UNITED STATES TAX COURT
WASHINGTON, DC 20217

ESTATE OF RICHARD L. MARSHALL, DECEASED, PATSY L. MARSHALL, PERSONAL REPRESENTATIVE, AND PATSY L. MARSHALL, TRANSFEREES, ET AL.,	
Petitioner(s),	
v.	Docket No. 27241-11, 28661-11, 28782-11.
COMMISSIONER OF INTERNAL REVENUE,	
Respondent	

O R D E R

This Court issued an opinion in this case, Estate of Marshall v. Commissioner, T.C. Memo. 2016-119, on June 20, 2016 holding petitioners liable as transferees for First Associated Contractors, Inc., f/k/a Marshall Associated Contractors, Inc.'s (MAC) unpaid tax liabilities for its fiscal year ending (FYE) March 31, 2003.

On September 14, 2016, respondent filed a Computation for Entry of Decision and on December 16, 2016, petitioners filed a Computation for Entry of Decision. On February 3, 2017, petitioners filed a Memorandum in Support of Petitioners' Rule 155 Computations and respondent filed a Notice of Objection to petitioners' Computation for Entry of Decision. On March 3, 2017, respondent filed a Reply to Memorandum in Support of Petitioners' Rule 155 Computations and petitioners filed a Reply to Notice of Objection to Computation for Entry of Decision and a Revised Computation. On April 24, 2017, respondent filed a Response to Revised Computation and on May 23, 2017, petitioners filed a Reply to Response to Revised Computation.

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The parties' computations reflect agreement on the following:

(a) MAC's liability for its FYE March 31, 2003 consists of $15,482,046 in income tax, $6,192,818 in section 6662(h)[1] penalty, and interest pursuant to section 6601 from the date MAC's FYE March 31, 2003 return was due until the day before each notice of liability was issued to petitioners.[2]

(b) The net total value of assets transferred on March 7, 2003 was $28,787,114, computed as follows: $24,410,000 cash, plus $6,766,500 of noncash tangible assets, plus $2,544,480 of future litigation proceeds, less $4,933,866 of assumed liabilities.

(c) John M. Marshall, Karen M. Marshall, Estate of Richard L. Marshall, and Patsy L. Marshall (Marshalls) were each allocated 25% of the net total value of assets transferred, or $7,196,778 each.

(d) MAC transferred net total assets of $6,766,500 to MA LLC on March 7, 2003.

(e) Each petitioner is liable for post-notice interest pursuant to section 6601 starting on the date each respective notice of liability was issued.

The parties disagree, however, on the following issues:

(a) whether petitioners are liable for prenotice interest; and

(b) whether petitioners are entitled to reductions in judgment based on Or. Rev. Stat. sec. 95.270(3), the doctrine of equitable recoupment, or other offsets.

First, petitioners are liable for prenotice interest to the extent explained herein. Interest in transferee liability cases is calculated in accordance with two

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[1]All section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

[2]The amount of sec. 6601 interest included in MAC's liability for FYE March 31, 2003 is $10,988,415 with respect to transferees Patsy L. Marshall, John M. Marshall, Karen M. Marshall, and MA LLC, which accrued from June 15, 2003, the due date of MAC's return, to October 25, 2011, the day before the issuance of their respective notices of liability. Petitioners' computations reflect an identical interest calculation for the Estate of Richard L. Marshall (Richard), however, a notice of liability was issued to Richard on August 26, 2011. As such, the amount of MAC's sec. 6601 interest with respect to Richard is $10,684,703.

separate periods–prenotice and postnotice–and, under some circumstances, two separate rates. See generally Estate of Stein v. Commissioner, 37 T.C. 945 (1962). The prenotice period is "measured from a point of time that would not be earlier than the date of transfer" up to (but not including) the notice of liability issue date. Lowy v. Commissioner, 35 T.C. 393, 395 (1960). Most State laws, including Oregon, refer to the interest that may accrue during the prenotice period as "prejudgment interest." As such, we will use the term "prejudgment interest" to refer to interest that may accrue under Oregon State law during the prenotice period.

Pursuant to the Oregon Uniform Fraudulent Transfer Act a transferee is liable for the debt of the transferor up to the amount of the transfer. Or. Rev. Stat. sec. 95.270(2). If the transferee received assets in excess of the transferor's liability (consisting of the transferor's tax, penalties, and interest through the day before the day the transferee's notice of liability was issued), then the transferee is liable for the full amount of the transferor's liability. Schussel v. Werfel, 758 F.3d 82, 88-89 (1st Cir. 2014). If the transferee received assets less than the transferor's liability, then the transferee is liable for the full amount of the assets transferred and may also be liable for prejudgment interest under State law. Id. at 91.

Because petitioners, as transferees, received assets worth less than MAC's total liability, Oregon law must determine the extent to which petitioners are liable for prejudgment interest. Under Oregon law, interest generally "cannot be awarded in the absence of either a contract or a statutory provision authorizing it." Strawn v. Farmers Ins. Co. of Oregon, 353 Or. 210, 239 (2013) (citing Dowling v. Albany Planing Mill, 238 Or. 425, 431 (1964). The statutory authority for an award of interest is Or. Rev. Stat. sec. 82.010, and provides, in relevant part:

> (1) The rate of interest for the following transactions, if the parties have not otherwise agreed to a rate of interest, is nine percent per annum and is payable on:
>
> > (a) All moneys after they become due; but open accounts bear interest from the date of the last item thereof.

Most claims for prejudgment interest in Oregon arise under Or. Rev. Stat. sec. 82.010 when the person from whom prejudgment interest is sought has breached a duty to pay money (subsection (1)(a)) or has wrongfully failed to return money to the person to whom it belongs (subsection (1)(b)). Strawn v. Farmers Ins. Co. of Oregon, 353 Or. at 240 (citing McDowell Welding & Pipefitting v. United States Gypsum Co., 345 Or. 272, 288-289 (2008)). The justification for

Oregon's prejudgment interest provision is that "[o]nce due, the debtor has the use of money to which the debtor is not entitled, while the delay in payment deprives the creditor of that use." Id. at 241.

Under Oregon law, the question of whether a court may order prejudgment interest usually depends upon whether the amount due and the time from which interest must run are readily ascertainable. Id. (citing Public Market Co. v. Portland, 171 Or. 522, 625 (1943) (interpreting a predecessor statute to Or. Rev. Stat. sec. 82.020(1)(a))); see also Farhang v. Kariminaser, 230 Or. App. 554, 556 (2009); Strader v. Grange Mutual Ins. Co., 179 Or. App. 329, 338 (2002). Petitioners are liable for prejudgment interest to the extent explained herein because the amount due and the date on which the duty to pay that amount are readily ascertainable, and petitioners had use of money to which the Commissioner was entitled.

Money becomes due for purposes of Or. Rev. Stat. sec. 82.010(1)(a) when a legal obligation to pay arises. United Farm Agency v. McFarland, 243 Or. 124, 133-134 (1966). MAC was legally obligated to pay its Federal income taxes for FYE March 31, 2003 on June 15, 2003. MAC's tax liability for FYE March 31, 2003 became due for purposes of Or. Rev. Stat. sec. 82.010(a)(1) on June 15, 2003. As evidenced by the record, the Marshalls were aware of, and actively sought to avoid paying, MAC's tax liability for FYE March 31, 2003, due June 15, 2003.

An amount due is considered readily ascertainable if the exact pecuniary amount is ascertained or ascertainable by simple computation. Public Market Co. v. City of Portland, 171 Or. 522, 624 (1943). The fact that amounts owed cannot be ascertained without resolving complex issues of fact does not bar a determination that sums certain at a date certain were owed. Precision Seed Cleaners v. Country Mutual Ins. Co., 976 F. Supp. 2d 1228, 1257 (2013).

Petitioners argue that it would have been virtually impossible to predict their liability as transferees. The record, however, indicates otherwise. MAC's pro forma Form 1120 attached to the stock purchase agreement listed MAC's Federal income tax liability as $13,225,942 for FYE March 31, 2003. The State and Federal tax liabilities reflected on the pro forma Form 1120 were used to negotiate the premium that the Marshalls were paid over MAC's net asset value. The Marshalls were paid 60% of MAC's tax liability as a premium over MAC's net asset value. As such, the Marshalls were aware that they had use of at least 60% of $13,225,942, or $7,935,565, to which they were not entitled once MAC's tax liability was due.

Petitioners are liable for prejudgment interest on $7,935,565 at a rate of 9% pursuant to Or. Rev. Stat. sec. 82.010(1)(a) from the June 15, 2003 due date of MAC's return until the day before the issuance of their respective notices of liability.

Second, petitioners are not entitled to reductions in judgment based on Or. Rev. Stat. sec. 95.270(3), the doctrine of equitable recoupment, or any other offsets. In Estate of Marshall, we determined that petitioners were not entitled to any offsets, adjustments, or other reductions to the amount of their transferee liability under Or. Rev. Stat. sec. 95.270(5) because they had at least constructive knowledge that MAC's tax liability would not be paid. Petitioners are now attempting to reduce their transferee liability by making the same arguments under Or. Rev. Stat. sec. 95.270(3) and the doctrine of equitable recoupment in their Rule 155 computations that they presented in their briefs. We declined to entertain these arguments in our opinion, so we will briefly address why they are inapplicable below.

Petitioners are not entitled to a reduction in judgment based on Or. Rev. Stat. sec. 95.270(3). Or. Rev. Stat. sec. 95.270(3) states "[i]f the judgment under subsection (2) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require." [Emphasis added.].

Petitioners contend that the equities favor them, thereby requiring an effective elimination of transferee liability. The equities, however, do not favor petitioners. In Estate of Marshall, we determined that petitioners: (i) engaged in the March 7, 2003 transaction solely to evade MAC's tax liability; (ii) had at least constructive knowledge that MAC's tax liability would not be paid; (iii) were explicitly warned about transferee liability; and (iv) agreed to receive 60% of MAC's avoided tax liability as a premium over MAC's net asset value.

MAC transferred $24,410,000 cash, $6,766,500 of noncash tangible assets, and $2,544,480 of future litigation proceeds to the Marshalls. Petitioners are not entitled to any equitable adjustments under Or. Rev. Stat. sec. 95.270(3) to the $24,210,000 cash or $2,544,480 in future litigation proceeds because cash is not subject to equitable adjustments. See Estate of Hurst v. Jones, 230 N.C. App. 162, 178 (2013) (addressing N.C. Gen. Stat. sec. 39-23.8(c), which is identical to Or. Rev. Stat. sec. 95.270(3) and UFTA sec. 8(c)).

Petitioners are not entitled to any equitable adjustments to the noncash tangible assets under Or. Rev. Stat. sec. 95.270(3). Uniform Fraudulent Transfer Act (UFTA) sec. 8(c) is identical to Or. Rev. Stat. sec. 95.270(3). Comment (3) to UFTA sec. 8(c) states:

> if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred * * * , a good faith transferee should be reimbursed for the outlay for such purpose to the extent the sale proceeds were increased thereby * * * .

Petitioners have not presented any evidence of the improvements contemplated in UFTA sec. 8(c) to the noncash tangible assets and have not satisfied any good faith requirement. For the same reason, Or. Rev. Stat. sec. 95.270(3) does not apply to any adjustment sought by petitioners listed below.

Petitioners are not entitled to a reduction in judgment based on the doctrine of equitable recoupment. "A basic requirement for equitable relief has always been the inadequacy of the remedy at law." Estate of Stein v. Commissioner, 37 T.C. 945, 957 (1962). Section 1341 is the appropriate remedy for taxpayers that are found liable as transferees and that have paid taxes on the transaction or transfer from which their transferee liability arose. Kardash v. Commissioner, T.C. Memo. 2015-197, slip. op. at *11 (citing Delpit v. Commissioner, T.C. Memo. 1992-297; Maynard Hosp., Inc. v. Commissioner, 54 T.C. 1675 (1970)).

As such, petitioners are not entitled to equitably recoup or use as an offset any Federal or State income taxes paid by the Marshalls on the long-term capital gain that they reported for the partial redemption and sale of MAC's stock on March 7, 2003. Their remedy is section 1341. Likewise, petitioners are not entitled to an adjustment or credit for interest associated with the taxes paid.

Petitioners are not entitled to equitably recoup or use as an offset any of MAC's purported income tax attributes for FYE March 31, 2003, including "projected tax savings from the duplicative interest income assessment made by respondent" and "transferor's unused federal tax benefits and state taxes paid by transferor." Petitioners contend that certain income tax attributes purportedly available to MAC, but not allowed in the notice of deficiency or in our opinion, should offset their respective transferee liabilities. In Estate of Marshall, we determined that the adjustments in MAC's notice of deficiency were correct, and we decline petitioners' invitation to reconsider this decision. Rule 155 proceedings are limited to purely computational items that must be consistent with the findings and conclusions of our opinion. Rule 155(b).

Petitioners are not entitled to an adjustment for "professional fees paid." Petitioners contend that they are entitled to an adjustment on the basis of assuming "MAC's obligation to pay legal fees associated with the ongoing U.S. Bureau of Reclamation litigation and the UBOC litigation". We accounted for future litigation costs in our valuation of the future Bureau of Reclamation (BOR) litigation proceeds that the Marshalls received in the March 7, 2003 transaction. The time to present additional evidence and advance arguments on this issue was during trial and in brief. Rule 155(c); Molasky v. Commissioner, 91 T.C. 683, 685 (1988), aff'd on this issue 897 F.22 334 (8th Cir. 1990). Petitioners have not substantiated any professional fees beyond what MAC was awarded in the Stillwater Equal Access to Justice Act appeal.

Petitioners are not entitled to an adjustment or credit for "a discount for the time value of money." Petitioners contend that a discount for the time value of money should have been applied to the future BOR litigation proceeds. The time to present evidence and advance arguments regarding this issue was during the trials of these consolidated cases and in their briefs. Rule 155(c); Molasky v. Commissioner, 91 T.C. at 685. A Rule 155 proceeding is not the proper place to raise this new issue.

Petitioners do not qualify for an offset based on the net asset value of their MAC shares. The net asset value of the Marshalls' shares is relevant to the constructive fraud analysis, specifically to the determination of whether they received a reasonably equivalent value of assets in exchange for their shares. We determined that because MAC did not receive reasonably equivalent value and was rendered insolvent as a result of the March 7, 2003 transaction, the transfers to petitioners were constructively fraudulent under Or. Rev. Stat. sec. 95.240(1). Or. Rev. Stat. sec. 95.270(5) provides a "good-faith transferee" with a reduction of their liability to the "extent of the value given the debtor for the transfer." In Estate of Marshall we determined, inter alia, that petitioners could not "claim the good-faith defense" because they had at least constructive knowledge that MAC's tax liability would not be paid.

For the reasons stated here and in our opinion it is

ORDERED that the parties are directed on or before July 28, 2017, to file with the Court their revised computations for entry of decision in conformity with this analysis as explained hereinbefore.

(Signed) Joseph Robert Goeke
Judge

Dated: Washington, D.C.
June 28, 2017