UNITED STATES TAX COURT
WASHINGTON, DC 20217

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

O R D E R

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 petitioner's nominee. The Trust holds real property located in Stratford, Connecticut (Stratford property) and Charlestown, Rhode Island (Charlestown property). Because the record does not provide a sufficient factual predicate for Appeals' determination that the Trust holds either property as petitioner's nominee, we will remand the case to Appeals for further consideration of petitioner's proposed collection alternatives.

Stratford Property

Although courts have considered a number of factors in determining whether a third party holds title to a property as a taxpayer's nominee, "[t]he ultimate inquiry is whether the taxpayer has engaged in a legal fiction by placing legal title to property in the hands of * * * [the] third party while actually retaining some or all of the benefits of true ownership." Holman v. United States, 505 F.3d 1060, 1065 (10th Cir. 2007). The record provides no evidence that petitioner himself used or benefitted from the Stratford property. In the supplemental notice of determination, respondent's settlement officer (SO), Renee Meskill, acknowledged: "A nominee theory focuses on whether the taxpayer is the true beneficial owner of

the property on the basis of how the taxpayer treats the property." But SO's Meskill's analysis does not demonstrate that petitioner treated the Stratford property as if he were its true beneficial owner. SO Meskill observed: "The Stratford property was rented to American Boiler, a company * * * [petitioner] controlled." Even if we were to accept that petitioner controlled American Boiler, Inc. (American Boiler),[1] it would not follow that American Boiler's use of the property should be attributed to petitioner himself. Moreover, the corporation did not consistently treat the Stratford property as if that property were its own; instead, it paid rent to the Trust.[2] Cf. Fourth Inv. Ltd. P'ship v. United States, 720 F.3d 1058, 1071 (9th Cir. 2013) (reasoning that taxpayers' payment of property expenses of residence rather than monthly rent required under lease with purported nominee weighed in favor of treating the owner as the taxpayers' nominee); Richards v. United States, 231 B.R. 571, 579 (E.D. Pa. 1999) (noting that debtors' rent-free occupation of property held by a trust supported a finding that the trust held the property as the debtors' nominee).

We are unpersuaded by respondent's efforts, in response to a prior order, to bolster SO Meskill's analysis. In an order dated October 31, 2018, we directed respondent to submit a memorandum of law explaining the legal and factual bases for his position that "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." In the memorandum he filed in response to that order, respondent notes the absence in the record of any lease agreement between American Boiler and the

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[1]As part of a criminal case regarding his involvement in the filing of false tax returns, petitioner and the Government stipulated that he controlled American Boiler "[f]rom at least 1999 through 2003". We find no evidence in the record, however, concerning petitioner's influence over American Boiler after 2003.

[2]In a memorandum dated April 3, 2013, approving the filing of a nominee lien on Trust properties (Area Counsel Memorandum), respondent's Area Counsel observed that American Boiler "currently leases" the Stratford property "for $60,000/year." The Trust's Federal income tax returns, however, indicate that American Boiler did not consistently pay annual rent in that amount. The Trust reported no rental income for 2002, 2003, 2006, or 2007 and reported rental income of less than $60,000 for 2005 and 2012. (The Trust's reporting of less than $60,000 of rental income for 2013 may be explained by American Boiler's having vacated the property by October 22nd of that year.)

Trust. He also suggests that the fluctuations in the rental income reported on the Trust's Federal income tax returns "seem[] uncharacteristic of a commercial lease agreement."[3] From those facts, and what he refers to as "[p]etitioner's admitted history of controlling American Boiler and the Trust for * * * [petitioner's] own benefit," respondent argues that "a reasonable person could conclude that these rent amounts represent distributions". Respondent seems to be inviting us to speculate that petitioner caused the Trust to use in some fashion for his own benefit the rental income it received from American Boiler. We will not indulge in such speculation. We find no evidence in the record that the Trust actually or constructively distributed to petitioner any of the rental income it received from American Boiler. Indeed, the Area Counsel Memorandum states that "Trust assets were not used to pay * * * [petitioner's] personal expenses".[4]

Because the record does not establish that petitioner retained possession of the Stratford property after purchasing it in the Trust's name, or that he otherwise enjoyed the benefits of the property or treated it as its own, the record does not support SO Meskill's conclusion that the Trust held the Stratford property as petitioner's nominee.[5]

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[3]Respondent also emphasizes that the Trust reported no rental income for either 2014 or 2015 and insinuates that "the cessation of rental income" was caused by his commencement in June 2013 of collection actions against petitioner, American Boiler, and the Trust. The Trust's failure to receive rental income in 2014 and 2015, however, could be explained by the vacancy of the Stratford property. The record provides no grounds for concluding that American Boiler's departure, which may have occurred before June 2013, was a response to respondent's collection efforts.

[4]Moreover, we see no evidence that SO Meskill relied on the prospect of distributions of rental income by the Trust to petitioner to support her conclusion that petitioner used and enjoyed the Stratford property after purchasing it in the Trust's name. As we observed in Salahuddin v. Commissioner, T.C. Memo. 2012-141, at *7, "our role under section 6330(d) is to review actions that the IRS took, not actions that it could have taken."

[5]Under the circumstances, we need not consider whether SO Meskill's conclusion that the value of the Stratford property must be taken into account in evaluating petitioner's collection alternatives could be justified on the alternative ground that his purchase of the property in the Trust's name effected a fraudulent conveyance. In his opening brief, respondent acknowledged some uncertainty

Charlestown Property

A taxpayer cannot be treated as owning through a nominee property that the taxpayer never himself owned. In LiButti v. United States, 894 F. Supp. 589 (N.D.N.Y. 1995), vacated and remanded, 107 F.3d 110 (2d Cir. 1997), the District Court for the Northern District of New York considered Edith LiButti's challenge to the Government's efforts to collect taxes owed by her father, Robert, by levying on a race horse, Devil His Due, which it claimed she held as his nominee. The court found that the government had "not shown substantial evidence to support the nominee theory." Id. at 598. "Most importantly," the court elaborated, "the government did not provide any proof that there was a transfer of Devil His Due from Robert to Edith LiButti." Id. The court also rejected the government's argument that the stable business that owned the horse was an alter ego of Mr. LiButti on the grounds that the alter ego theory applied only to pierce the veil of a corporation and could not be applied to impute property of a proprietorship to its owner. On appeal, the Court of Appeals for the Second Circuit viewed the district court's alter ego analysis as evidencing "an over-rigid preoccupation with questions of structure". LiButti v. United States, 107 F.3d at 119. The appellate court reasoned that "if Robert dominated and controlled Lion Crest [the stable] he should not be able to escape his tax liabilities simply because it was not incorporated, and he chose, instead, to constitute his daughter as his unincorporated business' nominee." Id. The appeals court agreed with the district court, however, regarding the importance of a transfer as a precondition to applying the nominee theory. If Lion Crest were neither a separate entity nor an unincorporated going concern, the Second Circuit reasoned, "the issue would simply be whether Edith owned Devil His Due as Robert's nominee, and proof of transfer would be an essential concern." Id.

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about the viability of the nominee theory under Connecticut law but claimed that "the result * * * [would be] the same" under Connecticut's fraudulent conveyance law. Petitioner's opening brief proposed as an ultimate finding of fact that he "did not make a fraudulent conveyance of the two real properties to the * * * Trust." In his reply brief, respondent objected to that proposed finding on the grounds that it is irrelevant, because SO Meskill relied on the nominee theory and did not base her determination "on fraudulent conveyance law." We thus treat respondent as having abandoned any argument that petitioner's purchase of the Stratford property in the Trust's name effected a fraudulent conveyance.

The required transfer from a taxpayer to his purported nominee need not be direct. As the Court of Appeals for the Tenth Circuit recognized in Holman, 505 F.3d at 1065: "A delinquent taxpayer who has never held legal title to a piece of property but who transfers money to a third party and directs the third party to purchase property and place legal title in the third party's name may well enjoy the same benefits of ownership of the property as a taxpayer who has held legal title." In such a case, however, the taxpayer, by providing the third party with the wherewithal to purchase the property, can appropriately be treated as having constructively transferred it. The treatment of the third party as the taxpayer's nominee ought not to depend on whether the taxpayer transferred to the third party the funds to buy the property or instead used those funds to buy the property himself and then transferred legal title to the property to the third party.

In the present case, the Trust, acting through petitioner as trustee, purchased the Charlestown property itself. And we find no evidence in the record that petitioner used his own funds to purchase that property. Respondent suggests that it was reasonable for SO Meskill to have inferred that the funds to purchase the Charlestown property must have come from petitioner. We disagree. Petitioner was not the Trust's only potential source of funds. Other family members might have had reason to benefit petitioner's daughters, who were the Trust's beneficiaries. In addition, the Trust earned rental income from American Boiler's lease of the Stratford property. Unless the Trust held the Stratford property as petitioner's nominee--a conclusion that, as explained above, the record does not justify--we would see no basis for sourcing to petitioner the Trust's rental income.

Because the record does not establish that petitioner actually or constructively transferred the Charlestown property to the Trust, it does not support SO Meskill's conclusion that the Trust held that property as petitioner's nominee.

On the premises stated, it is

ORDERED that the case is remanded to Appeals, at respondent's Appeals Office located closest to petitioner's residence (or at such other place as may be mutually agreed upon) at a reasonable and mutually agreed upon date and time, but no later than April 30, 2019, for further consideration of petitioner's proposed collection alternatives. It is further

ORDERED that the parties shall, on or before April 30, 2019, submit to the Court joint or separate reports on the progress of those further proceedings.

(Signed) James S. Halpern
Judge

Dated: Washington, D.C.
February 27, 2019