

UNITED STATES TAX COURT

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

OBJECTION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

RESPONDENT OBJECTS to the granting of petitioners' motion for summary judgment.

IN SUPPORT THEREOF, respondent respectfully states:

1. The key issue in this case involves a series of donations by petitioner-husband of shares of stock in Geosyntec Consultants, Inc. (GCI), his employer and a privately held corporation, to Fidelity Investments Charitable Gift Fund (Fidelity), a 501(c)(3) organization, which shortly after the donations redeemed the shares in GCI for cash.

2. On January 15, 2020, petitioners filed a motion for summary judgment. In their motion, they argue that 1) Fidelity was not legally bound, and GCI could not compel Fidelity, to surrender stock for redemption; 2) the contribution of stock by petitioner-husband and the subsequent sale of stock by the donee were not prearranged; and 3) the amount of the charitable contribution deduction was the fair market value of the stock at

the time of the contribution, because the stock was long-term capital gain property to petitioner-husband.

3. As more fully detailed in his own motion for partial summary judgment filed contemporaneously with this objection, respondent contends that GCI could compel Fidelity to surrender stock for redemption pursuant to the firm's shareholders' agreement, and that summary adjudication of that issue in favor of respondent is therefore appropriate. Material facts remain in dispute as to both whether Fidelity was legally bound to redeem the shares donated by petitioner-husband independent of the shareholders' agreement, and whether the contribution of stock by petitioner-husband and the subsequent sale of stock by the donee were prearranged. These disputes preclude summary judgment in favor of petitioners. As to petitioners' third argument, respondent does not contest that the stock was long-term capital gain property in the hands of petitioner-husband at the time of the donation.

4. Before addressing the substance of petitioners' arguments, respondent notes that a major contributing factor to the existence of disputed material facts is the premature nature of petitioners' motion. This Court's rules make clear the Court's expectation that the parties engage in informal consultation and communication regarding the issues and

pertinent facts in their cases. See Rule 70(a)(1) and Branerton Corp. v. Commissioner, 61 T.C. 691, 692 (1974) ("For many years the bedrock of Tax Court practice has been the stipulation process ... Essential to that process is the voluntary exchange of necessary facts, documents, and other data between the parties as an aid to the more expeditious trial of cases as well as for settlement purposes.") When respondent's counsel first contacted petitioners' counsel to schedule a Branerton conference, petitioners' counsel stated his intention to file the summary judgment motion. Respondent was served with the motion before receiving documents he had requested informally, and before the Branerton conference was held. In light of petitioners' responses to respondent's initial informal requests, respondent made further requests, to which petitioners have yet to respond. As detailed herein, the information respondent has requested, but not yet received, is relevant to the issues on which petitioners seek summary judgment.

5. This Court previously has rejected an objection to summary judgment based on information not in the record where the objecting party had ample opportunity to investigate the facts surrounding transactions and to request additional information from the parties involved and failed to do so. See Rauenhorst v. Commissioner, 119 T.C. 157, 175-176 (2002). Here,

the opposite is true. Petitioners' motion was filed in the midst of respondent's efforts to engage in the exchange of information required by this Court's rules.

6. In their motion, 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.

7. Based on that holding, the revenue ruling announced 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.

8. Petitioners contend that this case is materially indistinguishable from the facts envisioned by Rev. Rul. 78-197, and that respondent is therefore compelled to concede. To the

contrary, respondent contends that this case is clearly distinguishable from Palmer and Rev. Rul. 78-197.

9. 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 existence of material facts in dispute as to the first prong precludes summary judgment in favor of petitioners. As to the second prong, the undisputed facts show that GCI could compel redemption of the donated shares, as more fully detailed in respondent's motion for partial summary judgment, filed contemporaneously with this objection.

10. This Court has considered, in cases petitioners cite among others, situations similar to this one where a gift of stock was shortly thereafter sold back to the issuing corporation. "In the typical scenario, the taxpayer donates to a charity stock that is about to be acquired by the issuing corporation via redemption ... In determining whether the taxpayer

has assigned income in these circumstances, one relevant question is whether the prospective acquisition is a mere expectation or a virtual certainty." Chrem v. Commissioner, T.C. Memo. 2018-164, slip op. at 12.

11. In Chrem, the Court was considering cross-motions for summary judgment, and denied them both. The Court noted that a "relevant question is whether the charity is obligated, or can be compelled by one of the parties to the transaction, to surrender the donated shares to the acquirer," citing Rev. Rul. 78-197 and Rauenhorst, and then added that "The existence of an 'understanding' among the parties, or the fact that transactions occur simultaneously or according to prearranged steps, may be relevant in answering that question." Id. at 13. Because there was a dispute as to whether such an understanding or prearrangement existed, among other issues, the Court denied both motions. Id. at 14.

12. Petitioners have represented to respondent that GCI employees, including petitioner-husband, began exploring the possibility of donating shares to Fidelity (among others) in 2010, and first donated shares in 2011. Those donations continued into the years at issue, but facts related to the existence of an understanding or prearrangement of the transaction would most likely come from the beginnings of the

series of transactions. Respondent has requested, but not yet received, information and documents related to the beginning of the series of transactions as well as how Fidelity was selected from the several options identified.

13. The documents upon which petitioners rely from the years at issue, in addition to the facts of the transactions themselves, suggest the possibility of an understanding or prearrangement, at a minimum. In both of GCI's board's consent actions authorizing the donation of stock by petitioner-husband and others in 2013 and 2014, the board stated its 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 [shareholder] Agreement." Exhibits 12, page 1, and 13, page 1, to petitioners' memorandum of law in support of their motion for summary judgment (petitioners' exhibits).

14. In each of the years at issue, Fidelity redeemed the stock with GCI for cash shortly after the donation. In 2013, the shares owned by Dickinson and other employees 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 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. The proximity in time of the donations and redemptions at least suggests the possibility that they were prearranged. Respondent has requested, but not yet received, similar information about donations of stock made before the years at issue.

15. The record here is bereft of the evidence necessary to determine whether as a matter of law there was an 'understanding' between petitioner-husband, GCI, and Fidelity, or whether the transactions at issue in this case were undertaken as part of a prearrangement between them. If such an arrangement existed, it could give rise to a legal obligation on Fidelity's part to redeem the shares once donated. The series of transactions at issue here is part of a larger series of transactions that began before the years at issue, perhaps in 2010 or 2011, but there are no facts alleged in the pleadings or

in petitioners' motion regarding how the series of transactions began, or why.

16. Petitioners offer in support of their contentions an affidavit of Rudolph Bonaparte, GCI's board chair. Mr. Bonaparte states that he has been a GCI shareholder since 1988 and was, during the years at issue, GCI's president. He does not disclose in his affidavit whether he personally donated shares of GCI to Fidelity in the years at issue or any other time. The documents identifying the donors of stock, both those filed with petitioners' motion and those provided separately to respondent, have had the names of the donors aside from petitioner-husband redacted. See petitioners' exhibits 3, 4, 6, 7, 9, and 10. Respondent has requested, but not yet received, unredacted copies of these documents. It is worth noting, though, that petitioners have represented to respondent, in response to respondent's informal requests, that it was Mr. Bonaparte's personal financial advisor who first identified Fidelity as one of several entities with charitable contribution programs, and that it was Mr. Bonaparte who passed that information on to petitioner-husband. While the precise level of involvement of Mr. Bonaparte in the transactions at issue here remains unclear, it is broader than described in the affidavit offered by petitioners.

If it appears from the affidavits or declarations of a party opposing the motion that such party's only legally available method of contravening the facts set forth in the supporting affidavits or declarations of the moving party is through cross-examination of such affiants or declarants or the testimony of third parties from whom affidavits or declarations cannot be secured, then such a showing may be deemed sufficient to establish that the facts set forth in such supporting affidavits or declarations are genuinely disputed.

Rule 121(e). Here, cross examination may well be necessary to investigate Mr. Bonaparte's involvement in the transactions at issue and his potential for bias or lack of objectivity or credibility as a result.

17. Summary judgment is appropriate if the pleadings and other materials show that there is no genuine issue as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); Naftel v. Commissioner, 85 T.C. 527, 529 (1985). The moving party bears the burden of proving that no genuine issue exists as to any material fact and that he is entitled to judgment on the substantive issues as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "If there exists any reasonable doubt as to the facts at issue, the motion must be denied." Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992).

18. Reasonable doubt exists here as to the facts at issue because petitioners have neither provided relevant information


and documents to respondent as requested, nor included them in their otherwise voluminous motion for summary judgment. The facts and documents before the Court show that GCI could have compelled Fidelity to redeem the shares donated¹, as more fully detailed in respondent's motion for partial summary judgment. However, they are simply insufficient to support a finding as a matter of law that there existed no understanding or agreement that could have given rise to an obligation on Fidelity's part to redeem the shares. Accordingly, petitioners' motion must be denied.

¹ Even if the Court disagrees with respondent that the undisputed facts show as a matter of law that GCI had the right to repurchase its stock once donated by petitioner-husband, there are, at a minimum, material facts in dispute on that issue.

WHEREFORE, it is prayed that petitioners' motion be denied.

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