UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

EZ LUBE, LLC, EZL-1 INVESTMENTS, INC., A PARTNER OTHER THAN THE TAX MATTERS PARTNER,	)
Petitioner(s),	)
v.	) Docket No. 18021-13.
COMMISSIONER OF INTERNAL REVENUE,	)
Respondent	)

ORDER

This case was on the Court's November 17, 2014 trial calendar for Los Angeles, but the Court continued it because the parties seemed close to a deal. How close, and whether there was a deal at all, has since become the object of disagreement and then of a summary-judgment motion by petitioner. Then the Court spotted some administrative-law issues. Those issues have since been briefed, and the motion is ready for decision.

Both parties are represented, and the Court will assume that they know the background facts and general principles of summary judgment.

Background

Petitioner is an LLC that is taxed as a partnership under the old TEFRA rules.[1] It ended up in bankruptcy in late 2008, but got reorganized. The major

[1] Before its repeal, *see* Bipartisan Budget Act of 2015, Pub. L. No. 114-74, sec. 1101(a), 129 Stat. at 625, part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) governed the tax treatment and audit procedures for certain partnerships, *see* Pub. L. No. 97-248, §§ 401-407, 96 Stat. at 648-71. TEFRA partnerships are subject to special tax and audit rules. *See* I.R.C. §§

feature of that reorganization was the conversion of debt that Goldman Sachs (or entities controlled by Goldman Sachs) had in the old partnership into a controlling equity interest in the new partnership. This happened part way through 2009, and in 2010 the reorganized EZ Lube filed two tax returns for 2009. One was for January 1 through November 13, 2009; and one was for November 14 through December 31, 2009.

EZ Lube took the position in these returns that, because the reorganization had ousted more than 50% of the partnership interests through what was in substance a foreclosure of the old partners' interests, the partnership itself had been terminated on the effective date of the reorganization. *See* I.R.C. § 708(b)(1)(B). As a result, the old partners treated the reorganization as a deemed sale of their property and reported approximately $22 million of gain. Reorganized EZ Lube then filed an AAR (this stands for Administrative Adjustment Request, and is the rough equivalent of an amended return for a TEFRA partnership) in 2011. In this AAR, reorganized EZ Lube took the position that there was no technical termination of the partnership, but that the key part of the reorganization -- the exchange of debt for equity -- instead created $80 million of cancellation-of-debt income.

After pondering the matter for several months, the IRS agreed with reorganized EZ Lube's position in the AAR. It then issued an FPAA in which it said the partnership's first pair of returns -- the two that characterized the reorganization as having terminated the partnership and created a deemed sale -- were wrong.

An old partner, who liked the old characterization, then petitioned our Court to argue that the FPAA was wrong and the original returns got it right. The parties asked the IRS Appeals Office look at the case. The Appeals officer who handled the case spoke on the phone with petitioner's counsel and said she thought that the FPAA should be conceded -- namely, that the original returns were correct. She said that her manager concurred with her view, but that it was also necessary for her to consult with the Appeals National Office before any such concession could be embodied in a TEFRA settlement. The National Office disagreed with the Appeals officer, however, which meant the case did not settle in the usual way.

6221-6234. When the IRS audits a TEFRA partnership return and determines an adjustment is necessary, it sends the partnership a final partnership administrative adjustment (FPAA). An FPAA describes all the proposed changes at the partnership level.

Petitioner moves for summary judgment on the ground that its telephone conversation with the Appeals officer was a determination by IRS Appeals that should end the case. It argues that changes in recent years at the IRS have transformed the Appeals Office into a quasi-judicial part of the IRS that issues determinations rather than negotiates settlements. Petitioner thus claims that the only issue before the Court is whether IRS Appeals issued an administrative determination when the Appeals officer stated her view on the case to petitioner's counsel.

Respondent disagrees, contending that IRS Appeals was just trying to settle the case and didn't make even a "determination", much less a "final determination." The implementation of the internal IRS project called AJAC -- the Appeals Judicial Approach and Culture project -- may change how IRS Appeals processes cases, respondent observes, but it doesn't set up a system of informal agency adjudication followed by judicial review of that determination or order as those terms are commonly used in adminstrative law. And even if what the Appeals Office did *was* a determination, the Tax Court wouldn't have jurisdiction to review it.

Discussion

Petitioner begins its motion with a history of the Appeals Office and its predecessors, which we need not repeat. It acknowledges that Appeals traditionally held the function of settling cases before a court had to decide them. But it says this all changed on July 18, 2013, when Appeals rolled out the AJAC project to -- and here we quote Appeals itself -- "return[] Appeals to a quasi-judicial approach in the way it handles cases . . . ." *See* Susan L. Latham, Department of the Treasury, Memorandum for Appeals Employees (Control No. AP-08-0713-03) (July 18, 2013).

Petitioner then cites to the dictionary definition of "quasi-judicial" and concludes that Appeals officers now conduct hearings and make decisions like a court -- they are no longer (or at least primarily) in the business of cutting deals to end litigation. They instead now "hear from each side and issue a determination."

One is immediately struck by the unlikely comparison of an appealable decision -- written, fully captioned, carefully docketed, and labeled and signed as a "decision" or "judgment" -- with an "appealable determination" that takes the form of a phone call to one party.

A big obstacle to calling such informal communications "final determinations" is how to prove them. One can see how this might be a problem in some cases, and respondent begins his opposition to this motion with an argument that there's a dispute about whether there was a determination here at all. What respondent doesn't do, however, is point out any factual dispute specific to this case about what his Appeals officer said. The only argument respondent makes is about the proper characterization of what that officer said.

That kind of question is a legal one, and fit for summary judgment.

If this question of characterization is whether that phone call was a settlement, we have good case law to turn to. We've established, for example, that in both deficiency and TEFRA cases we may decide if the parties in fact did settle. To answer that question, we apply contract law and make any subsidiary findings of fact. *See, e.g.*, *Dorchester Indus., Inc. v. Commissioner*, 108 T.C. 320, 330 (1997), *aff'd*, 208 F.3d 205 (3d Cir. 2000); *Cinema '85 v. Commissioner*, 75 T.C.M. (CCH) 2477, 2480 (1998).

But petitioner specifically disclaims any argument that it and the IRS reached a settlement at the Appeals Office. It does not contend that the parties as a matter of contract law have settled on a particular value for a particular partnership item. It insists that there was no settlement, but rather that Appeals made a determination and that we have jurisdiction to review determinations made by Appeals.

But where? Sections 6320(c)[2] and 6330(d) give us jurisdiction to review Appeals Office's determinations to proceed with enforced collection. Section 7429(b)(2)(B) gives us jurisdiction to review the Commissioner's jeopardy levy or assessment in cases where he makes such an assessment after a taxpayer has petitioned for redetermination of a deficiency. Section 6404(h) gives us jurisdiction to review determinations not to abate interest. Section 7476(a) gives us jurisdiction to review determinations about the qualifications of ESOPs. Section 7428(a) gives us jurisdiction to review determinations to deny tax-exempt status. And section 7436(a) gives us jurisdiction to review determinations about an individual's employment status.

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[2] All section references are to the Internal Revenue Code in effect for the year in issue, unless otherwise indicated.

What unites all these types of cases is that Congress specifically enacted Code sections to give us jurisdiction over them. There's nothing like that for the sort of "determination" that petitioner sees here. And that is where petitioner's contention starts to crumble -- even if what happened at Appeals was an administrative "determination", there is no specific grant of jurisdiction to us to review such a "determination".

Petitioner admits this but suggests that the default rules of the Administrative Procedure Act (APA) give us that jurisdiction. It argues that the Appeals Officer's "determination" is an adjudication under 5 U.S.C. § 554, which makes it subject to judicial review under 5 U.S.C. § 702. That's a big problem because there would have to be a jurisdictional hook over that determination and not just the associated FPAA. And it is the Code that assigns Tax Court jurisdiction over particular kinds of cases. Such specific grants of jurisdiction are what the APA calls a "special statutory review proceeding." 5 U.S.C. § 703. The special statutory review proceeding in a TEFRA case depends on the existence of an FPAA that determines adjustments to partnership items and a timely petition that challenges that FPAA's adjustments. I.R.C. § 6226(a)(1). The special statutory proceeding in a deficiency case depends on the existence of a valid notice of deficiency that determines adjustments to items on a return and a timely petition to challenge that notice's adjustments. I.R.C. §§ 6213(a), 6214(a). These special statutory proceedings also come with a *de novo* standard and scope of review. *See Ax v. Commissioner*, 146 T.C. 153, 161-63 (2016); *Porter v. Commissioner*, 130 T.C. 115, 118-19 (2008).

What petitioner seeks is review under the *default rules of the APA*. Those default rules would mean that our scope of review would be limited to the administrative record compiled by the IRS, and our standard of review would be to look for an abuse of discretion. *Wilson v. Commissioner*, 705 F.3d 980, 990-91 (9th Cir. 2013) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)), *aff'g* 99 T.C.M. (CCH) 1552 (2010). Both this scope and standard of review are different from what we use in TEFRA and deficiency cases. And that's not all -- the proper default venue for review of administrative-agency determinations that lack a special statutory review procedure are the federal district courts, under their general federal question jurisdiction. *See* 5 U.S.C. § 704; *Bowen v. Massachusetts*, 487 U.S. 879, 903-04 (1988).

All of this seems impossible to reconcile with the way that we review respondent's TEFRA determination in the usual case. To avoid the weirdness of saying that there might be two kinds of TEFRA cases -- one that is a *de novo* redetermination of partnership items, and one that is a review of "determinations" that the Appeals Office made about partnership items -- petitioner says he is making an argument about what he calls "ancillary jurisdiction." He sees a parallel in our caselaw that has held that our jurisdiction to redetermine disputed items includes jurisdiction to determine if the parties reached a settlement, or if either party is entitled to equitable recoupment. But when we decide if a party has proved equitable recoupment, we are not exercising jurisdiction over the equitable recoupment. We are deciding whether and how to redetermine particular items that might be affected by equitable recoupment. *See, e.g.*, *Estate of Branson v. Commissioner*, 113 T.C. 6, 14 (1999), *aff'd*, 264 F.3d 904 (9th Cir. 2001); *Estate of Mueller v. Commissioner*, 101 T.C. 551, 555-56 (1993) (distinguishing recoupment as basis for jurisdiction from a fact relevant to redetermining a deficiency). When we decide if a party has proved the existence of a settlement, we are not exercising jurisdiction over that settlement. We are deciding whether and how a particular item has been settled to figure out what effect that might have on a petitioner's taxes.

The contents of a phone call might be a fact relevant to our decision, but it is irrelevant to our jurisdiction to decide. Here petitioner argues that the phone call itself is of jurisdictional importance. If it is correct -- that some court somewhere has to have *jurisdiction* to review this phone-call "determination" -- that court is not Tax Court. If petitioner is wrong, then the phone-call determination isn't reviewable and is just part of settlement negotiations that didn't work out. Under either analysis, and in a case where our Court has jurisdiction *under TEFRA*, it must be

ORDERED that petitioner's motion for summary judgment is denied. It is also

ORDERED that on or before May 30, 2019, the parties file a status report that sets out their views of what remains to be done in this case, and in particular their views on the necessity of a trial to decide any unsettled issues.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
April 11, 2019