counsel; and third, each taxpayer's circumstances uniquely determine whether they qualify—and all purchasers are told to consult with their own tax preparer about their unique circumstances.

The question of whether a person qualifies for the energy tax credit of section 48 and whether the person is in a trade or business is circular and dependent on the same facts. Section 48 requires that energy property be depreciable:

> For purposes of this subpart, the term "energy property" means any property—
> (A) which is—
> (i) equipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat,
> ****
> **(C) with respect to which depreciation (or amortization in lieu of depreciation) is allowable . . .**

26 U.S. Code § 48 (Emphasis added).

As clearly explained in both the Anderson letters (PLEX 23A and 570) and the Birrell memorandum (PLEX 362) a person can only qualify for the solar energy tax credit if the person can meet the requirements of taking depreciation for the asset. There is no evidence that Defendants misrepresented the tax provisions or deceived any lens purchaser when Defendants advocated that, upon buying a RaPower-3 Fresnel solar lens, the purchaser was involved in a trade or business.

Defendants suspect Plaintiff's challenge on this issue is whether all purchasers of lenses qualify as being involved in a trade or business. That qualification was explained in great detail by Ms. Anderson on the third day of trial, April 4, 2018. Ms. Anderson scrutinized the question of "material participation" (TR. 578), one of the main requirements of whether the energy property is depreciable. See Ms. Anderson's testimony from TR. 591 to 595.

The conclusion elicited by Ms. Healy-Gallagher in her examination of Ms. Anderson is "material participation is based on the facts applicable to the individual taxpayer." (TR. 595). That is the same instruction given by Defendants to purchasers of solar lenses. Defendants always advised purchasers of solar lenses to obtain the advice of their own tax advisor or attorney relating to the applicability of the solar energy tax credit and depreciation.

Ms. Anderson included in her letters the recommendation that the individual taxpayer consult his own lawyer and tax professional if he wants professional assurances that the information and interpretation of it is appropriate in his particular situation. (TR. 660, re PLEX 570). The version of the Anderson letter ultimately adopted by RaPower to give to lens purchasers states the letter was provided to help the taxpayer "understand the possible tax saving benefits of purchasing energy equipment through RaPower-3 . . . so that you can consult with your own tax professional abut the potential tax advantages." (TR. 669-670, PLEX 23A).

The Birrell memorandum included similar language as used by Ms. Anderson. Mr. Birrell included the Circular 230 disclaimer that the advice given in his memorandum was not intended to avoid paying federal tax penalties that may be imposed on a taxpayer and that each taxpayer should seek advice from its own tax advisor based on his or her individual circumstances. (TR. 701, PLEX 362, page 16).

The RaPower3.com website also includes a statement that each taxpayer should obtain his own advice on tax matters. (TR. 1465, EX 832A "It is the sole responsibility of purchasers of RaPower-3 equipment to verify all tax benefits through a competent tax preparer.")

There can be no doubt that Defendant instructed, advised, recommended, advocated, and promoted the potential tax benefits of buying RaPower Fresnel lenses and leasing the lens for use in research, testing, demonstrations and development. There is no evidence that the statements

by Defendants were false or fraudulent. The tax benefits of Section 48 are available to purchasers of RaPower Fresnel lenses who qualify. There is no tax fraud or illegal tax scheme.

Pursuant to Rule 52(c), judgment as a matter of law should be entered in favor of all Defendants that Plaintiff has failed to prove an essential element of its claims, specifically, the existence of a false or fraudulent tax scheme.

Dated this 12th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' RULE 52(c) MOTION FOR JUDGMENT AS A MATTER OF LAW NO FRAUDULENT TAX SCHEME** was sent to counsel for the United States in the manner described below.

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