

UNITED STATES TAX COURT
 WASHINGTON, DC 20217

JAMES L. MCCARTHY,)
)
 Petitioner(s),)
)
 v.) Docket No. 21940-15 L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)
)

ORDER

The remaining issue in this collection due process case is whether the Commissioner's Appeals Office (Appeals) abused its discretion in rejecting petitioner's proposed offer-in-compromise and a partial payment installment agreement because those proposals failed to consider the value of property held by the Stavros M. Ganias Irrevocable Trust (Trust), which Appeals determined to have been acting as the petitioner's nominee. The Trust holds, among other assets, real property located in Stratford, Connecticut (Stratford property). The parties apparently agree that, in determining whether the Trust holds the Stratford property as petitioner's nominee, it is appropriate to apply factors developed under Federal caselaw. Appeals based its determination of the Trust's nominee status on two memoranda provided by Area Counsel. Among the factors that Area Counsel considered was "whether the taxpayer retained possession of, continued to enjoy the benefits of, and/or otherwise treated as his or her own the transferred property". See Dalton v. Commissioner, 135 T.C. 393, 406 (2010), rev'd, 682 F.3d 149 (1st Cir. 2012). Area Counsel reasoned that petitioner retained possession, control, or enjoyment of the Stratford property because the Trust leased the property to American Boiler, Inc. (American Boiler), a corporation owned by petitioner's wife that he allegedly controlled. But American Boiler apparently vacated the Stratford property by October 2013.

In a conference call with the parties' counsel on October 15, 2018, we inquired about the apparent absence from the record of any evidence concerning the use of the Stratford property after October 2013. We understood respondent's

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counsel to have conceded the absence of evidence on that point but to have disputed the legal premise on which our question rested. As we understand respondent, he claims that the Stratford property can be treated as an asset available to satisfy the liability he seeks to collect from petitioner as long as the Trust held the property as petitioner's nominee when petitioner's liability arose. That would be so, respondent apparently claims, regardless of whether a change in circumstance caused the Trust no longer to hold the Stratford property as petitioner's nominee when Appeals made its decision to reject petitioner's proposed collection alternatives.

In a subsequent conference call on October 29, 2018, after intervening settlement discussions proved unsuccessful, Michael De Matos, one of respondent's counsel, asked about the prospect of additional submissions regarding the relevant time for determining nominee ownership. After we expressed our willingness to consider additional submissions, however, Mr. De Matos suggested that they might be unnecessary. He directed our attention to United States v. Cohen, 930 F. Supp.2d 962 (C.D. Ill. 2013), and claimed that it supports respondent's position on the temporal question described above. If we found the case self-explanatory on that point, Mr. De Matos reasoned, we would have no need for additional submissions.

It is not obvious to us, however, how Cohen addresses the question of when nominee ownership is to be determined. Accordingly, we have concluded that receiving the parties' written views on that question would be helpful.

The temporal question, however, is not the only legal issue raised by respondent's treatment of the Stratford property. Even if we were to accept that the Stratford property can be treated as an asset available to satisfy petitioner's liability as long as the Trust held the property as his nominee when that liability arose, it does not follow that the use of the property at that time supports respondent's nominee analysis. As far as we know, petitioner himself did not use the Stratford property at any time. It is thus not clear to us why American Boiler's leasing of the Stratford property means that the possession and enjoyment nominee factor weighs in favor of treating the Trust as petitioner's nominee in regard to that property during the term of that lease.

On the premises stated, it is

ORDERED that respondent shall, on or before November 14, 2018, submit a memorandum of law explaining the legal and factual bases for his positions that

(1) the Stratford property can be treated as an asset available to satisfy the liability he seeks to collect from petitioner as long as the Trust held the property as petitioner's nominee when that liability arose, and (2) petitioner can appropriately be treated as having retained possession of the Stratford property, continued to enjoy its benefits, or treated it as his own during the period that American Boiler leased the property from the Trust. It is further

ORDERED that petitioner may, on or before November 14, 2018, submit a memorandum of law providing any arguments he would like to make that challenge the positions of respondent described above.

(Signed) James S. Halpern
Judge

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Dated: Washington, D.C.
October 31, 2018