

UNITED STATES TAX COURT

JON DICKINSON & HELEN DICKINSON,)
)
 Petitioners,)
)
 v.) Docket No. 9526-19
)
 COMMISSIONER OF INTERNAL REVENUE,) Filed Electronically
)
 Respondent.) Judge Buch

MOTION FOR PARTIAL SUMMARY JUDGMENT

RESPONDENT MOVES, pursuant to the provisions of Tax Court Rule 121, for a partial summary adjudication in respondent's favor upon the issue that petitioners should have recognized capital gains from the constructive redemption of petition-husband's shares of stock in Geosyntec Consultants, Inc., donated in the 2013, 2014, and 2015 tax years.

IN SUPPORT THEREOF, respondent respectfully states:

1. The pleadings in this case were closed on July 31, 2019.
2. This motion is made at least 30 days after the date that the pleadings in this case were closed and more than 60 days before the Court's June 8, 2020, trial session, on which this case is calendared. Tax Court Rule 121(a).
3. In the notice of deficiency upon which this case is based, respondent determined that petitioners should recognize capital gains from the constructive redemption of petition-

husband's shares of stock in Geosyntec Consultants, Inc. (GCI), donated in the 2013, 2014, and 2015 tax years, and that petitioners are liable for penalties pursuant to section 6662.

4. In support of this Motion for Partial Summary Judgment, respondent relies upon the pleadings, respondent's administrative file, and documents and information provided by petitioners during the pendency of this case.

Background

5. GCI is a privately held corporation.

6. Petitioner-husband was, during at least the years at issue, the chief financial officer of GCI as well as a shareholder.

7. GCI's amended and restated shareholders' agreement (Exhibit 1 to petitioners' memorandum of law in support of their motion for summary judgment), provides that it is entered into between GCI and each of the shareholders, defined as a person who owns shares of GCI stock. Petitioners' Exhibit 1, pages 1 and 3.

8. The applicability of the shareholders' agreement is total. It applies to all shareholders, current and future, and is binding on their heirs, representatives, and successors. Furthermore, any transfer of shares is "null and void unless the

terms and conditions of this Agreement are strictly observed and followed." Petitioners' Exhibit 1, page 11.

9. The shareholders' agreement, in describing its purpose, provides that:

Ownership of Geosyntec Shares is restricted to Full-Time Employees who are authorized to become Shareholders by the Board, based on criteria established by the Board. The purpose of this Agreement is to establish the rules that govern the valuation of the Shares, the rights and obligations of the Shareholders, and that restrict the transfer of Shares as necessary to maintain ownership among selected employees of the company and its subsidiaries.

Petitioners' Exhibit 1, page 1. The agreement defines "Full-Time Employee" as "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," with an allowance that the board has the power to designate employees who work less as full-time employees. Petitioners' Exhibit 1, page 2.

10. Section 5-1 of the shareholders' agreement provides that GCI has an obligation to redeem its shares, among other occurrences, "whenever the Shareholder ceases to be an employee ... or whenever Geosyntec elects, at its sole discretion, to exercise its rights under Section 7 hereof to purchase Shares from a Shareholder." Exhibit 1, page 4.

11. Section 6-3 of the shareholders' agreement provides that a "Shareholder shall have an Obligation to Sell Shares in any other case where Geosyntec elects to exercise its Right to Purchase Shares pursuant to Section 7 below." Petitioners' Exhibit 1, page 5.

12. Section 7 of the shareholders' agreement provides that GCI's right to purchase shares is triggered by several different categories of events, which include a shareholder ceasing to be a full-time employee (Section 7-1). Petitioners' Exhibit 1, page 6.

13. Section 9 of the shareholders' agreement, a portion of which is quoted in petitioners' motion, provides in full that:

In addition to the transfers that are expressly authorized or required under Sections 5, 6, and 7 above, Shares may be transferred to a trust, partnership, limited partnership or other entity or fiduciary relationship for estate planning purposes, provided that the Shareholder retains sole voting rights, that the Shareholder continues to be reflected as owner of the Shares on the Geosyntec corporate records, and that Geosyntec is entitled to recognize the Shareholder as the owner of the Shares.

Petitioners' Exhibit 1, pages 7-8.

14. During the informal consultation and communication required by this Court's rules, petitioners have represented to respondent that in 2010, the personal financial advisor of GCI's chief executive officer advised him about several entities that

had charitable contribution programs, including Fidelity Charitable Gift Fund (Fidelity). GCI's CEO passed this information along to petitioner-husband¹.

15. Petitioners have further represented that GCI shareholders began donating shares of GCI stock to Fidelity in 2011.

16. The years at issue here are 2013, 2014, and 2015.

17. In each of those years, petitioner-husband (along with other GCI employees) donated GCI stock to Fidelity.

18. In each of those years, Fidelity redeemed the GCI stock for cash shortly after the donation. In 2013, the shares of Dickinson and other employees² were transferred via a letter from GCI's secretary on September 3 (petitioners' Exhibit 3); Fidelity sold the shares back to GCI via letter dated October 10, 2013 (petitioners' Exhibit 4), 37 days after the donation. In 2014, the shares were transferred to Fidelity via a letter dated August 1 (petitioners' Exhibit 6) and sold back to GCI via a letter dated August 26 (petitioners' Exhibit 7), a

¹ Respondent does not know if the representations made by petitioners in response to respondent's informal inquiries are accurate but does not dispute their accuracy for the limited purposes of this motion and the objection to petitioners' motion for summary judgment, filed contemporaneously with this motion.

² Respondent does not yet know the identity of the other employees involved in these transactions, because their names have been redacted in the documents provided by petitioners.

span of 25 days. In 2015, the shares were donated to Fidelity via a letter dated on June 1 (petitioners' Exhibit 9) and sold back via a letter dated June 3 (petitioners' Exhibit 10), a span of two days.

19. Each of the donations of stock required approval by the GCI board. In 2013 and 2014, that approval came in the form of consent actions by the board (petitioners' Exhibits 12 and 13), while in 2015 it came via vote at a board meeting (petitioners' Exhibit 14).

20. The consent actions contain identical language indicating the board's understanding that Fidelity's procedures require it "to immediately liquidate the donated stock" by "promptly tender[ing] the donated stock to the issuer for cash." Fidelity's "immediate tender of the Shares to [GCI] and the [GCI]'s intent to purchase the stock is deemed by the Board to be consistent with the prompt repurchase of Shares following a transfer by the Shareholder, consistent with the [shareholders'] Agreement." Petitioners' Exhibit 12, page 1, and Exhibit 13, page 1. The consent actions do not eliminate, limit, or waive any of the other requirements of the shareholders' agreement. See petitioners' Exhibits 12 and 13.

Analysis

21. Either party may move for summary judgment on any or all of the legal issues in controversy. Rule 121(a). The Court may grant summary judgment only if there is no genuine dispute as to any material fact. Rule 121(b); Naftel v. Commissioner, 85 T.C. 527, 528-529 (1985). The moving party bears the burden of proving that there is no genuine dispute and that it is entitled to judgment as a matter of law. Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). When deciding whether to grant summary judgment, the Court considers the facts and the inferences drawn from them in the light most favorable to the nonmoving party. FPL Grp., Inc. v. Commissioner, 115 T.C. 554, 559 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, 85 T.C. at 529. However, the nonmoving party may not rest on mere allegations or denials but must set forth specific facts showing that there is a genuine dispute for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Sundstrand Corp. v. Commissioner, 98 T.C. at 520; see also Rule 121(d).

22. In their own motion for summary judgment, petitioners rely on Palmer v. Commissioner, 62 T.C. 684 (1974), as well as Rev. Rul. 78-197, which acquiesced to the holding of Palmer. In Palmer this Court rejected respondent's argument that a donation

of corporate stock to a donee that immediately redeemed the stock, where both the corporation and donee were controlled by the donor, should be treated as a constructive redemption of the stock under section 301. In the words of the revenue ruling, the Court did so because "the foundation was not a sham, the transfer of stock to the foundation was a valid gift, and the foundation was not bound to go through with the redemption at the time it received title to the shares." Rev. Rul. 78-197.

23. Based on that holding, the revenue ruling said that respondent "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." Id.

24. Petitioners contend that the outcome of this case is governed by Palmer and Rev. Rul. 78-197. In actuality, it is distinguishable from both.

25. The revenue ruling, which in addition to Palmer cites a number of other cases dealing with similar facts, helpfully offers a two-prong framework for determining circumstances where a donation of stock immediately thereafter redeemed should be treated as a redemption of stock by the donor: 1) where the donee is legally bound to surrender the shares for redemption, or 2) where the corporation can compel redemption. It is

respondent's position that under either prong, a constructive redemption has occurred. The second prong is the focus of this motion; the first prong is addressed in respondent's objection to petitioners' motion for summary judgment, filed contemporaneously with this motion.

26. Here, GCI's shareholders' agreement applied to both petitioner-husband, the donor of the stock, and once the donation was made, to Fidelity, the donee.

27. The shareholders' agreement also limited ownership of its shares to full-time employees³. Petitioners point to two exceptions to this rule - 1) that transfer to non-employees can be approved by the board, and 2) that under certain circumstances shares can be transferred for estate planning purposes - and conclude that because exceptions exist, there is no rule. This conclusion does not follow from the premise. Logically, if specific exceptions to a rule are stated, we must assume that those are the only exceptions, not that the rule is somehow invalid.

28. Petitioner-husband was a full-time employee of GCI, and Fidelity obviously was not. The transfer from petitioner-husband to Fidelity was approved by the board, so it falls under the

³ Such limitations and ownership are contemplated and permitted by Florida's corporation statutes. See FLA. STAT. § 607.0627(1).

first of the two exceptions identified above. In its approval, the board did not exempt Fidelity from any other of the requirements of the shareholders' agreement.

29. As to the second exception, when considered in its totality, it undermines rather than bolsters petitioners' case. Petitioners note that transfers to entities for estate planning purposes are allowed by the shareholders' agreement, but omit that such transfers of ownership cannot include the transfer of voting rights, and that GCI can and must be able to still recognize the shareholder - that is, its full-time employee - as the owner of the shares on its books. This is substantially different from the alleged complete surrender of ownership petitioners contend happened here.

30. Petitioners state flatly, without indicating the authority for the statement, that GCI "could not compel Fidelity to surrender the Stock for redemption, just like [GCI] could not compel any other of its shareholders to redeem their shares." Petitioners' memorandum in support of petitioners' motion for summary judgment, pages 11-12. This ignores the existence of sections 5, 6, and 7 of GCI's shareholders' agreement, which detail at length GCI's obligation to buy shares, the shareholders' obligations to sell shares, and GCI's right to

repurchase its shares from shareholders under certain circumstances, respectively.

31. Most pertinently here, section 5-1 provides that GCI shall have the obligation to buy its shares "whenever the Shareholder ceases to be an employee." Section 7-1 provides that GCI has the right to repurchase its shares "[w]henver a Shareholder ceases to be a Full-Time Employee of [GCI] or one of its Subsidiaries for any reason." And Section 6-1 provides that "[a] Shareholder shall have an Obligation to Sell Shares in any other case where Geosyntec elects to exercise its Right to Purchase Shares pursuant to Section 7 below."

32. As noted above, petitioner-husband was a GCI employee and Fidelity was not, so when petitioner-husband transferred his stock to Fidelity, the shareholder of that stock ceased to be an employee.

33. Petitioners note that GCI did not compel Fidelity to redeem the shares, but that Fidelity initiated those transactions. While it appears true that Fidelity saved GCI the trouble of triggering its rights under the shareholders' agreement, that is irrelevant⁴. What is relevant here is that had

⁴ If the Court disagrees with respondent that the fact Fidelity initiated these transactions is irrelevant, those acts are relevant to the potential existence of an understanding between the parties, which pursuant to Chrem v. Commissioner, T.C. Memo.

Fidelity not sought immediately to redeem the shares, GCI had the right to purchase the shares and Fidelity had the obligation to sell them to GCI, pursuant to the shareholders' agreement. In fact, in its consent actions allowing petitioner-husband to donate his shares to Fidelity, the board said that Fidelity's immediate tender of the shares back to GCI was "deemed by the Board to be consistent with the prompt repurchase of Shares following a transfer by the Shareholder, consistent with the [shareholders'] Agreement." This is indicative that all of the steps of the transaction were prearranged, and suggests that the board may not have approved the donations otherwise.

34. The transfer and ownership of the stock of GCI is governed by the shareholders' agreement. That agreement requires - with one explicit exception that does not apply in this case - that GCI stock be owned by the firm's full-time employees, unless approved by GCI's board. GCI's board approved petitioner-husband's donation of stock to Fidelity, but in so doing did not eliminate, limit, or waive any of the other requirements of the shareholders' agreement. The shareholders' agreement provides that when GCI stock ceases to be owned by a full-time employee GCI has the right to buy it back. Here, GCI did not have to

2018-164, would preclude summary judgment in petitioners' favor, as detailed in respondent's objection to petitioners' motion.

exercise its right to buy it back because Fidelity freely and immediately offered it, but the board did note that Fidelity's plan to do so was "consistent with the prompt repurchase of Shares following a transfer by the Shareholder, consistent with the Agreement," which suggests both that the board would have bought it back and that it knew it would not need to. Nonetheless, because GCI had the right to repurchase its stock once donated, petitioner-husband is deemed to have constructively redeemed it and must recognize his capital gain, as determined in the notice of deficiency. For these reasons, respondent's motion should be granted.

35. Upon the granting of this motion, petitioners' liability for penalties pursuant to section 6662 remains an issue for trial.


36. Respondent respectfully states that counsel of record has reviewed the administrative file and on the basis of the review of the file and the pleadings, concludes that there remains no genuine issue of material fact for trial upon the issue of that petitioners should have recognized capital gains from the constructive redemption of petition-husband's shares of GCI stock donated in the 2013, 2014, and 2015 tax years.

37. Counsel for petitioners objects to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

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