UNITED STATES TAX COURT
WASHINGTON, DC 20217

KRISTOPHER L. LINGO, ET AL.,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 17356-12, 17679-12,
	)	17771-12, 17844-12.
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
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O R D E R

These cases were on the Court's January 6, 2014 trial calendar for San Diego, California, and involve members of the same family and overlapping tax years. The parties have not been able to settle, and petitioners reasonably suggested moving the cases to a partial-summary-judgment-motion track and have now filed a partial-summary judgment motion for Ms. Lingo only.

The Lingos -- husband, wife, and son -- each owned a Roth IRA during the years at issue. These IRAs lent money to third-party borrowers and received interest from the loans. At the same time, Mr. Lingo owned a corporation called STDS. STDS found borrowers for would-be lenders, including the Lingos' IRAs. Loans and interest would then pass through STDS between the Lingos' IRAs and borrowers. The Commissioner thought all this added up to multiple prohibited transactions under IRC § 4975 and he sent the Lingos notices of deficiency for the tax years 2004-2008. This case is complicated by the Lingos' divorce in February 2005, which affected whether Ms. Lingo was a disqualified person.

The Lingos argue we should grant their partial summary-judgment motion because there are no factual disputes regarding Ms. Lingo and she didn't participate in any prohibited transactions before the divorce and, since she wasn't a

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disqualified person after the divorce, couldn't engage in a prohibited transaction then either. The Lingos submitted affidavits supporting their partial summary-judgment motion, but the Commissioner says the affidavits aren't enough and are self-serving.

We may grant summary judgment when there is no genuine dispute of any material fact and a party is entitled to judgment as a matter of law. T.C. Rule 121(b); *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). After the moving party submits a proper summary judgment motion, the nonmoving party cannot rest on allegations or denials in his pleadings, but he must present specific facts showing that there is a genuine issue for trial. T.C. Rule 121(d); *Dahlstrom v. Commissioner*, 85 T.C. 812, 820-21 (1985). The moving party still bears the burden of proving there is no genuine dispute of material fact, and we read factual inferences in a manner most favorable to the nonmoving party. *Id.* Still, a party opposing summary judgment can't just ask for more of a chance to find evidence -- he has to make a showing with affidavits, declarations, or "other acceptable materials" that there is a genuine dispute about a material fact. *See Whistleblower 14106-10W v. Commissioner,* 137 T.C. 183, 188-89 (2011)

The Commissioner believes summary judgment is inappropriate because there is a disputed fact about whether Ms. Lingo did participate in prohibited transactions in 2004. The first fact the Commissioner says is in dispute is whether Ms. Lingo had an ownership interest in STDS in 2004. But the Lingos point to Mr. Lingo's affidavit that says he was the sole shareholder in 2004. There's also a signed copy of the Lingos' settlement agreement, where Ms. Lingo waived any interest after the divorce. Even if the affidavit and settlement agreement didn't exist, this fact isn't material because STDS already counted as a disqualified person for Ms. Lingo under the family attribution rules of section 4975. The Commissioner rests on his allegations and doesn't produce evidence to dispute the affidavit or settlement agreement. There's no material factual dispute here.

The Commissioner also questions whether a trust fund that received payments from STDS and sent them to Ms. Lingo's IRA existed. But there are documents showing the trust fund existed and the Commissioner doesn't produce any documents disputing this. In fact, it seems the Commissioner knew about the trust fund since the original audit. Again, no factual dispute.

There's also the issue of whether STDS got fees for being the middleman between the IRAs and their borrowers. But there's no factual dispute here either.

The Commissioner says the Lingos admitted STDS retained fees in Mr. Lingo's affidavits. But that's only partly true. Mr. Lingo acknowledges STDS retained fees, but not until two years after the Lingos' divorce. That time line is important because the Commissioner's argument here centers around 2004. The Commissioner hasn't produced any conflicting evidence here either. He did produce documents suggesting STDS received compensation for some transactions, but these transactions also didn't occur until after the divorce.

The Commissioner's last argument is that there's a factual dispute about whether the Lingos received income from STDS. Again, Mr. Lingo's affidavit says the STDS payments to the IRAs were only payments from borrowers passing through STDS. STDS acted only as a conduit. And again, the Commissioner doesn't offer any evidence disputing the affidavit -- he just says the Lingos should produce more documents to support their affidavit. That's not enough to overcome the Lingos' motion for partial-summary judgment.

But the Lingos must still show they are entitled to a decision in their favor on the issue of whether Ms. Lingo participated in prohibited transactions. Courts interpret section 4975's prohibitions broadly. *See Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159-60 (1993); *Peek v. Commissioner*, 140 T.C. 216, 224-25 (2013). Section 4975 was designed to keep taxpayers with retirement plans from using those plans in a way that could place them at risk before retirement. *Ellis v. Commissioner*, 106 T.C.M. (CCH) 468 (2013), 2013 WL 5807593 at 5.

Section 4975(c)(1)(C) prohibits a disqualified person from furnishing "goods, services, or facilities" to a plan. There's no dispute that Ms. Lingo's IRA counts as a plan under section 4975(e)(1)(B). The next question is who counts as a disqualified person? The answer is -- at least before the divorce -- a number of people. Ms. Lingo, as the IRA's owner, is a fiduciary and disqualified person of her IRA because she controls it. Sec. 4975(e)(2)-(3); *Ellis*, 106 T.C.M. (CCH) 468, 2013 WL 5807593 at 5. Mr. Lingo -- again, at least before the divorce -- was a disqualified person for Ms. Lingo's IRA since he was Ms. Lingo's spouse. Sec. 4975(e)(2)(F), (6). And then there's STDS. It's a disqualified person because it's owned by a disqualified person -- Mr. Lingo. Sec. 4975(e)(2)(G).

That brings us back to 4975(c)(1)(C). STDS -- a disqualified person -- provided services to Ms. Lingo's IRA, which counts as a plan. STDS received money from borrowers and sent the money on to the IRA, which counts as a service as respondent argues.

But is that the kind of service that is a "prohibited transaction?"

The answer is "no". The Supreme Court itself has held that a gratuitous transfer from a disqualified person to a plan is not a prohibited transaction. *Commissioner v. Keystone Consolidated Indus., Inc.,* 508 U.S. 152, 161 n.2 (1993). And this is a solid textual basis for this commonsense result: The six types of prohibited transactions in § 4975(c)(1) are colored by the last two, which bar a fiduciary who deals with a plan's property as his own, or who receives compensation in connection with a transaction involving a plan's property. The seemingly more general language of § 4975(c)(1) - (4) in no way shifts the focus of the prohibition away from a misbehaving "disqualified person." In the case of services, the more general language of "furnishing . . . between a plan and a disqualified person" includes situations where such a person contracts with a plan to provide services or somehow has a plan provide services to him. In either scenario a plan's property is at risk -- is too much being charged to the plan? Is it given too little in exchange? -- in a way that it isn't with gratuitous services of the type STDS provided here.

This becomes even more clear when one looks at § 4975(d)(2), which exempts from the prohibition services provided by a disqualified party to a plan so long as "no more than reasonable compensation is paid." The regulations then provide that a "disqualified person" who provides services without consideration isn't committing a prohibited transaction under § 4975(c)(1)(E) or (F). 26 CFR § 54.4975-6(a)(5)(ii) and (iii). We hold likewise that STDS's minor services to Mrs. Lingo's IRA were not prohibited transactions because zero compensation is "no more than reasonable compensation."[1]

It is therefore

ORDERED that petitioners' partial summary judgment motion is granted. It is also

ORDERED that on or before February 10, 2017 the parties file a status report describing their views on whether these cases will need to move to a

[1] This result is further reinforced by the damages provision in § 4975(f)(4), which is measured by the "excess compensation" for services that a "disqualified person" received.

pretrial-order track or would benefit from time to allow them to negotiate a settlement.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
December 28, 2016