

partial summary judgment that no deficiencies exist in his income taxes for the taxable years in issue because he holds his interest in the Italian account as Maurizio's nominee so that the income from that account is not included in his gross income. For the reasons explained below, we will deny each motion.

Summary Judgment in General

Rule 121(a) allows either party to move "for a summary adjudication in the moving party's favor upon all or any part of the legal issues in controversy" in a case. Summary judgment is appropriate "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b).

Petitioner's Motion on Jurisdiction To Determine Penalty Liability

Petitioner acknowledges that the penalty under section 6038D(d) that respondent assessed was not "listed" on the notice of deficiency for 2011. And he apparently accepts that the reason for that omission is that the penalty did not affect his deficiency, as statutorily defined. Section 6211(a) generally defines the term "deficiency" to mean the excess of "the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44" over "the amount shown as the tax by the taxpayer upon his return". Section 6038D appears in Chapter 61 of subtitle F.

Petitioner invokes section 6214(a), which provides that, in addition to our jurisdiction to redetermine deficiencies, we have jurisdiction "to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing." According to petitioner, respondent's assertion of the section 6038D penalty "is a claim for an additional amount for purposes of section 6214(a)."

We have consistently interpreted the term "additional amount", as used in section 6214(a), to have the same meaning it does in chapter 68 (captioned "Additions to the Tax, Additional Amounts, and Assessable Penalties"). E.g., Whistleblower 22716-13W v. Commissioner, 146 T.C. 84, 93-95 (2016); Pen Coal Corp. v. Commissioner, 107 T.C. 249, 261 (1996); Bregin v. Commissioner, 74 T.C. 1097, 1102-1103 (1980). Thus, amounts imposed under provisions outside of chapter 68 are not "additional amounts" for purposes of section 6214(a).

Because section 6038D appears in chapter 61, rather than chapter 68, the penalty imposed by subsection (d) of that section is not an "additional amount" for purposes of section 6214(a). Therefore, contrary to petitioner's claim, the jurisdiction granted to us by section 6214(a) does not allow us to determine his liability for the section 6038D(d) penalty respondent assessed.

Petitioner's Motion for Restraint on Assessment and Collection of Penalty

Our denial of petitioner's motion for partial summary judgment on our jurisdiction to determine his liability for the section 6038D penalty also requires that we deny his motion to restrain respondent from collecting that penalty.² Section 6213(a) prevents the Commissioner from assessing a deficiency that is the subject of a petition to this Court until our decision in the case becomes final. That section also provides that "the making of such assessment * * * during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered * * * of any amount collected within the period during which the Secretary is prohibited from collecting * * * under the provisions of this subsection." Our authority under section 6213(a) to restrain the assessment or collection of a deficiency, however, is limited to those deficiencies that are the subject of a petition before this Court. See Dover Corp. v. Commissioner, T.C. Memo. 1997-339, 1997 WL 419948, at *3, aff'd, 148 F.3d 70 (2d Cir. 1998). Because our jurisdiction in the present case does not include petitioner's liability for the section 6038D(d)(1) penalty, it follows that section 6213(a) does not allow us to restrain collection of that penalty.³

Petitioner's Motion for Partial Summary Judgment on Deficiencies

In his third motion, requesting partial summary adjudication in his favor under Rule 121(a), petitioner claims that "there is no genuine issue of material fact

²To the extent that petitioner's second motion seeks to restrain assessment of the sec. 6038D(d)(1) penalty, it is moot: Respondent has already assessed the penalty.

³Our inability in this case to prevent respondent from collecting the penalty he assessed does not mean that petitioner will necessarily be denied any opportunity to contest his liability for the penalty before paying it. Petitioner may be able to challenge respondent's efforts to collect the penalty in a collection due process proceeding. See secs. 6320, 6330.

regarding whether * * * [he] was a nominee of the foreign account." He contends that "he was a mere nominee of the Account" and "only maintained naked legal title of the Account." In support of that contention, he asserts that he "did not open or authorize the opening of the Account", could not exercise control over the account, "and did not accept the Account or any of the corpus or income earned from the Account as a gift."

Respondent opposes petitioner's motion for partial summary judgment concerning the nominee issue "on the ground that the evidence presented by petitioner does not support a finding that petitioner was merely a nominal owner of the foreign bank account". "To the contrary," respondent contends, "the evidence shows the petitioner was the beneficial owner of the account because he authorized his brother to open and fund the account on petitioner's behalf by granting him a valid power of attorney." At the very least, respondent argues, "there are genuine issues of material facts in dispute that preclude a finding that petitioner was merely a nominal owner of the account." Respondent claims that, "[b]ecause petitioner was the owner of record of the bank account, it is indisputable that petitioner had complete control over the assets held in the bank account". Respondent observes that "petitioner does not allege to have made any effort to close or transfer ownership of the account after he learned of the account's existence".

Applicable Legal Standard

The memorandum of law petitioner submitted in support of his third motion does not offer us a legal standard for determining whether the titleholder of an asset holds that asset as a nominee and thus is not subject to tax on any income the asset produces. None of the authorities petitioner cites involved efforts by the legal owner of an account to avoid tax on the account's income on the ground that someone else was the account's beneficial owner.

More generally, we are not convinced that a nominee analysis is the most appropriate one for addressing petitioner's liability for tax on the income from the account Maurizio created. Courts have traditionally applied a nominee analysis to determine whether a transferor of property remains its beneficial owner after the transfer. E.g., Holman v. United States, 505 F.3d 1060, 1065 (10th Cir. 2007) ("The ultimate inquiry [under the nominee analysis] is whether the taxpayer has engaged in a legal fiction by placing legal title to property in the hands of a third party while actually retaining some or all of the benefits of true ownership."). That traditional nominee analysis would thus have no application unless Maurizio used his own assets to fund the Italian account and, by placing the account in petitioner's

name, transferred those assets to petitioner. See LiButti v. United States, 107 F.3d 110, 119 (2d Cir. 1997) (opining that, in a nominee analysis, "proof of transfer" of the property in question is "an essential concern"). The parties disagree on that factual question. Petitioner claims that Maurizio funded the account with his own (that is, Maurizio's) assets, but respondent counters that the evidence petitioner offers does not support that conclusion. If we were to apply a traditional nominee analysis, it would be directed at the question of whether Maurizio retained beneficial ownership of the assets he used to fund the account he titled in petitioner's name. The issue before us, however, is petitioner's tax liability--not Maurizio's. Only by negative implication could we conclude that, if Maurizio funded the account and retained beneficial ownership of the assets in it, petitioner could not have been the beneficial owner of those assets.

Instead of applying the nominee analysis petitioner suggests--but does not draw out in detail--we could address the issue at hand directly by focusing on petitioner's own dominion and control over the Italian account. The issue before us is similar, even if not identical, to the question of the circumstances in which the Commissioner can consider accounts not owned by a taxpayer in reconstructing the taxpayer's income by means of a bank-deposits analysis. As we explained in Chambers v. Commissioner, T.C. Memo. 2011-114, 2011 WL 2135376, at *7: "We generally have held that when the Commissioner uses the bank deposit method to reconstruct a taxpayer's income, the taxpayer's gross income includes deposits into all accounts over which the taxpayer has dominion and control, not just deposits into the taxpayer's personal bank accounts." We added: "A taxpayer has dominion and control over an account when the taxpayer has the freedom to use its funds at will." Id.

Petitioner's Control Over Account as Disputed Fact

Analogizing to cases like Chambers, the critical question raised by petitioner's motion for partial summary judgment would be whether, during the years in issue, petitioner had the freedom to use at his will the funds in the Italian account. If deposits into an account a taxpayer does not own can be included in a taxpayer's income if the taxpayer has dominion and control over the account, then, a fortiori, the taxpayer should be subject to tax on income from an income that he both owns and controls.

As noted above, respondent asserts that ownership and control go hand in hand. Although respondent overstates the case in claiming it "indisputable" that petitioner controlled the assets in the Italian account, we can infer control from

ownership--in other words, that a bank would generally honor a request by the owner of an account to withdraw funds from it.

In support of his motion, petitioner submits two declarations from Maurizio. In each declaration, Maurizio states: "I am the only one who controls or makes decisions on the Account." His second declaration contains a virtually identical statement (simply changing the conjunction from "or" to "and".) Petitioner also submitted his own declaration (dated October 22, 2018), which states: "I do not now have, nor have I ever had, control over this account."

Although respondent challenges the authenticity of Maurizio's declarations on the basis of alleged discrepancies in their signatures, for present purposes, we need not resolve that issue. We do not find petitioner's or Maurizio's declarations specific enough to negate the inference that, as the account's owner, petitioner had the ability (whether or not exercised) to withdraw funds from the account without Maurizio's approval. Neither petitioner nor his brother describes any terms or conditions on the account that would deny petitioner the usual rights of an account holder and prevent the Italian bank from honoring withdrawal requests from petitioner.

Petitioner's Knowledge of the Account

Petitioner, however, could not have withdrawn funds from an account of which he was unaware. And petitioner claims to have been unaware of the existence of the Italian bank account until around September 2012. If we were to accept petitioner's claim that he was unaware of the account throughout 2011, we would have to consider whether it entitled him to summary judgment for that year.

But respondent disputes petitioner's claim that he was unaware of the Italian account through 2011. Under Rule 121(d), a party opposing a motion for summary judgment cannot rest on "mere * * * denials". Instead, the opposing party must generally "set forth specific facts showing that there is a genuine dispute for trial." Rule 121(d). And respondent offers no evidence that petitioner did learn of the Italian account before the end of 2011. But evidence to that effect may not exist. It may be that the question of when petitioner first learned of the account can be answered only by evaluating the credibility of his claim. We must therefore consider Rule 121(e), which provides:

If it appears from the affidavits or declarations of a party opposing * * * [a] motion [for summary judgment] that such party's only legally available method of contravening the facts set forth in the supporting affidavits or declarations of the moving party is through cross-examination of such affiants or declarants or the testimony of third parties from whom affidavits or declarations cannot be secured, then such a showing may be deemed sufficient to establish that the facts set forth in such supporting affidavits or declarations are genuinely disputed.

Respondent did not invoke Rule 121(e) in his opposition to petitioner's motion or accompanying memorandum of law. But he does claim repeatedly that he "should not be forced to take information contained in declarations at face value without the right of cross-examination of witnesses under oath." Those claims implicitly invoke Rule 121(e).

We agree with respondent that he should be allowed to cross-examine petitioner about when he learned of the Italian bank account (as well as other matters in regard to which petitioner's statements provide the only evidence). If petitioner did learn of the account's existence before September 2012, evidence of that fact may not exist and in any event would not be readily available to respondent. Denial of petitioner's motion thus should not turn on respondent's ability to produce evidence to that effect. Petitioner's testimony about when he first learned of the Italian account may be the only available evidence of that potentially critical fact. Therefore, we will not accept petitioner's testimony until respondent has had the opportunity to challenge it through cross-examination (and we have the opportunity to observe petitioner's demeanor and judge his credibility).

We conclude that the question of whether petitioner learned of the Italian account before the end of 2011 is a disputed question of material fact whose existence justifies the denial of petitioner's motion for partial summary judgment for 2011. And the question of petitioner's control over the account and ability to withdraw funds from the account is a disputed question of material fact whose existence justifies the denial of petitioner's motion for the remaining years in issue.

On the premises stated, it is

ORDERED that petitioner's motion for partial summary judgment in regard to our jurisdiction to determine his liability for the section 6038D(d) penalty respondent assessed is denied. It is further

ORDERED that petitioner's motion for restraint and collection of the section 6038D(d) penalty is denied. It is further

ORDERED that petitioner's motion for partial summary judgment that no deficiencies exist in his income taxes for the taxable years in issue is denied.

**(Signed) James S. Halpern
Judge**

Dated: Washington, D.C.
September 20, 2019