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IN THE UNITED STATES TAX COURT

In the Matter of:	)	
PRESTON OLSEN & ELIZABETH OLSEN, ET AL.,	)	Docket Nos. 26469-14, 21247-16
Petitioners,	)	
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	Consolidated

Volume: 1

Pages: 1 through 153

Place: Provo, Utah

Date: January 21, 2020

or a four-line statement that we're engineers with experience. It does not allow us to explore it, pre-trial, to develop what that experience was, who they are, and what they did.

Additionally, the report doesn't -- is factually deficient on the experiments. We were unable to read the report and determine -- or ascertain exactly what was done, what records were kept, what was utilized in the report to determine what they determined.

The third point, Your Honor, is they conducted a test that has no relationship to the system that we're arguing about. Nowhere was a Stirling engine discussed in the years of the promotion, yet that's what they utilized.

The last point, Your Honor, is, at no point in time has the Respondent ever contended that the lenses do not produce heat in some fashion.

THE COURT: That's the point I want to get to. It seems like they were -- that Respondent concedes the point that they thought -- they demonstrated by their experiment.

MR. SORENSEN: Concede is a strong word, Your Honor. We have never contested that the lenses do not produce some form of heat.

THE COURT: So Respondent does -- in your Pre-Trial Memo, you said you agree that the lenses can be

used to produce enough heat that in some system --

MR. SORENSEN: Some system somewhere.

THE COURT: -- that could potentially produce energy electricity, right, in some system?

MR. SORENSEN: Could produce electricity. That doesn't mean that it could commercially produce --

THE COURT: Right.

MR. SORENSEN: -- electricity or that it could utilize the system as Mr. Johnson envisioned it. That's correct, Your Honor. Well, there's one point, and I misspoke. We would like to have the witnesses excused prior to where we are at this point, the witnesses who are going to testify.

THE COURT: The fact witnesses?

MR. SORENSEN: The fact witnesses. And I meant to do that prior to starting my argument. We'd like to have those witnesses excluded from the courtroom.

THE COURT: During the Motions in Limine?

MR. SORENSEN: Yes. We're going to also address another issue that involves on the fact witnesses that we would like to have the Court cleared for.

THE COURT: Okay. Any objection?

MR. JONES: No.

THE COURT: Okay.

MR. JONES: No, I don't. I don't have any,

argument, Your Honor.

THE COURT: Okay.

MR. SORENSEN: It was something I had in my notes.

But yes, the Court is correct in that we did state that in our pre-trial memo. So we believe that with that fact involved, that nothing that these experts will testify to is relevant.

THE COURT: Um-hum. Because the experiment goes to a point that's not in --

MR. SORENSEN: Not in dispute. And it's envisioning and testing the system that's not in dispute, not even part of the case.

THE COURT: And how about the two CPAs? I understand you have conceded the penalty because you didn't get requisite supervisor approval, as we had in our latest ruling required.

MR. SORENSEN: Yes. We violated the claim ruling, essentially. So we have conceded all additions to tax in this case. Additionally, Your Honor --

THE COURT: And accuracy penalties, you mean?

MR. SORENSEN: Yes.

THE COURT: Yeah.

MR. SORENSEN: I'm sorry. Yes. Additionally, Your Honor, the CPAs in this case, and we'll address them

MR. JONES: Okay.

THE COURT: So I think that's irrelevant.

Okay. Mr. Jones, would you like to address the expert report point?

MR. JONES: Yeah, the expert report --

THE COURT: The thing that troubles me is --

MR. JONES: Sure.

THE COURT: -- primarily, it does seem to me that it may not just be relevant. If Respondent agrees that you can take these lenses, and they can be used to generate enough heat through some system to power an engine and produce electricity, if that's conceded, I don't see what more they prove by their experiment than that.

MR. JONES: If I can get that concession on the record, I will agree. Yeah.

THE COURT: Well, I think they said they have an agreement, but concession was too strong a word.

MR. JONES: Right.

MR. SORENSEN: We don't disagree, Your Honor, that the lenses do produce heat, and that heat, in some systems, can be then used to generate electricity. We do not dispute that.

MR. SORENSEN: So is that -- the question, though, is that a concession. So --

THE COURT: But let me read the relevant sentence of the report. Find it. Okay. It's on page 11, "Conclusion: It's clearly, by the most basic definitions, electrical power. The Johnson Fresnel Lens System produces enough solar process heat to run a Stirling engine and produce electricity. Selecting a Stirling engine size for this application and tuning the engine generator will likely improve performance". Well, it --

MR. SORENSEN: Up until that last sentence, Your Honor, I think we were okay.

THE COURT: How about system? I don't think you agree there's a system.

MR. SORENSEN: No, we don't agree. We agree the system that they tested and utilized was not the system --

MR. JONES: Not the system.

MR. SORENSEN: -- not the system that was envisioned.

MR. JONES: And just if I could speak to that specific point. So this case is not about the system that International Automated Systems and RaPower3 developed and promoted and sold and so forth, or -- what the taxpayer at issue in this case purchased was the lens. And so its use is what is at issue. It gets leased to an entity called LTB. There is an understanding about what those lenses were intended to do, once they were leased, that this

taxpayer has. And so the concern -- the overarching concern that Petitioners have is, is that lens -- does it qualify to solar energy property under the regs? Is it energy property under the Code, by extension?

And so we are dealing with just the lens itself. We believe that a reading of the regs qualifies it as solar energy property because it can be used in a system that will generate electricity.

THE COURT: Well, I think you're getting into you --

MR. JONES: Sure.

THE COURT: -- opening argument now. But I'm just trying to -- I mean, if we take the word "system" out, if we just say that the conclusion of these engineers was that, by the most basic definition electrical power, the Johnson Fresnel Lens produces enough solar process heat to run an engine and produce electricity. If Respondent would agree with that, right --

MR. SORENSEN: As long as there's not a commercial --

THE COURT: Right. Right.

MR. SORENSEN: -- determination.

THE COURT: Right.

MR. SORENSEN: That the lenses do produce sufficient heat, that the Stirling engine did produce some

electricity, we have no problem with that.

THE COURT: I think you've got the concession that --

MR. JONES: Okay.

THE COURT: -- you want. So on that basis, I will exclude this report as not relative to any point in dispute.

MR. JONES: With that concession being part of the ruling?

THE COURT: Right. Right.

MR. JONES: Thank you.

MR. SORENSEN: Your Honor, there is one other housekeeping matter to be brought up, a delicate matter. Petitioners intend to call Neldon Johnson as a witness. And the Respondent would like some clarification on two points related to that. The first is, we're concerned about a conflict of interest that we want to establish on the record so that we don't have a collateral attack sometime down the road. In that I mean, Mr. Johnson hired Mr. Jones as an attorney some years ago, related to the transaction. We're not sure whether Mr. Jones still has some relationship capacity as an attorney for the witness versus his capacity to the Petitioners. We're also aware that the District Court, in their finding, found that Mr. Johnson was paying Mr. Jones' fees for this litigation.

were changed after the initial contracts were signed. And so the owners of the plants, which were typically pension funds and other consortia -- I'm sorry. Am I --

Q I'm actually going to stop you, if that's okay.

A Okay. No, that's --

Q I'm more interested in where you derive your -- why you would hold yourself out as an expert to be able to say, this is a commercial-grade application.

THE COURT: Well, could I ask a question about that. It seems to me, commercial grade can be a lot of different things. On the one hand, an invention that has gone through all four stages of development and really works and is ready to be sold, you might say is commercial. When it's going to be highly profitable given the market and the competing products and the tariffs and the taxes, that's whole different question, right?

THE WITNESS: And that's why I said, I'm not aware of a good definition of commercial grade, what that means. And that's why I'm trying to qualify it a little bit here. But the work I did in those cases was technical work. It was not related to that.

Certainly, commercial grade has a lot to do with profitability and whether you can sell it in the open market. And you might try, and it doesn't work. And you don't make it.

Q Okay.

A But you would never stick your hand into the beam itself because your hand then would absorb --

Q Oh, I see.

A -- and convert --

Q I understand now what you're saying.

A -- convert that energy --

Q Yeah.

A -- into heat and cook you.

Q You would burn yourself, in other words.

A You'd burn yourself.

Q Okay. I'm sorry. I was --

A Yeah, I --

Q -- lost in translation. I'm sorry.

A I'm probably gaming semantics games here, and I'll try not to do that.

Q That's okay. Okay. So again, it sounds like we don't have a disagreement with the ring. The ring with the lenses on it comes to a focal point where there is heat absorption. And so from that point, do you believe that it's possible to implement any number of different systems that might generate or that would generate electricity?

A Yes. I mean, I think the discussion yesterday about maybe putting photocells at that location or

something like that, although there are other issues and so forth. Yes. The answer to that is yes.

Q Okay. Great. And so the statement about -- and I think -- I don't want to jump ahead either, but the -- we're all kind of agreeing that these lenses can be used in a system. And I think you take exception to it being this system -- but in a system to generate electricity; that's a fair statement?

A You could potentially. Whether that would be a commercial system -- it wasn't the -- my discussion has been focused on the system that was proposed.

Q I understand.

A Okay.

Q And specifically I should say, you looked at a specific set of assumptions and variables that were provided to you. Were you also provided other materials? Like, I have an engineering drawing that has the solar towers connected to just one turbine. Did you --

A That was the system that I was modeling.

Q Okay. Isn't your -- we can look at your report real quick. It's on page -- I apologize. Let me look to it.

A 16? I'm guessing.

Q Yeah, you're right. Thank you. Page 16. So this has a diagram where there are multiple towers

THE WITNESS: I think Mr. Johnson would tell you that he produced it, and there are sections in it that he did not produce but he admits that other technical experts did produce, but he won't identify --

THE COURT: Okay. What I'm trying to get at is whether this was your --

THE WITNESS: No, it's not my drawing.

THE COURT: -- attempt to model what was going --

THE WITNESS: This is his.

THE COURT: This is -- okay. Got it.

THE WITNESS: And this is a system that I tried to use --

THE COURT: I understand.

THE WITNESS: -- to build the model.

THE COURT: Right.

BY MR. JONES:

Q And we heard testimony yesterday from Randy Johnson, for example, where they had also intended just to use one tower alone. And so you're -- I just want to make sure I'm being clear. You're saying there's no reason why that couldn't be done. You could use this one tower or --

A That's correct. They could use just one tower and the power cycle there, yes.

Q Okay. Great. Did you perform any tests on your

Q Okay.

A But to say that it doesn't need to be done simply isn't correct.

Q Yeah. So you testified in direct when Mr. Bradbury was asking you that you think it probably could be a viable system. And I got specific points here, but I think in your direct you said this so we can save some time here, but you kind of made the overarching statement that, yeah, get better personnel, I guess wash the lenses. I think you have an issue about sandblasting the towers and painting them, things like that. But get all this in place. You think the technology could probably work to generate electricity in five years, you said. Is that --

A Oh, I don't know. I don't know five years. But I think if you got the right team on it, and you really invested the money in it, you could probably make something that would generate electricity using the concept as it stands.

Now, could it -- what it compete in commercial marketplace was really the issue I was going after, and I don't think it would.

Q And is that entirely cost-driven?

A Without having gone through the process, I can't say for 100-percent sure that it could be made to work. But I'm relatively confident that if you put people who

Q -- test? Mr. Gardner also testified about one tower being erected with four arrays full of complete lenses. Do you remember that testimony?

A I do.

Q When you visited in January of 2017, what was the condition of the towers?

A There wasn't any with complete complementive facets. The towers -- in fact, there was a little bit of difference between the two visits, but only one of them was tracking at the time. And it had -- it would only track during the first visit, and as -- it would not track in the elevation mode.

And they showed me that, and it wasn't tracking automatically; it was being done manually. During that first visit at the manufacturing facility, Randale Johnson had showed me his tracking -- he was developing the tracking program, and he explained how it was going to work.

And I think during the second visit, I think they were tracking it automatically, but I don't know that. But Randale was operating it, so I assume that that same dish was tracking in both elevation and azimuth. But it was not fully populated with lenses at that point either.

Q Thank you.