

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

WALEED HAMED, as Executor of the)	
Estate of MOHAMMAD HAMED,)	
)	
Plaintiff/Counterclaim Defendant,	)	CIVIL NO. SX-12-CV-370
v.)	
	)	ACTION FOR INJUNCTIVE
FATHI YUSUF and UNITED CORPORATION,	)	RELIEF, DECLARATORY
	)	JUDGMENT, AND
Defendants/Counterclaimants,	)	PARTNERSHIP DISSOLUTION,
v.	)	WIND UP, AND ACCOUNTING
)	
WALEED HAMED, WAHEED HAMED,)	
MUFEED HAMED, HISHAM HAMED, and)	
PLESSEN ENTERPRISES, INC.,)	
)	
<u>Additional Counterclaim Defendants.</u>	)	Consolidated With
)	
WALEED HAMED, as Executor of the)	
Estate of MOHAMMAD HAMED,)	
	)	CIVIL NO. SX-14-CV-287
Plaintiff,)	
v.	)	ACTION FOR DAMAGES AND
	)	DECLARATORY JUDGMENT
UNITED CORPORATION,)	
)	
<u>Defendant.</u>)	
)	
WALEED HAMED, as Executor of the)	
Estate of MOHAMMAD HAMED,)	
	)	CIVIL NO. SX-14-CV-278
Plaintiff,)	
v.	)	ACTION FOR DEBT AND
	)	CONVERSION
FATHI YUSUF,)	
)	
<u>Defendant.</u>)	

**YUSUF'S MOTION TO CLARIFY OR RECONSIDER ORDER DEEMING
REQUEST TO ADMIT NO. 1 ADMITTED**

Pursuant to V.I. R. Civ. P. 6-4(b), defendant/counterclaimant Fathi Yusuf ("Yusuf"), through his undersigned counsel, respectfully submits this Motion to Clarify or Reconsider the

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Order Deeming Hamed Request to Admit No. 1 (“Hamed RTA No. 1”) Admitted. There is an ambiguity in Request Number 1 regarding whose tax returns it is referring to, and the Master’s Deemed Admission does not resolve that ambiguity. Moreover, as explained below, one reading of the Deemed Admission would be inequitable and flatly contrary to positions taken by Mohammad Hamed before the Virgin Islands Internal Revenue Bureau (“IRB”).

I. The Court’s Deemed Admission as to Hamed RTA No. 1 Perpetuates an Ambiguity in the Request.

Hamed RTA No. 1 states as follows:

Request to Admit 1 of 50:

Request to admit number 1 of 50 relates to Claim H-13 (Previously identified as 210) – described in the claims list as “Hamed payment of taxes during criminal case.”

Admit or deny that Fathi, Fawzia, Maher, Nejeh, Syaid, Zayed and Yusuf Yusuf’s income taxes were paid with Partnership funds for the years 2002-2012, but the Hamed taxes were not paid with Partnership funds.

In its Order of April 12, 2018, the Court deemed the following to be admitted:

- (1) Fathi, Fawzi, Maher, Nejeh, Syaid, Zayed and Yusuf Yusuf’s income taxes were paid with Partnership funds for the years 2002-2012; and (2) *Hamed taxes* were not paid with Partnership funds.

See April 12, 2018 Order, p. 5. (emphasis added). It is Part (2), that “*Hamed taxes* were not paid with Partnership funds” that is not wholly correct unless further clarified.

Hamed RTA No. 1 specifically relates to Hamed Claim H-13, which is a claim that the Partnership should reimburse two members of the Hamed family – Waleed and Waheed Hamed – for income tax payments they made to the IRB in 2013 in the total amount of \$133,128.00 for back income taxes owed for wages earned as employees of the supermarket businesses during the 2002 – 2012 tax years. The use of the shorthand term “Hamed taxes” in the Request is not defined.

Without a definition, the “Hamed taxes” shorthand is ambiguous because it could refer to income tax payments made by Mohammad Hamed and/or one or more of his sons, each of whom filed income tax returns for the 2002 – 2012 time period in 2013, and each of whom had tax withholdings made by United during the 2002 -2012 period for wages earned by them at the Plaza Extra grocery stores.¹ Viewed within the context of Hamed Claim H-13, “Hamed taxes” would presumably mean the income tax payments made by Waleed and Waheed Hamed that are referenced in that Claim, rather than the income taxes of any other Hamed family member that were paid or withheld from their paychecks at the Plaza Extra stores during the 2002 – 2012 tax years. This distinction is critically important as to Mohammad Hamed, because in 2013 he filed with the IRB 1040 returns for the 2002 – 2012 tax years representing that half of the income earned by the Partnership for those tax years was his, and that the Partnership (through United Corporation) had already paid the entirety of his half of the income taxes for those years. Hence, the deemed admission should be limited to reflect that income taxes paid for *Waleed Hamed* and *Waheed Hamed* for the tax years 2002 through 2013 were not paid with Partnership funds, rather than a deemed admission that “Hamed taxes” for 2002 through 2012 were not paid with Partnership funds.

To the extent that the deemed admission with the current language “Hamed taxes” could be construed to mean that Mohammad Hamed’s taxes were not paid with Partnership funds, the admission would be inconsistent with positions taken by Mohammad Hamed, and with correspondence sent to the IRB on his behalf by his accountant in 2013. Some background regarding the criminal case and the way in which tax obligations were paid for the periods before

¹ For almost the entirety of the 2002 to 2012 time period, a U.S. Marshal was overseeing the operation of the Plaza Extra stores and the finances of the stores.

and after the indictment for tax evasion is necessary in order to understand why it would be improper for the deemed admission to apply to Mohammad Hamed's income taxes. At the very least, the deemed admission should be revised to exclude that possible reading of it.

During the pendency of the Criminal Case, which commenced in 2003, Mohammad Hamed never claimed to be a partner in the grocery store operations.² Indeed, to have made that claim before the plea agreement was made and the United guilty plea accepted would have invited his joinder as a defendant in the criminal case. Consistent with longstanding practice going back decades, United, a subchapter S "flow through" corporation, assigned all of the grocery store income for the 2002 to 2012 tax years to Mr. Yusuf and the other Yusuf shareholders of United to be taxed at that level. And United made annual and quarterly estimated income tax payments to the IRB for those tax years on behalf of Mr. Yusuf and the other Yusuf shareholders for the grocery store income that had been allocated to each of them.

The plea agreement in the criminal case, which was entered in February 2010 and amended in 2011 and again in 2013, provided that United would pay \$10,000,000 to the IRB for the tax years 1996 to 2001 to cover back corporate and individual income taxes and gross receipts taxes for those tax years. Under the plea agreement, United would plead to one count of the indictment (false return) and all charges brought against the individual defendants (Fathi, Maher and Nejeh Yusuf, and Waleed and Waheed Hamed³) would be dismissed.

²Mohammad Hamed filed no tax returns for the years 1997 to 2012 until 2013, after the plea agreement had been entered. In his earlier returns, he did not claim to be a partner in the supermarket business and his income tax returns filed with the IRB treated his income as wage income, and it was well under six figures for every return.

³Mohammad Hamed was not named as a defendant in the criminal case.

As for the tax years that followed 2001, the plea agreement required United and the individual defendants to satisfy all of their income tax filing and payment obligations for those years.⁴ As stated above, United made regular estimated income tax payments for business income allocated to Fathi, Maher and Nejeah Yusuf for the tax years 2002 to 2012. In June 2013, United agreed that in addition to estimated tax payments that had already been made for the three Yusufs, United would pay an additional sum of \$6,586,132 for income taxes the three of them still owed for the 2002 to 2012 time period because of shortfalls in withholding or making estimated payments. Contemporaneously with the making of that \$6,586,132 payment, income tax returns for United and the individual Yusufs were filed with the IRB. *See Exhibit A – Plea Agreement and Plea Agreement - Second Addendum.*⁵

A few months after Mohammad Hamed filed this instant lawsuit, his accountant, David Jackson, sent the IRB a letter in May 2013 enclosing completed 1040 income tax returns for Mohammad Hamed for the tax years 2002 to 2012 in which he claimed approximately 50% of the gross income from the supermarkets shown on the United corporate income tax returns for those years, and took the position that United had already paid all of his taxes owed on that income in estimated tax payments made on behalf of the Yusuf shareholders of United. *See Exhibit B – Mohammad Hamed Tax Returns for 2002-2011 and accompanying letter from David Jackson to*

⁴With the permission of the U.S. Attorney, no income tax returns for United or the individual defendants for the tax years 2002 to 2012 were filed until 2013, although estimated income tax payments were made during the course of that period.

⁵The \$6,586,132 payment made by United did not cover the deficiency that was reported on Waheed and Waleed Hamed's income tax returns filed in 2013 for the tax years 2002 to 2013. That deficiency was based on under-withholding of taxes for wages earned at the Plaza Extra stores or a failure to report non-wage income from other sources.

the IRB of May 15, 2013 explaining the allocation of business income on his returns and the statement that his income taxes on that income had already been paid.⁶ Mohammad Hamed's tax filings and correspondence sent on his behalf reflect his position that taxes due on his income from the Partnership *were paid by United with Partnership funds*. Thus, Mohammad Hamed is judicially estopped from contravening that position in this proceeding.⁷ He may not seek an admission, or rely on a deemed admission, from Mr. Yusuf that his income taxes for the tax years 2002 through 2012 were not paid with Partnership funds. If the deemed admission as to Hamed RTA No. 1 is read to apply not just to Waheed and Waleed Hamed's income taxes for the 2002 to 2012 tax years, but also to Mohammad Hamed's income taxes for that period, the admission would be inequitable and in need of revision to make it clear that it does not apply to payment of Mohammad Hamed's income taxes. Of course, as discussed in the first section of this brief, the easiest way to address this problem is to revise the deemed admission so that it is limited specifically to the two Hamed sons, Waheed and Waleed, who contend in Claim H-13 that the income tax deficiency they paid in 2013 should be reimbursed by the Partnership.

Consequently, Yusuf respectfully requests the Court to reconsider the precise language of the Order as to the deemed admission of Hamed RTA No. 1 and revise it to read: "(2) Income taxes paid by *Waleed Hamed and Waheed Hamed* to the IRB for the tax years 2002 through 2012 were not paid with Partnership funds." This would replace the prior language that "(2) *Hamed*

⁶See also **Exhibit C** - Attorney Holt's October 17, 2013 letter to the IRB enclosing the 2012 tax return for Mohammad Hamed.

⁷See *Sarauw v. Fawkes*, 66 V.I. 253, 264-265 (V.I. 2017) (doctrine of judicial estoppel precludes a party from asserting a position on a question of fact or a mixed question of law and fact that is inconsistent with one taken in an earlier proceeding).

taxes were not paid with Partnership funds” and eliminate a possible construction of this admission that is contrary to positions taken by Mohammad Hamed before the VI taxing authorities that United had paid his income tax liability for the 2002 to 2012 tax years.

CONCLUSION

For the foregoing reasons, Yusuf respectfully requests that the Master grant his Motion to Clarify or Reconsider and revise the deemed admission to Hamed No. RTA No. 1 in the form described above. A proposed order is attached.

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

DATED: April 20, 2018

By:



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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2018, I caused the foregoing **Yusuf's Motion to Clarify or Reconsider Order Deeming Request to Admit No. 1 Admitted** which complies with the page and word limitations of Rule 6-1(e), to be served upon the following via the Case Anywhere docketing system:

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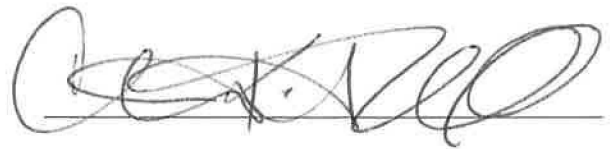
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ORDER

THIS MATTER came before the Special Master (hereinafter "Master") on Yusuf's Motion to Clarify or Reconsider Order Deeming Request to Admit No. 1 Admitted. Having considered the reasons and basis for the motion;

Accordingly it is hereby:

ORDERED that the Motion to Clarify or Reconsider Order Deeming Request to Admit No. 1 Admitted is **GRANTED**. It is further

ORDERED that as to Hamed Request to Admit No. 1, the following matters are deemed admitted: (1) Fathi, Fawsi, Maher, Negeh, Syaid, Zayed and Yusuf Yusuf's income taxes were paid with Partnership funds for the years 2002-2012; and (2) Income taxes paid by Waleed Hamed and Waheed Hamed to the IRB for the tax years 2002 through 2012 were not paid with Partnership funds. It is further,

ORDERED that this deemed admission shall replace the earlier deemed admission set forth in the Order of April 12, 2018 as to Hamed Request to Admit No. 1

DONE and **ORDERED** this the ___ day of _____, 2018.

EDGAR D. ROSS
Special Master