UNITED STATES TAX COURT

JON & HELEN DICKINSON,

Petitioners,

vs.

DOCKET NO. 9526-19

COMMISSIONER OF INTERNAL REVENUE,

Filed Electronically

Respondent.
_____/

PETITIONERS' OBJECTION TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THE PETITIONERS, in accordance with the Court's Order dated March 23, 2020, file this Petitioners' Objection to Respondent's Motion For Partial Summary Judgment.

IN SUPPORT OF THIS OBJECTION (hereinafter referred to as the "Objection"), Petitioners respectfully show to the court:

1. Rule 121 of the Tax Court's Rules of Practice and Procedure permits a party to file a motion for summary judgment, or partial summary judgment, supported by such evidence as would be admissible at trial to show that there are no disputed material facts, such that the filing party is entitled to judgment on the

issue(s) as a matter of law. As discussed in the following paragraphs, respondent's motion fails even the most basic requirements of Rule 121.[1]

2. While paragraph 1 of respondent's motion acknowledges that the case was at issue on July 31, 2019, respondent did not reach out to petitioners until December 10, 2019 by which time, petitioners already knew the case would likely be on the June 8, 2020 trial session. Petitioners cannot be expected to wait an indefinite period of time for respondent's counsel to turn his attention to and start working a case.

3. In paragraph 12 of respondent's motion, respondent recognizes that Section 7 of the Shareholder Agreement provides that Geosyntec[2] has the right to elect to purchase under several events, including "a shareholder ceasing to be a full-time employee." This section, however, does not apply in the instant case as it is only triggered when a shareholder of Geosyntec *ceases* to be a full-time employee. Fidelity was never a full-time employee of Geosyntec. Therefore, it can never *cease* to be a full-time employee of Geosyntec. The section was also not triggered because

[1] Although the Court's Order dated March 23, 2020 does not request comments from petitioners with respect to respondent's objection to petitioners' motion for summary judgment, petitioners note that respondent has not complied with the requirements of Rule 121(d), by failing to "set forth specific facts showing that there is a genuine dispute for trial." Rather respondent's objection contains the same speculation and conjecture as pointed out in this Objection.

[2] All capitalized terms have the same meaning as defined in petitioners' motion for summary judgment, unless otherwise specified.

Geosyntec did not require Fidelity to sell its shares. Instead, in each year at issue Fidelity offered the shares to Geosyntec and Geosyntec elected to purchase the shares pursuant to section 7-3.

4. In paragraph 20 of respondent's motion, respondent focuses on Geosyntec's "board's understanding [of] Fidelity's [internal] procedures." However, respondent failed to analyze why and how such an understanding allegedly rises to the level of the two-prong test referenced by respondent in paragraph 25 (discussed in more detail later in para. __ of this Objection). The truth is, merely having an understanding of a third party's internal policy does not trigger an obligation in the third party and does not even remotely satisfy the two prong test.

5. Pursuant to the letters of understanding executed between Mr. Dickinson and Fidelity, Fidelity was the legal owner of the donated shares, had the authority to transfer the shares, but was not under any obligation to redeem, sell or otherwise transfer the shares. (See Exhibits 15 and 16 of petitioners' memorandum in support of petitioners' motion for summary judgment).

6. Furthermore, what the respondent conveniently failed to consider is that the consent actions clearly state that Fidelity is "likely" to comply with its internal procedures which will result in Fidelity's prompt tender of the shares to Geosyntec. See Exhibits 12 and 13 attached to petitioners' memorandum in support of petitioners' motion for summary judgment. Such a "likely" event does not rise to

the level of a legally binding requirement of Fidelity to surrender the shares (first prong), and such a "likely" event for sure does not rise to the level where Geosyntec can compel a redemption (second prong).

7. The first prong is addressed in respondent's objection to petitioners' motion for summary judgment (see reference in paragraph 25 of respondent's motion). However, respondent's analysis and application of the first prong of the test is speculative and wrong.

8. The first prong, derived from Palmer, tests whether the donee is legally bound to surrender the shares for redemption. Palmer v. Commissioner, 62 T.C. 684 (1974), *aff'd on other grounds*, 523 F.2d 1308 (8th Cir. 1975). In his analysis of the first prong, respondent reached the conclusion that Fidelity was legally bound to surrender the shares, based on the following suggestions and guesses which, according to respondent, might pose a possibility of stock redemption:

- Facts related to the existence of an *understanding* or prearrangement of the transaction would *most likely* come from the beginning of a series of transactions.
- The documents … *suggests the possibility* of an understanding or prearrangement.
- The proximity in time of the donations and redemptions at least *suggests the possibility* that they were prearranged.

(emphasis added).

9. The legal standard in Palmer is NOT whether the donee *is likely* to surrender the shares, or whether there is a *possibility* that the donee will surrender the shares. The Palmer standard is whether the donee is legally bound to surrender the shares.

10. The taxpayer in Palmer controlled both the issuing corporation and the foundation donee. Within one day of the stock transfer to the donee, the board of the corporation and the board of the foundation approved the redemption of the shares. It is hard to believe that the taxpayer's left hand did not know what his right hand was planning to do. Nonetheless, the Tax Court respected each step of the transactions and determined that the redemption was not prearranged.

11. In reaching that conclusion, the court in Palmer emphasized that "[e]ven though the donor anticipated or was aware that the redemption was imminent, the presence of an actual gift and *the absence of an obligation* to have the stock redeemed have been sufficient to give such gifts independent significance." (*emphasis added*) Palmer, *supra*, at 693. Furthermore, the foundation was not a sham. It was not an alter ego of the taxpayer, and the foundation in fact had dominion and control over the shares of stock received by gift from the taxpayer. Palmer, *supra*, at 693-94.

12. The facts in the instant case mirror Palmer. The two major differences were that in Palmer, the taxpayer controlled both the issuing corporation and the foundation donee. However, in the instant case, petitioners controlled neither Geosyntec (the issuing corporation) nor Fidelity (the charitable donee). In addition, the redemption of the stock in Palmer occurred only one day after the donation. Whereas, in the instant case, the redemptions occurred after 40, 26 and 3 days, respectively, of each respective donation[3]. Thus, the facts in the instant case are even more in the petitioners' favor, and no amount of additional discovery, informal or formal, by respondent is going to change that.

13. Speculative analysis of the first prong was not the only mistake made by respondent in his motion. Respondent repeatedly made assumptions without foundation and based his conclusion on those hypotheses.[4]

14. For instance, in paragraph 33 of respondent's motion, respondent again alleged that the board consent is "*indicative* that all of the steps of the transaction

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[3] For taxable year 2013, the donation occurred on August 31, 2013 and the redemption occurred on October 10, 2013; for taxable year 2014, the donation occurred on July 31, 2014 and the redemption occurred on August 26, 2014; for taxable year 2015, the donation occurred on May 31, 2015 and the redemption occurred on June 3, 2015.

[4] As noted in paragraph 2, above, respondent waited over 4 months after the case was at issue to contact petitioner's undersigned counsel, and only after it was apparent that this case was to be set for trial at the June 8, 2020 trial session (since cancelled). Respondent's counsel has sent two (2) informal requests for information, both of which have been fully responded to by petitioners.

were prearranged, and *suggests* that the board *may not have approved the donations otherwise*."

15. Legal analysis should be based on known facts, not speculations and guesses. Tax Court Rule 121, on responding to a motion for summary judgment, does not permit any party to base arguments and conclusions on hypotheses and what ifs.

16. Paragraph 30 of respondent's motion alleges that petitioners ignore the existence of sections 5, 6, and 7 of the Shareholder Agreement in establishing that Geosyntec could not compel Fidelity to surrender the Stock for redemption – the second prong. However, respondent did not provide any analysis to explain why these three sections allegedly trigger the failure of the second prong.

17. The only explanation that respondent provided was that section 5-1 of the Shareholder Agreement granted Geosyntec the right to repurchase its shares if the shareholder ceases to be a full-time employee. (See paragraphs 31 and 32 of respondent's motion). As analyzed above in paragraphs ____ of this response, section 5-1 of the Shareholder Agreement is inapplicable in the instant case.

18. Respondent alleges that when petitioner-husband transferred his stock to Fidelity, he "ceased to be an employee" of Geosyntec. (See paragraph 32 of respondent's motion). This analysis totally missed the point. The question is not when Mr. Dickinson ceased to be an employee because Geosyntec did not redeem

the shares from Mr. Dickinson. Rather, the question is when Fidelity "ceased" to be an employee of Geosyntec. As analyzed earlier, Fidelity never ceased to be an employee of Geosyntec because it was never an employee of Geosyntec in the first place.

19. Respondent relied heavily on the conclusion of Chrem without even arguing that the facts of Chrem are remotely similar to the facts of the instant case. Chrem v. Commissioner, T.C. Memo 2018-164. The conclusion of Chrem does not govern the outcome of the instant case because the facts of the two cases are materially different.

20. The transactions in Chrem, *supra*, are as follows: petitioners (along with 8 other individual shareholders) owned 100% of the stock of Comtrad Trading, Ltd. (Comtrad), a closely held Hong Kong corporation. SDI Technologies, Inc. (SDI), a U.S. corporation and a related company, proposed to purchase 100% of Comtrad's stock. After Comtrad's shareholders agreed to tender about 87% of their shares, petitioners in Chrem donated the balance of their stock to a charitable organization. SDI then completed the acquisition, purchasing the donated stock. Petitioners in Chrem claimed a charitable contribution deduction on their federal income tax return. The IRS issued a notice of deficiency determining that the petitioners were liable for tax under the anticipatory assignment of income doctrine on their transfer of shares to the charitable organization.

21. Of legal significance are the following material facts:

(a) Comtrad and SDI are closely related in that SDI was the principal customer of Comtrad during the year at issue. SDI accounted for 83% of Comtrad's revenue and 76% of its gross profit immediately preceding the year at issue.

(b) Virtually all of SDI's stock was owned by an employee stock ownership plan (ESOP). Petitioners and other Comtrad shareholders were beneficiaries of the ESOP.

(c) A majority of each company's board of directors served as directors for both companies.

(d) Most importantly, there was an agreement amongst the parties before all the transactions took place. In 2012, SDI made a proposal to acquire 100% of Comtrad's stock. According to the proposal, the stock acquisition would proceed in two steps. First, SDI would purchase 6,100 Comtrad shares from petitioners and other Comtrad shareholders. The second step was that petitioners agreed to donate the remaining 900 shares to the Jewish Communal Fund (JCF), a 501(c)(3) charitable organization, and SDI agreed to purchase each share tendered by JCF for the same price as stated in step one. Furthermore, petitioners agreed, after donating their shares to JCF, to use all reasonable efforts to cause JCF to tender the 900 shares to SDI. If this failed,

a squeeze-out merger would be triggered resulting in SDI owning 100% of Comtrad. Finally, if SDI failed to secure ownership of JCF's shares within 60 days of completion of the first step, the entire acquisition would be reversed and SDI would return the stock acquired in the first step to the tendering Comtrad shareholders.

22. Here, there was no planned acquisition involved. No related company proposed to purchase Geosyntec.

23. More importantly, there was no pre-acquisition proposal and plan involved like that in Chrem. Unlike in Chrem, petitioners' donation of the stock was not part of an overall acquisition proposal. Petitioners never were involved in any agreement to cause Fidelity to tender the stock to Geosyntec. Had Fidelity not tendered the stock back to Geosyntec, there was no "squeeze-out merger" in place to compel Fidelity to redeem the stock. Finally, had Fidelity decided to keep the stock, the gift would not be reversed like what was anticipated in Chrem.

24. Respondent flatly borrowed the Chrem conclusion without even comparing its facts with the instant case. Even a semi-diligent review of the facts in both cases would lead to the conclusion that the governing case is Palmer, not Chrem.

25. Filed concurrently with this Objection is a Supplemental Declaration by petitioner Jon Dickinson, in which he confirms that at no time did he ever have a

discussion with Fidelity about the requirement to redeem, or sell back, the shares that Mr. Dickinson had gifted under Fidelity's charitable programs. Even assuming that respondent had presented actual facts supporting the existence of a pre-arrangement, it is clear that Mr. Dickinson was the only person from Geosyntec discussing these issues with Fidelity, and the issue of redemption was never discussed.

WHEREFORE, it is prayed that Respondent's motion for partial summary judgment be denied, and petitioners' motion for summary judgment be granted.

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DOCKET NO. 9526-19

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April 30, 2020

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