United States Tax Court

T.C. Memo. 2022-69

CLAIR R. COUTURIER, JR.,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 19714-16. Filed July 6, 2022.

Alvah Lavar Taylor and *Daniel W. Soto*, for petitioner.

Laura A. Price, *Hilary E. March*, *Noelle White*, *Patricia P. Wang*, and *Edward T. Mitte*, for respondent.

MEMORANDUM OPINION

LAUBER, *Judge*: This case involves a determination by the Internal Revenue Service (IRS or respondent) that petitioner in 2004 made an excess contribution of $25,132,892 to his individual retirement account (IRA). Section 4973(a) imposes an excise tax "in an amount equal to 6 percent of the amount of the excess contributions" that a taxpayer makes to an IRA in any given year.[1] This excise tax continues to apply to future tax years, until such time as the original excess contribution is distributed to the taxpayer and included in income. *See* § 4973(b)(2).

In 2016 the IRS issued petitioner notices of deficiency determining, for tax years 2004–2014, excise tax deficiencies totaling $8,476,705

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code (Code), Title 26 U.S.C., in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[*2] under section 4973, plus associated additions to tax and penalties.[2] Currently before the Court is petitioner's Motion for Summary Judgment under Rule 121. Petitioner contends that the IRS "is precluded as a matter of law from asserting excise tax liability under section 4973" because it did not issue him a notice of deficiency challenging his income tax treatment of the transactions that generated the excess contributions. Finding no merit in this argument, we will deny the Motion.

Background

The following facts are derived from the parties' pleadings, motion papers, and declarations and exhibits attached thereto. They are stated solely for the purpose of deciding petitioner's Motion and not as findings of fact in this case. *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). Petitioner resided in Washington when he petitioned this Court.

In 1999 petitioner was employed as the president of Noll Manufacturing Co. (Noll). He remained president of Noll at least into 2004. Noll was a subsidiary of The Employee Ownership Holding Company, Inc. (TEOHC).

TEOHC maintained an employee stock ownership plan (ESOP). As of 2004 petitioner owned 4,586 shares of stock in the ESOP. He also enjoyed benefits, beginning in 2001 or earlier, under three other compensatory plans maintained by TEOHC. Under the Compensation Continuation Agreement (CCA), a nonqualified deferred compensation plan, he was entitled upon retirement to monthly payments of $30,000 (as of 2004). He participated in an Incentive Stock Option (ISO) plan, in which he held at least 80,000 shares. And he participated in a Value Enhancement Incentive (VEI) plan, in which he held at least 500 shares (plus 200 "tax bonus units"). Petitioner's ISO and VEI shares constituted "synthetic equity" in TEOHC within the meaning of section 409(p)(6)(C). He was therefore a "disqualified person" with respect to the ESOP under section 409(p)(4).

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[2] The notices of deficiency were issued to petitioner and his wife, Vicki Couturier, but the parties later stipulated that she has no excise tax liability. By Order served March 8, 2022, we severed all claims involving Ms. Couturier and recaptioned this case in the name of petitioner husband only. The notices of deficiency also determined accuracy-related penalties under section 6662, but respondent has conceded the penalties.

[*3] After a corporate reorganization in 2004, TEOHC informed petitioner that it wished to buy out his interests. Following lengthy negotiations, TEOHC agreed to pay him $26 million in exchange for his ESOP stock and his relinquishment of the interests he held in the CCA plan, the ISO plan, and the VEI plan. The $26 million of consideration took the form of a $12 million cash payment to petitioner's IRA and a $14 million promissory note payable to his IRA. In August 2005 TEOHC paid the promissory note in full.

For the 2004 taxable year petitioner alleges that TEOHC issued him a Form 1099–R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., reporting a "gross distribution" of $26 million. (Respondent represents that the IRS has no record of having received a Form 1099–R.) The Form 1099–R allegedly reported that no portion of the distribution was taxable, with the box being checked for "distribution code G." The Form 1099–R instructions for 2004 explain that distribution code G was for a distribution that was a "direct rollover to . . . an IRA."

On April 11, 2005, petitioner timely filed Form 1040, U.S. Individual Income Tax Return, for 2004. On line 16(a) of that return he characterized the $26 million received from TEOHC as a nontaxable "rollover contribution" to his IRA. He left blank line 59, "Additional tax on IRAs, other qualified retirement plans, etc." The instruction for line 59 indicated that, if a taxpayer made excess contributions to his IRA, then he must consult IRS publications to determine whether he was required to file Form 5329, Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts. Petitioner did not include a completed Form 5329 with his 2004 return or with any subsequent income tax return.

The U.S. Department of Labor (DOL) initiated an investigation of petitioner and other fiduciaries of the ESOP for alleged violation of their fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA). In November 2008 DOL sued petitioner and other defendants in the U.S. District Court for the Eastern District of California, alleging (among other things) that they had engaged in a prohibited transaction under ERISA. That litigation was resolved by settlement in March 2010.

In connection with its investigation DOL made a referral to the IRS, in the form of a Report of Investigation (ROI), so that the IRS could consider whether to open any related tax examinations. The ROI was

[*4] received by the IRS Employee Plan Division, a component of Tax-Exempt/Government Entities, in October 2008. On November 17, 2008, DOL staff sent IRS staff a copy of the district court complaint and a DOL news release about the case.

In spring of 2009 the IRS opened an examination of the ESOP's Form 5500, Annual Return/Report of Employee Benefit Plan, to investigate whether the ESOP and one or more of its disqualified persons had engaged in a "prohibited transaction" under section 4975. At the conclusion of that examination, the IRS determined that no prohibited transaction involving the ESOP had in fact occurred. In the course of examining the ESOP, however, the IRS determined that the value of petitioner's stock in the ESOP was worth considerably less than $26 million, which caused the IRS to conclude that he had made excess contributions to his IRA in 2004. The IRS never opened an examination of petitioner's Form 1040 for 2004.[3]

On June 10, 2016, respondent issued notices of deficiency determining that petitioner is liable for excise taxes under section 4973 in the aggregate amount of $8,476,705 for 2004–2014. These deficiencies are based on the determination that petitioner's 4,586 shares of stock in the ESOP were worth only $830,392 and that TEOHC had paid the balance of the $26 million in exchange for petitioner's relinquishment of his interests under the CCA plan, the ISO plan, and the VEI plan. Since none of those interests represented interests in a "qualified plan," the IRS determined that only $830,392 constituted a valid "rollover contribution" within the meaning of section 4973(b)(1)(A). The IRS allowed growth on that amount as part of the eligible rollover, plus the $3,500 deduction normally allowed under section 219(b) for a 2004 IRA contribution, for a total allowable contribution of $867,108. The IRS determined that the balance of petitioner's $26 million contribution to his IRA, or $25,132,892, constituted an "excess contribution" under section 4973(a)(1) and (b)(2), generating excise taxes for the 11 years in question.

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[3] Respondent has submitted declarations under penalties of perjury from two IRS officers, both of whom aver that the IRS did not at any point open an examination of petitioner's 2004 Federal income tax return. Although petitioner initially disputed that proposition, for purposes of ruling on this Motion we must view all facts in the light most favorable to respondent as the nonmoving party. *See Sundstrand Corp.*, 98 T.C. at 520. In his Reply petitioner conceded, for purposes of resolving this Motion, that the IRS did not examine his 2004 return.

[*5] Petitioner timely petitioned this Court. In 2017 he filed a Motion for Summary Judgment contending that the notices of deficiency were untimely because they were issued after expiration of the three-year period of limitations specified in section 6501(a), as well as the six-year period of limitations specified in section 6501(e)(3). Respondent filed a Cross-Motion for Partial Summary Judgment, urging that the excise taxes could be assessed "at any time" under section 6501(c)(3) because petitioner had failed to report his excess contributions on Form 5329, which constitutes a tax "return" within the meaning of section 6011. *See Paschall v. Commissioner,* 137 T.C. 8, 16 (2011). In April 2019 we denied both parties' motions, concluding that the period-of-limitations issue was "intertwined with the merits," i.e., with the question whether petitioner had actually made "excess contributions" reportable on a Form 5329.

On August 27, 2021, petitioner filed a second Motion for Summary Judgment, currently before the Court. In this Motion he contends that the IRS "is legally precluded from asserting any deficiencies against [him] under section 4973 for any of the tax years at issue" because the IRS "did not assert any income tax deficiency against [him] for [2004], the tax year in which the relevant events occurred." Respondent objected to the Motion and further briefing ensued.[4]

Discussion

A. *Summary Judgment Standard*

The purpose of summary judgment is to expedite litigation and avoid costly, unnecessary, and time-consuming trials. *See Fla. Peach Corp. v. Commissioner*, 90 T.C. 678, 681 (1988). We may grant summary judgment when there is no genuine dispute of material fact and a decision may be rendered as a matter of law. Rule 121(b); *Sundstrand Corp.*, 98 T.C. at 520. In deciding whether to grant summary judgment, we construe factual materials and inferences drawn from them in the light most favorable to the nonmoving party (here respondent). *Sundstrand*

[4] On December 13, 2021, petitioner made evidentiary objections to certain exhibits attached to the Declaration of Laura A. Price, submitted by respondent in support of his opposition to the Motion. We have not considered those exhibits, and our Memorandum Opinion does not depend in any way on their contents. Petitioner's evidentiary objections are accordingly moot.

[*6] *Corp.*, 98 T.C. at 520. The question presented is essentially one of law, and we find that it may be adjudicated summarily.

B. *Analysis*

Section 4973 is in subtitle D of the Code, captioned "Miscellaneous Excise Taxes." It provides that, in the case of any IRA, "there is imposed for each taxable year a tax in an amount equal to 6 percent of the amount of the excess contributions to such individual's account[]." § 4973(a). The term "excess contributions" is initially defined as the excess of (1) the amount contributed to an IRA for the taxable year (other than a "rollover contribution" described in section 408(d)(3)), over (2) the amount allowable as a deduction under section 219 for such contribution. § 4973(b)(1). This excise tax continues to apply to future tax years, until such time as the original excess contribution is distributed to the taxpayer and included in income. *See* § 4973(b)(2).

Petitioner asserts that the excise tax liabilities determined in the notices of deficiency are "legally impermissible" because the IRS "is barred" and "is precluded as a matter of law" from asserting liability against him under section 4973. But he has pointed to no statute or regulation that is alleged to have such a preclusive effect. The terms he uses to construct his argument have the ring of estoppel, but he has identified no action or inaction sufficient to create a claim of estoppel against the Government.[5] The most obvious source for legal preclusion would be expiration of the relevant period of limitations. But petitioner previously moved for summary judgment on that point, and we denied his Motion upon finding material facts in dispute. To the extent he is making a different argument now, he cannot be relying on the periods of limitation specified in section 6501(a) or (e)(3).

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[5] The doctrine of equitable estoppel is applied against the Commissioner "with utmost caution and restraint." *Schuster v. Commissioner*, 312 F.2d 311, 317 (9th Cir. 1962), *aff'g* 32 T.C. 998 (1959), *and rev'g First W. Bank & Tr. Co. v. Commissioner*, 32 T.C. 1017 (1959); *see Norfolk S. Corp. v. Commissioner*, 104 T.C. 13, 60 (1995), *supplemented by* 104 T.C. 417 (1995), *aff'd*, 140 F.3d 240 (4th Cir. 1998). The U.S. Court of Appeals for the Ninth Circuit, to which an appeal in this case would presumably lie, requires the party seeking to apply the doctrine against the Government to prove "affirmative misconduct going beyond mere negligence." *Purer v. United States*, 872 F.2d 277, 278 (9th Cir. 1989) (quoting *Wagner v. Dir., FEMA*, 847 F.2d 515, 519 (9th Cir. 1988)). Affirmative misconduct requires "ongoing active misrepresentations" or a "pervasive pattern of false promises." *Purcell v. United States*, 1 F.3d 932, 940 (9th Cir. 1993) (quoting *S&M Inv. Co. v. Tahoe Reg'l Plan. Agency*, 911 F.2d 324, 329 (9th Cir. 1990)).

[*7] Petitioner grounds his "legal preclusion" argument on the fact that the IRS "has not asserted an income tax deficiency against [him] for the year 2004, the year of the alleged excess contribution under section 4973." But there is nothing in section 4973, the Treasury regulations, or any other IRS authority that makes the assertion of an income tax deficiency a precondition for determining an excise tax deficiency for the same year.

There are many reasons why the IRS might do the latter without having done the former. The taxpayer may have filed an income tax return, but that return may have eluded scrutiny through the "audit lottery." The taxpayer may have made an excess contribution but claimed no deduction under section 219; there would then be no deduction to disallow and no deficiency to assert. The taxpayer may have failed to file a return, and the IRS may have received no third-party reports suggesting the need to prepare a substitute for return. *See* § 6020(b). Or the taxpayer may have had no obligation to file a Form 1040 because his gross income was below the filing threshold. *See* § 6012(a)(1)(A); 2004 IRS Instructions for Form 5329, at 1 ("If you do not have to file [an] income tax return, complete and file Form 5329 by itself at the time and place you would be required to file Form 1040.").

Any such taxpayer might have made an excess contribution to an IRA, which could be any contribution larger than the amount allowable as a deduction under section 219(b)(5) (for 2004, $3,500). But section 4973 does not condition the imposition of an excise tax on whether the taxpayer has an income tax liability, whether the taxpayer has filed (or the IRS has examined) an income tax return, or whether the IRS has issued the taxpayer a notice of deficiency in income tax. Section 4973(a) provides, simply and unambiguously, that "there is imposed for each taxable year a tax in an amount equal to 6 percent of the amount of the excess contributions to such individual's account[]."

Petitioner bases his "legal preclusion" argument, not on anything in the Code or the regulations, but on the assertion that the IRS has taken "inconsistent positions." The excise tax deficiencies at issue are predicated on a determination by the IRS that petitioner for 2004 is entitled to a "rollover contribution" of $867,108 rather than $26 million. On that theory the IRS might have determined that petitioner, for income tax purposes, had unreported income for 2004 in excess of $25 million. Because the IRS did not assert what would have been a very large deficiency in income tax, petitioner contends that the IRS is "precluded as a matter of law" from determining any deficiency in excise tax.

[*8] A central flaw in petitioner's argument is its premise: that the IRS has taken inconsistent positions. The IRS took no position whatever about petitioner's income tax liability for 2004. The Employee Plans Division received a DOL referral indicating that TEOHC's fiduciaries (including petitioner) may have engaged in a "prohibited transaction" with the ESOP. The Employee Plans Division opened an examination of the ESOP's Form 5500; it ultimately resolved that matter in petitioner's favor, determining that neither he nor the ESOP had any liability under section 4975. But in the course of investigating the ESOP the IRS determined that petitioner's 4,586 ESOP shares were not worth $26 million. That determination generated the section 4973 excise tax liability for excess contributions to his IRA.

At no point did the IRS examine petitioner's Form 1040 for 2004 or make any determination regarding his income tax liability for 2004. Petitioner contends, in essence, that the IRS's inaction with respect to his income tax return amounted to tacit approval of the position he took on that return, i.e., that he had made a valid rollover contribution of $26 million. But the law is well established: The IRS's failure to examine a return, or its failure to challenge a particular position that a taxpayer took on a return, does not constitute a concession or admission that the taxpayer's position was correct. *See Coca-Cola Co. & Subs. v. Commissioner*, 155 T.C. 145, 207 (2020); *Union Equity Coop. Exch. v. Commissioner*, 58 T.C. 397 (1972), *aff'd*, 481 F.2d 812 (10th Cir. 1973); *Rose v. Commissioner*, 55 T.C. 28, 32 (1970). This bedrock principle underlies the well-known maxim that every tax year stands on its own.[6]

In *Mazzei v. Commissioner* (*Mazzei I*), T.C. Memo. 2014-55, 107 T.C.M. (CCH) 1292, we rejected an argument identical to the one that petitioner makes here. In that case the IRS issued notices of deficiency in excise tax under section 4973 on the basis of a determination that the taxpayers had made excess contributions to their IRAs. The taxpayers urged that they had no excise tax liability because the IRS had not

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[6] *See United States v. Skelly Oil Co.*, 394 U.S. 678, 684 (1969); *ATL & Sons Holdings, Inc. v. Commissioner*, 152 T.C. 138, 147 (2019); *Koprowski v. Commissioner*, 138 T.C. 54, 60 (2012); *Flora v. Commissioner*, 47 T.C. 410, 413 (1967); *see also Martin v. Commissioner*, T.C. Memo. 2021-35, 121 T.C.M. (CCH) 1237, 1242; *Larkin v. Commissioner*, T.C. Memo. 2020-70, 119 T.C.M. (CCH) 1485, 1499, *aff'd per curiam*, 2022 WL 994768 (D.C. Cir. Apr. 1, 2022); *McMillan v. Commissioner*, T.C. Memo. 2019-108, 118 T.C.M. (CCH) 188, 192; *Becker v. Commissioner*, T.C. Memo. 2018-69, 115 T.C.M. (CCH) 1364, 1375; *Bon Viso v. Commissioner*, T.C. Memo. 2017-154, 114 T.C.M. (CCH) 178, 180 n.8; *O'Neal v. Commissioner*, T.C. Memo. 2016-49, 111 T.C.M. (CCH) 1218, 1228 n.6.

[*9] determined income tax deficiencies resulting from the same transactions. *Id.* at 1294. We rejected that argument, concluding that the IRS "d[id] not take inconsistent positions for income tax purposes and excise tax purposes." *Id.* at 1295. The IRS in *Mazzei I* took no position regarding the taxpayers' income tax returns because (for income tax purposes) the applicable periods of limitation had expired. *Ibid.* The IRS "did not seek to undertake the useless action" of determining income tax deficiencies that it "was prohibited by law from assessing and collecting." *Ibid.* We accordingly denied the taxpayers' motion for summary judgment.[7]

Asserting that our holding in *Mazzei I* "is incorrect," petitioner relies chiefly on an earlier memorandum opinion of this Court, *Hellweg v. Commissioner*, T.C. Memo. 2011-58, 101 T.C.M. (CCH) 1261. In that case, as in *Mazzei I* and the instant case, the IRS determined excise tax deficiencies under section 4973 but did not assert income tax deficiencies arising from the same transactions. But as we explained in *Mazzei I*, the facts in *Hellweg* were "materially distinguishable." *See Mazzei I*, 107 T.C.M. (CCH) at 1295.

In *Hellweg* the IRS determined excise tax deficiencies by recharacterizing a transaction on substance-over-form grounds. But the IRS sought to do this "for excise tax purposes only." *Hellweg*, 101 T.C.M. (CCH) at 1264. The IRS had examined the relevant income tax returns, had made no adjustments to those returns, and had issued the taxpayers "no change" letters. *Id.* at 1263. The IRS conceded that the transaction should be given effect for income tax purposes; it "argue[d] that the Transaction, while being valid for income tax purposes, lacks substance for excise tax purposes only." *Id.* at 1265. We held that the IRS was bound by its concession and could not take inconsistent positions regarding the income and excise tax consequences of the same transaction. *Id.* at 1265–67; *see Mazzei I*, 107 T.C.M. (CCH) at 1295 (distinguishing *Hellweg* because "the Commissioner took a position . . . for income tax

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[7] After the taxpayers' summary judgment motion in *Mazzei I* was denied, the case proceeded to trial, and the Court upheld the excise tax deficiencies. *See Mazzei v. Commissioner* (*Mazzei II*), 150 T.C. 138 (2018). The taxpayers appealed, and the Ninth Circuit reversed for reasons unrelated to the issue decided in *Mazzei I*. *See Mazzei v. Commissioner* (*Mazzei III*), 998 F.3d 1041 (9th Cir. 2021).

[*10] purposes that was inconsistent with the position that the Commissioner took in that case for excise tax purposes").[8]

Petitioner's reliance on *Hellweg* is misplaced for the same reason the taxpayers' reliance was misplaced in *Mazzei I*. In *Hellweg* the IRS examined the taxpayers' income tax returns, issued them "no change" letters, conceded the transaction's validity for income tax purposes, and sought to take the opposite position when asserting an excise tax deficiency. The IRS in the instant case did not examine petitioner's 2004 income tax return and took no position regarding the tax liability reported on that return. Petitioner seeks to equate the IRS's inaction on the income tax front with its explicit concession in *Hellweg*. But as explained previously, the IRS's failure to examine a return, or to challenge a particular position taken on a return, does not constitute a concession or admission that the taxpayer's position is correct. *See supra* p. 8. The IRS did not take "inconsistent positions" here, as we found that it had done in *Hellweg*. And while the IRS may be "legally precluded" by an explicit concession, it cannot be precluded by inaction, inattention, or silence.[9]

To reflect the foregoing,

An order will be issued denying petitioner's Motion for Summary Judgment.

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[8] Petitioner seeks to analogize this case to *Hellweg* by contending that the IRS (here as there) is attempting to "recharacterize" the transaction reported on the income tax return. We reject that analogy. Respondent concedes that petitioner made a valid rollover contribution with proceeds from sale of his ESOP stock. The excise tax deficiencies are based on the Commissioner's determination that petitioner's rollover contribution is limited to $867,108, i.e., the value of the 4,586 ESOP shares he owned (plus growth thereon through year-end 2004). This is fundamentally a dispute about value, not about characterization.

[9] The other case on which petitioner relies, *Ohsman v. Commissioner*, T.C. Memo. 2011-98, 101 T.C.M. 1471, is likewise of no help to him. That was a short memorandum opinion that followed *Hellweg,* explaining that the Court had "previously rejected [the IRS's] argument in a case involving similar transactions [viz., *Hellweg*]." *Id.* at 1473. The Court concluded in *Ohsman*, as it had in *Hellweg*, that "the Commissioner's approval of the transactions for income tax purposes undermined his attempted use of the substance-over-form doctrine" for excise tax purposes. *Ibid.*