

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE**

FEDEX CORPORATION	)	
and SUBSIDIARIES	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
_____	)	

Case No. 2:20-CV-02794

**MEMORANDUM IN SUPPORT OF UNITED STATES’ MOTION TO EXTEND THE  
TIME PERIOD TO RESPOND TO FEDEX’S MOTION FILED ON MARCH 8, 2024  
AND TO CONTINUE CONFERENCE SET FOR APRIL 2, 2024  
AND FOR EXPEDITED CONSIDERATION OF THIS MOTION**

The United States moves this Court to extend its deadline to respond to the motion filed by FedEx on March 8, 2024 (Dkt. 52). The government asks that the Court set the response deadline for **April 12, 2024**. Concurrently, the government also asks that the Court continue the status conference currently set in this case for April 2, 2024, until a date after briefing on that motion concludes. Finally, the government requests that the Court give this motion expedited consideration.

Good cause exists for the Court to grant the motion for numerous reasons. First, reading FedEx’s motion for what it actually is—a motion for summary judgment—the United States is already entitled to more time to respond under the Local Rules of this Court. FedEx styled its motion as one for entry of judgment under Rule 58. (Dkt. 52 at 1). However, FedEx does not actually seek entry of a judgment. (See id. at 6 (“The parties are working to agree on the amount

of the refund due for FY18 and FY19.”)). The entirety of FedEx’s brief is spent on “prophylactic” legal arguments—contents not appropriate for a request under Rule 58.

Indeed, as this Circuit recognized “[t]he primary purpose of Rule 58 ‘is to enable a party to know when the court regards the case as closed and intends that no further action be taken, and thus to know when the time to appeal has commenced to run.’” Ladder Man, Inc. v. Manufacturer’s Distrib. Servs., Inc., 234 F.3d 1268, 2000 WL 1679439, at \*3, n.3 (6th Cir. 2000) (quoting Hooker v. Weathers, 990 F.2d 913, 914 (6th Cir.1993)). Thus, Rule 58 is not intended as an independent mechanism for seeking judgment on unresolved legal issues. But that is exactly the relief FedEx seeks here. (See Dkt. 52 at 7 (“The motion prophylactically addresses what FedEx understands to be the government’s new argument.”)). In addressing legal claims that this Court has not yet decided, let alone heard, FedEx admits that it asks this Court for judgment outside the scope of that contemplated by Rule 58. As such, FedEx’s motion is more accurately described as a motion for summary judgment. See Fed. R. Civ. P. 56. The proper time for the United States to respond to FedEx’s motion is April 5, 2024. See L.R. 56.1(b).

Second, there is no urgency to the disposition of FedEx’s pending motion. FedEx chose to litigate this case in district court against the backdrop of a pending IRS audit.<sup>1</sup> And despite its assurances that it would not ask the Court to “supervis[e]” the IRS’s audit process, (dkt. 28 at 2), and that it would allow the audit process to “proceed according to the relevant procedures and applicable rules,” (id.), it now demands that this Court issue a final judgment as to the amount of a refund it is owed without the information necessary to calculate such a judgment. While FedEx

---

<sup>1</sup> This is a strategy apparently some tax litigators “are starting to recommend” to “bypass the administrative process.” United States v. Liberty Glob., Inc., 2023 WL 4603954, at \*1 n.1 (D. Colo. June 1, 2023). As that court observed, a taxpayer’s “lamentations” about the speed and process of a district court proceeding “ring particularly hollow when its own machinations . . . forced the matter into district court.” Id.

“anticipates that the parties can resolve the computational issues while this motion is pending,” FedEx cannot unilaterally dictate when or whether the government will agree with its view as to how this audit will conclude. (Dkt. 52 at 2 n.2).

Third, FedEx will suffer no harm by allowing the government the benefit of three weeks to fully formulate its arguments. Interest will continue to accrue in its favor on any refund that would be issued if it ultimately prevails in this litigation. 26 U.S.C. § 6611(a) (providing interest on overpayments of tax). FedEx made no attempt in the meet-and-confer process to identify any harm that will befall it other than a conclusory assertion that “this litigation needs to move to a conclusion.” And of course, a three-week delay will not prevent this litigation from moving to a conclusion; it will merely allow it to do so while permitting the government an appropriate amount of time to fully respond to the plaintiff’s arguments.

Lastly, despite the parties being in regular correspondence over the last few weeks, FedEx did not inform the government in advance that it planned to file its motion last Friday.<sup>2</sup> This occurred notwithstanding counsel for FedEx suggesting during earlier meet-and-confer conversations that it would alert the government when it intended to file this motion, so the parties could prepare and submit a joint briefing schedule to the Court. Counsel for the United States relied on this representation in good faith when making plans to tend to this and other litigation.<sup>3</sup>

---

<sup>2</sup> This assumes *arguendo* that FedEx correctly filed its motion under Rule 58 (it didn’t). As discussed, this motion seeks relief more appropriately obtained under Rule 56. The government seeks this extension in part to avoid any confusion between the parties or the Court as to when a response should be due in this matter.

<sup>3</sup> Given this discussion, the attorneys representing the government scheduled leave and depositions in another matter before FedEx filed the instant motion with a purported two-week briefing schedule. Even with this information, FedEx declined to consent to this motion, perhaps thinking its best chance to prevail is to deny the government a fulsome response.

In advance of filing this motion, the government asked FedEx what position it would take as to the relief requested. In response, FedEx stated it would oppose *any* deviation from its view of the current briefing schedule.<sup>4</sup> Given FedEx’s opposition to *any* extension of time for the government and government counsel’s prior commitments, the government requests expedited consideration of its motion for an extension.

DATED: March 12, 2024

DAVID A. HUBBERT  
Deputy Assistant Attorney General

*s/ Kyle L. Bishop*  
KYLE L. BISHOP  
D.C. Bar No. 999007  
Trial Attorney, Civil Trials - Eastern  
ROBERT J. ATRAS  
Trial Attorney, Civil Trials – Eastern  
U.S. Department of Justice – Tax Division  
P.O. Box 227, Ben Franklin Station  
Washington, D.C. 20044  
202-616-1878 (Bishop)  
202-598-3738 (Atras)  
Fax: 202-514-6866  
Kyle.L.Bishop@usdoj.gov  
Robert.J.Atras@usdoj.gov

---

<sup>4</sup> During the meet-and-confer process, FedEx suggested that it “understand[s] that the government already has a written statement of its new argument.” FedEx does not state how it reached this understanding, and the government can represent to the Court and to FedEx that the Department of Justice—the agency charged with representing the government in this action, *see* 28 U.S.C. § 517; 26 U.S.C. § 7122(a)—has prepared no such statement; it has received an analysis from IRS Chief Counsel. That analysis is the beginning, not the end, of the process in formulating a response.

**CERTIFICATE BY COUNSEL  
PURSUANT TO LOCAL RULE 7.2(A)(1)(B)**

Pursuant to Local Rule 7.2(A)(1)(B), the undersigned certifies that counsel for the parties discussed the extension sought in the United States' *Motion to Extend the Time Period to Respond to FedEx's Motion Filed March 8, 2024 and to Continue Status Conference set for April 2, 2024* by email. On March 11, 2024, Kyle L. Bishop, on behalf of defendant, emailed Joseph B. Judkins George M. Clarke and Cameron C. Reilly of Baker & McKenzie, requesting the extension and continuance. The same day, Judkins responded by email that the plaintiff opposes the extension and continuance requested in this motion.

s/ Kyle L. Bishop  
Kyle L. Bishop  
Trial Attorney