UNITED STATES TAX COURT
WASHINGTON, DC 20217

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CELIA MAZZEI, ET AL.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 16702-09, 16779-09.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

Decisions were entered in these consolidated cases on March 6, 2018, pursuant to the Court's Opinion, Mazzei v. Commissioner, 150 T.C. ___ (2018). These cases are before the Court on petitioners' motion for reconsideration of findings or opinion pursuant to Rule 161, filed April 4, 2018, and on petitioners' motion to vacate or revise decision pursuant to Rule 162, filed April 5, 2018.[1] On May 7, 2018, respondent filed responses to petitioners' motions.

The decision to grant a motion to reconsider or to vacate lies within the discretion of the Court. Estate of Quick v. Commissioner, 110 T.C. 440, 441 (1998) (motion to reconsider); Kun v. Commissioner, T.C. Memo. 2004-273 (motion to vacate), aff'd, 157 F. App'x 971 (9th Cir. 2005). Reconsideration is intended to correct substantial errors of fact or law and allow the introduction of newly discovered evidence that the moving party could not have introduced by the exercise of due diligence in the prior proceeding. Knudsen v. Commissioner, 131 T.C. 185, 185 (2008). Similarly, motions to vacate are generally not granted absent a showing of unusual circumstances or substantial error such as mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud. E.g., Mitchell v. Commissioner, T.C. Memo. 2013-204, aff'd, 775 F.3d 1243 (10th Cir. 2015); Fed. R. Civ. P. 60(b).

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

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In their motions, and for the first time in these proceedings, petitioners argue that Rev. Rul. 81-54, 1981-1 C.B. 476, covers the situation that was at issue in these cases, and that under Rauenhorst v. Commissioner, 119 T.C. 157, 170-173 (2002), we should treat Rev. Rul. 81-54 as a concession by respondent. Consequently, according to petitioners, we must vacate our decision and enter decision for them. We disagree.

In Rev. Rul. 81-54, three shareholders owned an operating business with export sales. The shareholders formed a domestic international sales corporation (DISC), the shares of which they contributed to irrevocable trusts for the benefit of their children. Rev. Rul. 81-54 held that the shareholders made initial gifts to the trusts upon the transfer of the shares to the trusts and then made subsequent gifts as each commission transaction with the DISC was completed. As a result, the commissions paid to the DISC--which were income to the DISC--were also treated as gifts to the trusts (i.e., gifts at the shareholder level) each time the exporting business paid a commission to the DISC.

Insofar as the gift-tax analysis in Rev. Rul. 81-54 has any relevance to this section 4973 excise tax case, it supports our analysis. The conclusion in Rev. Rul. 81-54 that commissions resulted in separate gifts over time at the shareholder level, rather than simply earnings on the prior gift of DISC stock, is consistent with our conclusion in these cases that each commission payment was, in substance, first a commission payment, then a dividend from the foreign sales corporation (FSC) to petitioners, and finally a contribution to the Roth IRAs.

In Rauenhorst, we treated one of the Commissioner's revenue rulings as a concession with respect to the holding contained therein, stating that "taxpayers should be entitled to rely on revenue rulings in structuring their transactions, and they should not be faced with the daunting prospect of the Commissioner's disavowing his rulings in subsequent litigation." Rauenhorst v. Commissioner, 119 T.C. at 182-183. Petitioners, however, did not rely on Rev. Rul. 81-54. If petitioners had followed Rev. Rul. 81-54, as they claim, they would have treated the commissions to the FSC both as income to the FSC and as contributions to the Roth IRAs. In other words, if they had followed Rev. Rul. 81-54, they would have reached the exact result of our Opinion in these cases (on slightly different reasoning).

Because petitioners did not rely on or follow Rev. Rul. 81-54, and because they are claiming a result that is directly contrary to the holding of Rev. Rul. 81-

54, they are not entitled to treatment of isolated statements from that ruling, taken out of context, as respondent's concession under Rauenhorst.

Petitioners also claim in their motions that "[t]he crux of the plurality's opinion[2] hinges on the questionable premise that the value paid by [p]etitioners' Roth IRAs herein for their interest in the shared FSC program was less than what the FSC was actually worth." Although their argument is not entirely clear, petitioners appear to suggest that the Court's analysis improperly treated these cases as valuation cases, such as might arise under section 482. Petitioners are mistaken.

We have not approached these cases as valuation cases, even though our analysis considers value in various respects. See Mazzei v. Commissioner, 150 T.C. at ___ (slip op. at 38, 41, 43). As our Opinion points out, the FSC stock was transferred for nominal value, and it clearly would have been worthless to an independent party. Id. at ___ (slip op. at 43-51). Our Opinion does not hold that the purchase price needed adjustment, as might occur in a section 482 case, nor did respondent assert such a challenge. Instead, the Opinion held that the alleged purchase must be disregarded for Federal tax purposes because the formal transfer did not change the positions of the Roth IRAs in the slightest. On the facts before us, we held that the Roth IRAs owned no investment upon which income could be earned.

Our holding was well within the scope of the parties' arguments. See Mazzei v. Commissioner, 150 T.C. at ___ (slip op. at 22-23). Respondent carefully set forth all of the facts of these cases, including many points relating to value. Respondent challenged all of petitioners' steps, including the purchase step. See id. at ___ (slip op. at 36). Petitioners had fair notice and ample opportunity to respond. We applied a substance inquiry to each of the steps presented by the parties, in accord with the direction of the Court of Appeals for the Ninth Circuit. See id. at ___ (slip op. at 23), and cases cited thereat. We examined each of the statutes and other authorities presented by petitioners. In all of this, petitioners have provided no authority, textual or otherwise, that would support the Roth IRAs' purchase of this FSC stock on these facts. See id. at ___ (slip op. at 60-63).

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[2]Although petitioners' motions refer repeatedly to the Court's "plurality opinion", there was no plurality opinion. These cases were decided pursuant to the Court's majority Opinion.

Petitioners' motions claim that "shared FSCs", like the FSC at issue in these cases, have "less substance" than a DISC because shared FSCs were "expressly created by Congress to have no substance whatsoever." Petitioners would appear to be suggesting that because the FSC itself may be exempt from any substance inquiry as to certain clearly defined transactions between the FSC and its related supplier (i.e., because section 925 provides a corporate-level safe harbor, of sorts), FSC shareholders must likewise be exempted from any substance inquiry as to transactions at the FSC shareholder level. Otherwise, they suggest, FSC stock generally would be rendered an unsaleable investment, contrary to legislative intent.

Our Opinion, however, does not address the treatment of FSC investments generally but addresses only the facts and circumstances of these cases, in which petitioners' business retained complete control over whether commission payments would ever be paid, and their Roth IRAs effectively paid nothing for the FSC stock, put nothing at risk, and could not have expected any benefits from an objective perspective. See Mazzei v. Commissioner, 150 T.C. at ___ (slip op. at 48).[3] Petitioners' inference that a shareholder-level exemption or safe harbor must be implied is unsound. As our Opinion explained: (1) there is no textual support for creating such an exemption, see id. at ___ (slip op. at 36-38, 60-63); (2) there is no discernible basis for petitioners' arguments with respect to Congressional intent, see id. at ___ (slip op. at 57-58); and (3) Commissioner v. Banks, 543 U.S. 426 (2005), requires that income, including dividend income, be attributed to the person who controls it, see id. at ___ (slip op. at 38-43).

Citing Ithaca Trust Co. v. United States, 279 U.S. 151 (1929), petitioners' motions also claim that the analysis in our Opinion "impermissibly uses the benefit of hindsight to establish the present value of the asset at the time the purchase was made." As described, our Opinion did not adjust the value of the FSC stock. In any event, our Opinion did not rely on hindsight. As our Opinion explained, see Mazzei v. Commissioner, 150 T.C. at ___ (slip op. at 63-65), we examined the value of the FSC stock, in the light of, among other things, petitioners'

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[3]The circumstances of petitioners' cases are not the only possible circumstances in which an FSC might be used. See, e.g., sec. 1.925(a)-1T(f), Example (6), Temporary Income Tax Regs., 52 Fed. Reg. 6451-6452 (Mar. 3, 1987) (providing an example in which the FSC "will receive" a portion of the related supplier's export receipts "equal to" a calculable amount, rather than an amount at the discretion of the related supplier).

"established capacity and clear intention to make payments", all as of "the moment of purchase". Id. at ___ (slip op. at 65).

Petitioners' motions also assert that FSCs and DISCs "are identical for excise tax purposes". In our Opinion it was not necessary for us to decide whether FSCs and DISCs are identical, as our analysis rested on the FSC statutes and regulations and on section 408A, rather than on any comparison to DISC operation. In response to petitioners' argument with respect to section 995(g) (which is a provision relating to DISCs), we pointed out that section 995(g) responds to DISC mechanics (rather than to elements common to both DISCs and FSCs) and consequently has somewhat less meaning for FSCs, which work differently. Mazzei v. Commissioner, 150 T.C. at ___ (slip. op. at 53-54). But as we said in our Opinion, even if we were to accept that section 995(g) has meaning for FSCs, at most it can be read to demonstrate Congress' acquiescence in ownership of FSCs by IRAs in general, not in all circumstances. Mazzei v. Commissioner, 150 T.C. at ___ (slip. op. at 54-55).

Finally, we note that on April 6, 2018, petitioners filed a Notice of Relevant Judicial Decisions, apprising the Court of the opinion issued by the Court of Appeals for the First Circuit, Benenson v. Commissioner, 887 F.3d 511 (2018), rev'g Summa Holdings, Inc. v. Commissioner (Summa Holdings I), T.C. Memo. 2015-119. In Benenson the Court of Appeals for the First Circuit distinguished our Opinion in these cases, stating, "We therefore express no view on whether * * * [the Tax Court's analysis in Mazzei] would be successful or change our analysis." Benenson v. Commissioner, 887 F.3d at 522 n.10. Over a well-reasoned dissent, the majority opinion in Benenson largely tracked the rationale expressed by the Court of Appeals for the Sixth Circuit in Summa Holdings, Inc. v. Commissioner (Summa Holdings II), 848 F.3d 779, 785 (6th Cir. 2017), rev'g Summa Holdings I, T.C. Memo. 2015-119. Because our Opinion in these cases has already addressed Summa Holdings II, see Mazzei v. Commissioner, 150 T.C. at ___ (slip op. at 51-53), we see no need to rehash these matters here, especially since the instant cases are not appealable to the Courts of Appeals for either the First or Sixth Circuits.

Consequently, because petitioners have failed to establish grounds as to why this Court should reconsider its Opinion or vacate its decision, it is

ORDERED: That petitioners' motion for reconsideration of findings or opinion pursuant to Rule 161, filed April 4, 2018, is denied. It is further

ORDERED: That petitioners' motion to vacate or revise pursuant to Rule 162, filed April 5, 2018, is denied.

(Signed) Michael B. Thornton
Judge

Dated: Washington, D.C.
May 24, 2018