Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided. SD

UNITED STATES TAX COURT
WASHINGTON, DC 20217

MICHAEL DELUCA & ELIZABETH DELUCA,)
Petitioners,)
v.) Docket No. 584-18.
COMMISSIONER OF INTERNAL REVENUE,)
Respondent)

O R D E R

This case is currently calendared for trial at the trial session scheduled to begin on April 15, 2019, in New York, New York. This case is before the Court on petitioners' motion for summary judgment filed November 15, 2018, pursuant to Rule 121.[1] On December 20, 2018, respondent filed a notice of objection to petitioners' motion for summary judgment and also a memorandum of law in support of his objection. On January 4, 2019, petitioners filed a reply to respondent's notice of objection.

Factual Background

The following facts are not in dispute. In or about July 2006 petitioners established a traditional individual retirement account (IRA), MD IRA. On January 17, 2010, they caused it to be converted to a Roth IRA.

In 2011 MD IRA maintained a bank account with National Iron Bank. In December 2011 Michael Deluca began borrowing money from the MD IRA account maintained by National Iron Bank. On December 5, 2011, MD IRA made its initial loan to Mr. Deluca in the sum of $7,000, and three days later it made an additional $3,000 loan to Mr. Deluca. From 2012 through 2016 MD IRA made additional loans to Mr. Deluca, and from time to time he repaid the loans with

[1]Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect for 2014.

market rate of interest. By March 3, 2016, he had repaid in full the loans made by MD IRA.

On their income tax returns for all relevant years, petitioners treated MD IRA as an existing IRA; they did not disclose the loans to Mr. Deluca. Petitioners assert that this was an innocent mistake. In a notice of deficiency dated October 19, 2017, respondent determined in part that during 2014 petitioners had a deemed distribution of $198,048 from their Roth IRA due to prohibited transactions (i.e., the loans from MD IRA to Mr. Deluca) under section 4975(c)(1)(B).[2]

Analysis

The Court may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). The moving party bears the burden of showing that there is no genuine dispute of material fact. Sundstrand Corp. v. Commissioner, 98 T.C. at 520. In deciding whether to grant summary judgment, we view the factual materials and inferences drawn from them in the light most favorable to the nonmoving party. Id. If a motion for summary judgment has been properly made and supported by the moving party the opposing party must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial. Rule 121(d).

The disposition of this case turns upon the application of section 408(e)(2)(A), which provides:

> If, during any taxable year of the individual for whose benefit any individual retirement account is established, that individual * * * engages in any transaction prohibited by section 4975 with respect to such account, such account ceases to be an individual retirement account as of the first day of such taxable year.

There is no dispute that Mr. Deluca first engaged in a prohibited transaction with MD IRA in 2011. Consequently, under the plain terms of the statute, MD

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[2]The remaining adjustments in the notice of deficiency have been resolved through a stipulation of settlement filed by the parties on October 12, 2018.

IRA ceased to be a valid IRA as of the first day of 2011. Accordingly, respondent's determination that there was a distribution from MD IRA in 2014 is in error.

This conclusion is consistent with the holding of Marks v. Commissioner, T.C. Memo. 2018-49. In Marks, in circumstances closely analogous to those of the instant case, the Court sua sponte requested the parties to address the effect of the prohibited transaction rule of section 408(e)(2)(A). In response, the Internal Revenue Service (IRS) conceded that a prohibited transaction in a year preceding the year at issue caused the IRA to cease to be a valid IRA in the earlier year, such that there was no taxable distribution from the IRA in the later year at issue. The Court held accordingly.

Respondent asserts that Marks is not controlling because in that case the IRS did not raise, and the Court did not address, any duty of consistency defense. Respondent contends that the undisputed facts of the instant case support the application of the duty of consistency. He contends that having always treated MD IRA as an existing IRA, petitioners changed their position with respect to their 2011 return only in response to respondent's examination. Consequently, he suggests, the duty of consistency should prevent petitioners from benefitting from this change in position by asserting that MD IRA ceased existence at any time before 2014.

We agree that respondent's concession in Marks does not necessarily preclude him from invoking the duty of consistency in this case. In making his argument, however, respondent misses the larger point. The issue that the Court raised sua sponte in Marks--the consistent application of the prohibited-transaction rules for earlier years--is the same issue that petitioners have raised to defend against respondent's determination in the notice of deficiency. In Marks the duty of consistency had no relevance because, if for no other reason, it was the Court, rather than the taxpayers, who raised the issue. In those circumstances there was no issue as to the taxpayer's taking inconsistent positions, and consequently there was no meaningful basis for the IRS to invoke a duty of consistency defense. In the case presently before us, such a defense takes on no greater relevance by virtue of the fact that it is petitioners, rather than the Court, who have raised the issue. In either circumstance, the question has nothing to do with any inconsistency in the taxpayer's factual representations and everything to do with the correct application of the law.

The Court of Appeals for the Second Circuit, to which any appeal of this case would ordinarily lie, has held that the duty of consistency applies only to inconsistencies of fact and not to inconsistent positions on questions of law. See Bennet v. Helvering, 137 F.2d 537, 538-39 (2d Cir. 1943). The issue in the case before us is a purely legal question as to the application of the prohibited transaction rule to undisputed facts. Petitioners' reporting position for all relevant years has been consistent--they treated the loans as if they were not prohibited transactions and as if MD IRA remained a valid IRA. Consistent with that reporting position, they repaid all the loans before respondent commenced his examination. Unlike Estate of Ashman v. Commissioner, T.C. Memo. 1998-145, on which respondent relies, this is not a case in which the taxpayer filed inconsistent returns.

Respondent's basic problem, as he acknowledges, is that he has blown the statute of limitations for petitioners' 2011 tax year. Be that as it may, the judicially crafted doctrine of the duty of consistency cannot displace the detailed statutory rules governing the tax treatment of IRAs. Under the plain terms of the statute MD IRA ceased to be a valid IRA as of the first day of 2011, the year in which the prohibited transactions first occurred, and the IRA was treated as distributing all its assets on that same day. See sec. 408(e)(2)(A) and (B). To adopt respondent's position would essentially mean rewriting the statute to postpone the consequences of prohibited transactions indefinitely into the future, depending upon when the IRS might happen to discover them. The intention and effect of respondent's position would be to toll the statute of limitations for the collateral tax consequences of a prohibited transaction. This result would contradict the well-established teaching of the Court of Appeals for the Second Circuit that "the fact that the taxpayer has in the past omitted an item of charge from his gross income and has therefore never paid any tax upon it, does not toll the statute." Bennet v. Helvering, 137 F.2d at 538.

Respondent contends that material facts remain in dispute. Contrary to Rule 121(d), however, he has not set forth specific facts to show that there is any genuine issue for trial. He says that he is awaiting additional information regarding an alleged increase in the value of MD IRA from the 2010 conversion date to its reported valued in 2011, but he has failed to meaningfully explain the materiality of these facts to the issue before us. We conclude that there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law.

Accordingly, it is

ORDERED: That petitioners' motion for summary judgment filed November 15, 2018, is granted. It is further

ORDERED: That this case is stricken for trial from the Court's April 15, 2019, New York, New York, trial session. It is further

ORDERED: That, on or before April 29, 2019, the parties shall file with the Court either an agreed computation for entry of decision under Rule 155, or each party shall file with the Court and serve on the other party his or her computation for entry of decision under Rule 155.

(Signed) Michael B. Thornton
Judge

Dated: Washington, D.C.
January 31, 2019