UNITED STATES TAX COURT

JON & HELEN DICKINSON,

Petitioners,

vs. DOCKET NO. 9526-19

COMMISSIONER OF INTERNAL REVENUE, Filed Electronically

Respondent.

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PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Petitioners file this Memorandum of Law in Support of Petitioner's Motion for Summary Judgment on the issue of whether petitioner Jon Dickinson's donation of stock of Geosyntec Consultants, Inc. ("Geosyntec") to Fidelity Investment Charitable Gift Fund ("Fidelity") and Fidelity's subsequent sale of the stock should be treated as complete gifts made by Mr. Dickinson followed by independent sales by Fidelity during each of the taxable years of 2013, 2014 and 2015 (the "Years At Issue"), and not, as respondent asserts, a deemed redemption of the shares resulting in capital gain income to the petitioners, followed by a deemed contribution of the redemption proceeds.

STATEMENT OF FACTS

Geosyntec is a privately held company. Jon Dickinson was a shareholder of Geosyntec during the Years At Issue. Mr. Dickinson is bound by the Geosyntec

Consultants, Inc. Amended and Restated Shareholders' Agreement effective as of April 14, 2009 (the "Shareholder Agreement"). A copy of the Shareholder Agreement is attached as Exhibit 1[1].

Fidelity is a charitable organization, tax-exempt under §501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code[2]") that is classified as a public charity under Code §509. Fidelity receives donations from various sources. Generally, as Mr. Dickinson was ultimately required to do, Fidelity requires donors of non-cash assets to sign a Letter of Understanding (LOU) with respect to such donations. A copy of the LOU template is attached as Exhibit 2. According to the LOU:

- Once Fidelity accepts a contribution, it is irrevocable and not refundable.
- Once Donor transfers the asset, Fidelity acquires the entire economic interest in the asset and the asset is exclusively owned and controlled by Fidelity.
- Fidelity, as the sole owner of the asset, maintains full discretion over all conditions of any subsequent sale of the asset.
- As holder of the asset, Fidelity is not and will not be under any obligation to redeem, sell, or otherwise transfer the asset.

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[1] All referenced exhibits are attached only to this Memorandum.
[2] All Section (§) references are to the Internal Revenue Code of 1986, as amended.

When receiving a non-cash asset, it generally is Fidelity's policy to liquidate the asset. Such a policy, however, is merely Fidelity's internal policy. According to the LOU, Fidelity funds a donor's giving account with the sales proceeds received from the sale of a donated asset.

On August 31, 2013, Mr. Dickinson contributed 500 shares of Geosyntec stock (the "Stock") to Fidelity, and Fidelity sold the shares back to Geosyntec as of October 10, 2013 at the price set forth in the Shareholder Agreement. These facts are reflected in Geosyntec's letter to Fidelity dated September 3, 2013, Fidelity's letter to Geosyntec dated October 10, 2013 and Fidelity's letter to Mr. Dickinson dated October 15, 2013. A copy of each letter is attached as Exhibits 3, 4 and 5 respectively. The letter from Geosyntec to Fidelity stated that "[a]s of 31 August 2013, Geosyntec reflects [Fidelity] as the owner of these shares on the books and records of the company." Geosyntec did not request or require Fidelity to redeem the Stock.

On July 31, 2014, Mr. Dickinson contributed 400 shares of the Stock to Fidelity and Fidelity sold the shares back to Geosyntec as of August 26, 2014 at the price set forth in the Shareholder Agreement. These facts are reflected in Geosyntec's letter to Fidelity dated August 1, 2014, Fidelity's letter to Geosyntec dated August 26, 2014 and Fidelity's letter to Mr. Dickinson dated August 28, 2014. A copy of each letter is attached as Exhibits 6, 7 and 8 respectively. The

letter from Geosyntec to Fidelity stated that "[a]s of 31 July 2014 Geosyntec reflects [Fidelity] as the owner of these shares on the books and records of the company." Geosyntec did not request or require Fidelity to redeem the Stock.

On May 31, 2015, Mr. Dickinson contributed 1,800 shares of the Stock to Fidelity, and Fidelity sold the shares back to Geosyntec as of June 3, 2015 at the price set forth in the Shareholder Agreement. These facts are reflected in Geosyntec's letter to Fidelity dated June 1, 2015, Fidelity's letter to Geosyntec dated June 3, 2015, and Fidelity's letter to Mr. Dickinson dated June 5, 2015. A copy of each letter is attached as Exhibits 9, 10 and 11, respectively. The letter from Geosyntec to Fidelity stated that "[a]s of 31 May 2015, Geosyntec reflects [Fidelity] as the owner of these shares on the books and records of the company." Geosyntec did not request or require Fidelity to redeem the Stock.

Each of the above described contributions of the Stock to Fidelity was approved by Geosyntec's Board of Directors pursuant to Section 7 of the Shareholder Agreement. Copies of the pertinent parts of Board resolutions approving each contribution for years 2013, 2014 and 2015 are attached as Exhibits 12, 13 and 14, respectively.

With respect to the contributions of the Stock to Fidelity for years 2013 and 2014 as described above, Mr. Dickinson executed a LOU with Fidelity. Copies of the 2013 and 2014 LOUs are attached as Exhibits 15 and 16, respectively. With

respect to year 2015, a copy of the executed LOU cannot be located. According to the executed LOUs for years 2013 and 2014, (i) the Stock was "exclusively owned and controlled" by Fidelity; (ii) Fidelity, as the sole owner of the Stock, maintained "full discretion over all conditions of any subsequent sale of the [Stock]"; and that (iii) Fidelity was not and would "not be under any obligation to redeem, sell, or otherwise transfer the [Stock]."

The fair market value ("FMV") of the Stock at the time of each contribution was separately appraised by MFA Cornerstone Consulting ("MFA").

With respect to the petitioners' returns of each Years At Issue, transfer of the Stock to Fidelity was treated as a charitable contribution, and accordingly charitable contribution deductions in the amount of the FMV of the Stock were claimed, as determined by MFA.

In the Notice of Deficiency, respondent did not adjust the amount of charitable contribution deductions claimed on petitioners' returns for the Years At Issue. The only adjustments relating to the Stock made by respondent were addition of capital gain taxes during the Years At Issue, based on respondent's erroneous determination that, in effect, Mr. Dickinson first redeemed his shares to Geosyntec, and then contributed the resulting cash to Fidelity.

ARGUMENT

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 246 (1986). The party opposing summary judgment may not rest upon the allegations set forth in its pleadings, but must produce significant probative evidence demonstrating a genuine issue for trial. See Anderson at 248-49; Gnifkowski, et al. v. U.S., 93 AFTR 2d 2004-1159 (DC MN 2004). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson at 247-48. If the opposing party fails to carry that burden, or fails to establish the existence of an essential element of its case on which that party will bear the burden of proof at trial, summary judgment should be granted. Celotex at 322. In this case, there is no apparent disagreement as to the material facts and circumstances but a disagreement as to the application of Rev. Rul. 78-197, 1978-1 C.B. 2, Palmer v. Commissioner, 62 T.C. 684, *acq. and nonacq.,aff'd on other grounds*, 523 F.2d 1308 (8th Cir. 1975), and subsequent cases cited herein. Thus, this case is ripe for resolution by means of summary judgment. See Blosser v. Commissioner, T.C. Memo. 2007-323.

1. Contribution Of Stock Was Gift, Not Redemption Followed By Contribution Of Sales Proceeds

A. Fidelity Was Not Legally Bound, And Geosyntec Could Not Compel Fidelity To Surrender Stock For Redemption

Respondent's position directly contradicts his longstanding and clearly articulated administrative position as set forth in Rev. Rul. 78-197, *supra,* and case law. See e.g., Palmer v. Commissioner, 62 T.C. 684 (1974), *aff'd on other grounds*, 523 F.2d 1308 (8th Cir. 1975). Respondent also completely misreads the Shareholder Agreement. As a result of its erroneous understanding of case law and its own revenue ruling and facts, in the Notice of Deficiency dated March 21, 2019 (the "NOD"), the respondent reached the wrong conclusion that, "[Mr. Dickinson]'s charitable donation of shares of Class A common stock in Geosyntec Consultants, Inc. (Geo), followed by liquidation of the shares of [Fidelity] in exchange for cash, should be treated in substance as a redemption of the shares, taxable under section 301."

The Tax Court in Palmer established the "legal obligation test." In Palmer, the taxpayer contributed appreciated stock of a corporation to a charitable foundation, both of which were controlled by the taxpayer. One day after the contribution, the board of directors and shareholders of the corporation approved an agreement whereby the shares of the corporation stock held by the foundation

were to be redeemed. Later in the same day, the board of directors and trustees of the foundation approved the redemption. The taxpayer took a charitable contribution deduction using the full fair market value of the stock at the time of the contribution. The Tax Court held that "[e]ven though the donor anticipated or was aware that the redemption was imminent, the presence of an actual gift [to the charitable foundation] and the absence of an obligation to have the stock redeemed have been sufficient to give such gifts independent significance." Id. at 693. In rejecting the IRS's argument that the redemption was anticipated, the Tax Court stated that "expectation is not enough" because at the time of the gift, "the redemption had not proceeded far enough along for us to conclude that the [donee] was powerless to reverse the plans of the petitioner. In light of the presence of an actual, valid gift and because the foundation was not a sham, we hold that the gift of stock was not in substance a gift of the proceeds of redemption." Id. at 694. The Tax Court noted the tax treatment of the contribution would be different if "[they] were to find that the [taxpayer] arranged for a redemption of such shares and then contributed the assets so acquired to the foundation." Id. at 690-91. However, the Tax Court found no such pre-arrangement[3] in Palmer.

The holding in Palmer was confirmed by respondent in Rev. Rul. 78-197, *supra,* which went one step further to adopt a "legally bound" standard, where

[3] The pre-arrangement test is discussed in Blake v. Commissioner, 697 F.2d 473 (2nd Cir. 1982), which is analyzed in subsequent sections of this Memorandum.

respondent stated that "[t]he Service will treat the proceeds of a redemption of stock under facts similar to those in *Palmer* as income to the donor only if the donee is legally bound, or can be compelled by the corporation, to surrender the shares for redemption." (emphasis added).

Here, the facts in the instant case are similar to those in Palmer. During the Years at Issue, Mr. Dickinson made three separate contributions of the Stock to Fidelity of 1,800 shares, 400 shares and 500 shares in each year. Each contribution was approved in writing by Geosyntec's Board and subsequently was evidenced by a letter from Geosyntec to Fidelity, noting the donation as an actual gift to Fidelity. See letters from Geosyntec to Fidelity dated June 1, 2015, August 1, 2014, and September 3, 2013, attached as Exhibits 9, 6, and 3, respectively. In each of the letters, Geosyntec confirmed that "Geosyntec reflects [Fidelity] as the owner of these shares on the books and records of [Geosyntec]." Each contribution was indeed a gift and title of the Stock passed hands.

Fidelity's absolute ownership of Geosyntec Stock was not only reflected on Geosyntec's books and records, but also in Fidelity's own internal policies and procedures. For instance, in connection with each contribution, Fidelity required Mr. Dickinson to sign a LOU, acknowledging, among other items, that:

- Once the Donor transfers the asset, Fidelity Charitable acquires the entire economic interest in the Asset and the Asset is *exclusively owned and controlled by* Fidelity Charitable.
- Fidelity Charitable, as the *sole owner of the Asset, maintains full discretion over all conditions of any subsequent sale of the Asset.*
- As holder of the Asset, Fidelity Charitable *is not and will not be under any obligation to redeem, sell, or otherwise transfer the Asset.*

Although it generally is Fidelity's policy to liquidate the assets it receives as a donation, such an internal policy is by no means a mutual understanding among Fidelity, Geosyntec and Mr. Dickinson. From and after the time of each contribution in question, Fidelity was never required by Geosyntec to redeem the Stock.

Respondent might argue that Fidelity is not authorized to become a shareholder of Geosyntec because the Shareholder Agreement limits its shareholder only to Full-Time Employees as defined in Section 3-7 of the Shareholder Agreement[4]. Further, based on this flawed interpretation of the Shareholder Agreement, respondent might draw the conclusion that since Fidelity

[4] Full-Time Employee is defined in Section 3-7 of the Shareholder Agreement to mean "an employee of Geosyntec or a Subsidiary who is scheduled to work at least an average of 30 hours per week on an ongoing basis, provided that the Board shall have the power to designate, on a case-by-case basis, an employee who works less than 30 hours per week as a Full-Time Employee."

is not an employee of Geosyntec, Fidelity is obligated to sell the shares to Geosyntec.

This argument is erroneous because the Shareholder Agreement does not limit its ownership to Full-Time Employees of Geosyntec. Although Section 2 - Purpose of the Agreement - generally states that ownership of Geosyntec is restricted to Full-Time Employees who are authorized to become shareholders by the Board, shareholders of Geosyntec may also include a "trust, partnership, limited partnership or other entity or fiduciary relationship for estate planning purposes." See Section 9 of the Shareholder Agreement. These entities clearly are not Geosyntec employees. Therefore, the Shareholder Agreement does not prohibit Fidelity from becoming a shareholder of Geosyntec.

Furthermore, the Shareholder Agreement permits the Board to approve transfers of ownership of Stock not otherwise permitted by the Shareholder Agreement. Geosyntec's Board authorized each donation in writing in accordance with the Shareholder Agreement.

In addition, Geosyntec could not, and did not, compel Fidelity to surrender the Stock for redemption. After each contribution of the Stock to Fidelity by Mr. Dickinson, Fidelity became a shareholder of Geosyntec, just like any other shareholder. Geosyntec could not compel Fidelity to surrender the Stock for redemption, just like Geosyntec could not compel any other of its shareholders to

redeem their shares. As stated in the Rev. Rul. 78-197, "[t]he Service will treat the proceeds of a redemption of stock under facts similar to those in Palmer as income to the donor only if the donee is legally bound, or can be compelled by the corporation, to surrender the shares for redemption." (emphasis added).

With respect to each redemption, it was Fidelity that initiated the redemption. Fidelity was in control of the timing of each redemption. For instance, with respect to the Stock at issue in 2013, after receiving the Stock, Fidelity held the Stock for more than a month before it voluntarily decided to sell it back to Geosyntec. It could have held it for much longer had it wanted to.

When a taxpayer's transaction is substantially the same as those in the revenue ruling, the taxpayer is entitled to rely on the revenue ruling. Barnes Grp., Inc. & Subs. v. Commissioner, T.C. Memo. 2013-109 , at 37-38, aff'd, 593 F. App'x 7 (2d Cir. 2014). As this Court stated in Rauenhorst v. Commissioner, "[Rev. Rul. 78-197] has been in existence for nearly 25 years, and it has not been revoked or modified. No doubt taxpayers have referred to that ruling in planning their charitable contributions, and, indeed, petitioners submit that they relied upon that ruling in planning the charitable contributions at issue." 119 T.C. 157 at 173 (2002)[5]. Here, similar to the taxpayers in Rauenhorst, petitioners in this case meticulously followed each step described in Rev. Rul. 78-197, and went to great

[5] In point of fact, Rev. Rul. 78-197, *supra*, has now been in existence for 41 years without being revoked or modified.

length to structure their transactions to comply with applicable law. Respondent is required to follow his own revenue rulings, as the Tax Court has treated revenue rulings as concessions by the Commissioner where those rulings are relevant to the disposition of a case. Rauenhorst at 171. Syzygy Inc. Co. v. Commissioner, T.C. Memo 2019-34, at 18. It is this Court's long standing position that "Respondent's counsel may not choose to litigate against the officially published rulings of the Commissioner without first withdrawing or modifying those rulings. The result of contrary action is capricious application of the law." Phillips v. Commissioner, 88 T.C. 529, at 534 (1987) (cited in Rauenhorst, *supra*, at 171).

Petitioners also followed the specific steps provided in the Internal Revenue Code[6] in structuring the donations.

For the foregoing reasons, the contribution of the Stock and the subsequent sale of the Stock were separate and independent transactions. Fidelity was not legally bound, and Geosyntec could not compel Fidelity, to surrender the Stock for redemption, and the transactions did not meet the "legally bound" test established in Rev. Rul. 78-197.

B. Contribution Of Stock By Donor And Subsequent Sale of Stock By Donee Were Not Prearranged

[6] Code §170(f)(18).

Contribution of Mr. Dickinson's Stock to Fidelity and Fidelity's subsequent sale of the Stock were not pre-arranged. As analyzed above, the Tax Court in Palmer noted that the tax treatment of the contribution would be different if the taxpayer pre-arranged for a redemption of the shares and then contributed the shares to the charitable organization. Id. at 690-91.

The pre-arrangement test (aka mutual interdependence test or *Quid Pro Quo*) was first officially named in Greene v. United States, 13 F.3d 577 (2nd Cir. 1994), but first used (without naming it) in Blake v. Commissioner, 697 F.2d 473 (2nd Cir. 1982).

In Blake, the taxpayer had a yacht with a $2.5 million basis and a current fair market value of $200,000 to $250,000. Blake proposed the following transaction to a charitable organization: taxpayer would contribute $700,000 worth of publicly held stock to a charity, after which, the charity would sell the stock on the open market and use the proceeds to purchase the yacht from Blake. Under this proposal, Blake planned to take a charitable contribution deduction for $700,000 and claim a long-term capital loss on the sale of the yacht for $1.8 million. The transaction went through. Three or four months later, the charity sold the yacht for $200,000.

The Tax Court held that Blake actually sold the stock to the charity for $700,000 followed by a charitable contribution of the yacht. Accordingly, the

court held that Blake should recognize gain on the sale of the stock, but was allowed to take a charitable contribution deduction for the value of the yacht of $200,000. The Second Circuit affirmed the Tax Court's holding and reasoned that Blake had expected the charity to purchase his yacht. Blake even testified in court that "he would not have made a donation as substantial as the amount of the market value of the stock he transferred 'except for the boat thing.'" Blake, 697 F.2d at 478. Had the charity refused to buy the yacht, Blake would have a cause of action against the charity under the promissory estoppel theory.

In Greene, the taxpayer contributed futures contracts to a non-for-profit organization. In 1974, Greene obtained a private letter ruling from the IRS permitting Greene to take a charitable contribution deduction for the fair market value of the contracts at the time of the contribution. In 1981, the law changed to treat only 60% of the gain on futures contracts as long-term capital gain (LTCG) and the rest as short-term capital gain, resulting in the amount of charitable deduction reduced by the non LTCG from the fair market value of the contracts. In light of the law change, Greene in 1982 donated the 60% LTCG portion to charity and took a full deduction of the contributed portion. The charity later sold the contracts. The IRS argued that the donation of the 60% of the LTCG portion was an assignment of income, and the gift and sale should be collapsed together.

The Second Circuit rejected the IRS's argument and expressly stated two tests – the end result test and the mutual interdependence test, although practically, these two tests overlapped. Under the end result test, the step transaction doctrine will be invoked if it appears that a series of separate transactions were prearranged parts of a single transaction, cast from the outset to achieve the ultimate result. This test did not apply in Greene because there was no prearranged agreement to sell the contracts, even though it was highly likely that a sale would occur.

Under the interdependence test, the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series. According to the Second Circuit, the fact pattern in Blake was a good example of the interdependence test, although it could be a good example of the end result test as well. In any event, the fact pattern in Greene was materially different, in that Greene made a gift to charity and received nothing in return. There was no understanding that the charity would handle the donation in any way that would benefit Greene.

Here, the facts in the instant case are materially distinguishable from those in Blake, but substantially similar to those in Greene. Just like the fact pattern in Greene, at the time of each contribution, Mr. Dickinson made a gift to Fidelity and received nothing in return. Unlike the fact pattern in Blake, there was no pre-arranged plan for Fidelity to sell the Stock back to Geosyntec. The Board of

Geosyntec approved each transfer of the Stock to Fidelity. See each of Geosyntec's Consent Action by the Board of Directors dated June 26, 2013, July 8, 2014, and April 22-23, 2015. Although Fidelity had its own policy that it likely would redeem the Stock promptly, such likelihood did not reach the level of a legal obligation as required in Palmer. Such policy was only an internal policy of Fidelity, and there was nothing in the record showing that Fidelity, Geosyntec and/or Mr. Dickinson had a mutual understanding or agreement that the Stock was required to be sold back to Geosyntec at the time of each contribution. Although there might be some expectation that Fidelity would sell the Stock at such time as their value could be realized, Fidelity was under no legally binding obligation to do so at the time the Stock was transferred to it. Rev. Rul. 78-197 focused on the donee's control over the disposition of the donated property. Also, as the Court in Palmer noted, expectation is not enough. All along, Fidelity had the choice as to whether to redeem the Stock or hold onto the Stock. It was Fidelity's choice to liquidate its investment for the benefit of its charitable endeavors. Unlike in Blake, Fidelity did not handle the donation in any way that benefited Mr. Dickinson. For instance, Fidelity did not make arrangements to use the sales proceeds to purchase anything from Mr. Dickinson.

For the foregoing reasons, Mr. Dickinson's contribution of the Stock and Fidelity's subsequent sale of the Stock were not interdependent upon each other, and each step should be treated as having its own legal significance.

C. *The Amount of Charitable Contribution Deduction was Full Fair Market Value of Stock at Time of Contribution*

Pursuant to Treas. Reg. §1.170A-1(c), generally, the amount of contribution is the fair market value of the property, subject to reduction exceptions.

Code §170(e)(1)(A) states that the amount of a charitable contribution of property shall be reduced by the amount of gain "which would not have been long-term capital gain … if the property contributed had been sold by the taxpayer at its fair market value determined at the time of such contribution." For this purpose, the rules of Code §751 (Unrealized Receivables and Inventory Items) apply in determining whether gain on such stock would have been long-term capital gain if such stock were sold by the taxpayer. For example, if a taxpayer donated a used personal vehicle with a blue book value of $500 to charity, and the charity turned around the sold the vehicle for $200 the next day, then the taxpayer's charitable contribution deduction is limited to $200, not $500. The reason is that had the taxpayer sold the vehicle at the time of the contribution, he would have sold it for its fair market value of $200, and there was no long-term capital gain.

Here, had Mr. Dickinson sold the Stock at the time of each contribution, he would have realized long-term capital gain. Thus, the charitable deduction reduction does not apply to the extent of the long-term capital gain. Thus, the amount of the charitable deduction is the FMV of the Stock at each time of the contribution.

2. Accuracy Related Penalty And Accrued Interest Issues Will Be Moot Should the Court Grant Petitioners' Motion for Summary Judgment

In its NOD, respondent imposed a 20% accuracy related penalty under Code §6662(c), and imposed accrued interest on alleged unpaid liabilities. These issues will be moot should the Court grant petitioners' Motion for Summary Judgment.

Based upon the above, petitioners' Motion for Summary Judgment should be granted.

[Signature Page to Follow]

Dated:

January 15, 2020

Mitchell I. Horowitz
T.C.B.N. HM0395
BUCHANAN INGERSOLL & ROONEY PC
401 E. Jackson Street, Suite 2400
Tampa, Florida 33602-5236
Tel. No. (813) 222-8180
Mitchell.Horowitz@bipc.com

Qian Wang
T.C.B.N. WQ0002
BUCHANAN INGERSOLL & ROONEY PC
401 E. Jackson Street, Suite 2400
Tampa, Florida 33602-5236
Bonita.Wang@bipc.com

Counsel for Petitioners
4814-3023-0431, v. 2