

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

UNITED STATES TAX COURT
WASHINGTON, DC 20217

LEIGH C. FAIRBANK & BARBARA J. FAIRBANK,)	CLC
)	
)	
Petitioners,)	
)	
v.)	Docket No. 13400-18.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case is before us on the Fairbanks' motion for summary judgment. Because we find there exist genuine disputes of material fact, we deny the motion.

Background¹

The Fairbanks are husband and wife, and for all relevant years, Ms. Fairbank was a United States person.

During 2003-2011, Ms. Fairbank engaged in transfers with a foreign account located in Switzerland under the name Xavana Establishment. Ms. Fairbank was a beneficial owner of Xavana Establishment during this time. Ms. Fairbank was also the sole shareholder of Xong Services, Inc., which was incorporated in the British Virgin Islands in 2009.

The parties agree that the Fairbanks timely filed their joint income tax returns for 2003-2011. The Fairbanks did not provide their tax returns in connection with this motion. Because we do not know what the Fairbanks reported

¹ For purposes of this order, we have resolved all questions of fact and made all factual inferences against the Fairbanks. Facts set forth in this order are determined solely for purposes of this order. The Fairbanks submitted many documents with their motion, but most of those documents are written in German and the Fairbanks did not provide a translation.

on their returns, we infer that income from Xavana Establishment and that ownership of Xong Services, Inc. were not reported on the Fairbanks' tax returns.

The Fairbanks submitted Reports of Foreign Bank and Financial Accounts (FBARs) for Xong Services, Inc. on February 11, 2014.

On April 12, 2018, the Commissioner sent the Fairbanks a notice of deficiency. The notice of deficiency included 2003-2011 and determined additional income and penalties for all years at issue except 2010.² The Commissioner attributed this additional income in part to Passive Foreign Investment Company (PFIC) income, interest income, and income from capital gain and loss attributable to foreign accounts.

On July 9, 2018, the Fairbanks timely filed their petition. In their petition, the Fairbanks claim that because they "did not create, fund or operate the foreign accounts at issue in this case" they are not responsible for the additions to tax related to those accounts. Additionally, the Fairbanks claim the period of limitation for assessment lapsed on April 15, 2015.

In his answer, the Commissioner denies for lack of knowledge or information the Fairbanks' claim that they "did not create, fund or operate the foreign accounts at issue". The Commissioner asserts that Ms. Fairbank was a beneficial owner of a foreign trust named Xavana Establishment during 2003-2009. The Commissioner claims that because of this beneficial interest, the Fairbanks had additional reporting requirements under section 6048.³ The Commissioner argues that not until those reporting requirements are met does the period of limitation begin to run. The Commissioner claims the Fairbanks did not meet those reporting requirements.

The Commissioner also asserts that Ms. Fairbank was the sole shareholder of a foreign corporation, Xong Services, Inc. during 2009 and 2011. The Commissioner claims that, as a shareholder of a foreign corporation, Ms. Fairbank would have had additional reporting requirements under section 6038. The Commissioner asserts that Ms. Fairbank did not meet those reporting requirements

²No deficiency was determined for 2010.

³Unless otherwise indicated, all section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

until June 18, 2015. The Commissioner issued the notice of deficiency within three years of that date.

In April 2019, the Fairbanks filed a motion for summary judgment arguing that the period of limitations had lapsed before the Commissioner issued the notice of deficiency underlying this case. The Fairbanks contend that even if they had additional reporting requirements under section 6038 and section 6048, they met those requirements. The Fairbanks claim they completed reporting obligations for Xavana Establishment on July 18, 2012, when they and their counsel met with a Revenue Agent, but they provide no proof of what they submitted. In their motion, the Fairbanks also claim to have met their reporting obligations upon filing FBARs and other information about Xong Services, Inc. on February 13, 2014, and March 27, 2014. They conclude that the period of limitations for Xavana Establishment ran on July 18, 2015, and the period for Xong Services, Inc. ran on March 27, 2017, before the Commissioner mailed the notice of deficiency.

With their motion, the Fairbanks submitted financial documents and correspondence with the foreign bank regarding the Xavana Establishment account. The Fairbanks claim they provided these documents to the Revenue Agent during the July 18, 2012 meeting. The Fairbanks also submitted documents related to Xong Services, Inc. with their motion. Among these documents, only the FBARs indicate that they had been submitted to the Commissioner. Because the Fairbanks did not provide evidence that they submitted the remaining Xong Services, Inc. and Xavana Establishment documents to the Commissioner, we assume for purposes of this motion that they did not do so.

In his response to the Fairbanks' motion, the Commissioner contends the period of limitations remains open for all years at issue. He argues that under section 6501(c)(8), taxpayers who engaged in certain foreign transactions must meet particular filing requirements before the three year period of limitations begins to run. According to the Commissioner, the Fairbanks were bound by sections 6038 and 6048 to meet additional reporting requirements to begin the period of limitations under section 6501. The Commissioner contends that the Fairbanks did not meet these reporting requirements for Xavana Establishment, but did meet the requirements for Xong Services, Inc. on June 18, 2015. Less than three years elapsed from that date until the Commissioner issued the notice of deficiency.

Discussion

We must decide whether we should grant the Fairbanks' motion for summary judgment. Under Rule 121(a), either party may move for summary judgment regarding all or any part of the legal issues in a controversy. We may grant summary judgment only if there is no genuine dispute of material fact.⁴ The party moving for summary judgment bears the burden of demonstrating that there is no genuine dispute of material fact.⁵ In deciding whether to grant summary judgment, facts and inferences drawn from them must be considered in the light most favorable to the nonmoving party.⁶ When a motion for summary judgment is made and properly supported, the nonmoving party may not rest on mere allegations or denials, but must set forth specific facts showing that there is a genuine dispute for trial.⁷

I. Reporting Requirements Under Section 6048 for Foreign Trusts

Section 6048 dictates notice and reporting requirements for certain foreign trusts. It requires a United States person who is treated as an owner of a foreign trust to "submit such information as the Secretary may prescribe with respect to such trust for such year".⁸ Additionally, a United States person who receives a distribution from a foreign trust must file a return that includes the name of the trust, the aggregate amount of distributions received from the trust in that year, and any other information prescribed by the Secretary.⁹ Under "Special Rules", the section emphasizes that "[a]ny notice or return required under this section shall be made at such time and in such manner as the Secretary shall prescribe."¹⁰

The corresponding regulations under section 6048 detail these reporting requirements. The regulations require that each taxpayer subject to tax on a

⁴Rule 121(b).

⁵Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994).

⁶FPL Group, Inc. v. Commissioner, 115 T.C. 554, 559 (2000).

⁷Rule 121(d).

⁸Sec. 6048(b)(1).

⁹Sec. 6048(c)(1).

¹⁰Sec. 6048(d)(3).

foreign trust that has a United States beneficiary “must file Form 3520-A, Annual Return of Foreign Trust with U.S. Beneficiaries”.¹¹

The Commissioner also issued a notice outlining the reporting requirements of United States taxpayers with respect to a foreign trust. A United States beneficiary of a foreign trust “is required to report on Form 3520 the name of the trust, the aggregate amount of distributions received from the trust during the taxable year, and such other information as the Secretary may prescribe.”¹² The prescribed form is Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts, or a Form 3520-A.

II. Reporting Requirements Under Section 6038 for Foreign Corporations

Section 6038 sets forth the reporting requirements for certain foreign corporations and partnerships. The section states that every United States person who controls a foreign corporation or business must furnish to the Commissioner “information as the Secretary may prescribe”.¹³ This includes information such as the corporation’s name, country of incorporation, balance sheet, transactions, and information about United States shareholders.¹⁴

The regulations under section 6038 explain how a taxpayer meets reporting requirements for a foreign corporation. A United States person who controls a foreign corporation must make a separate annual information return by filing Form 5471, Information Return of U.S. Persons with Respect to Certain Foreign Corporations.¹⁵ A taxpayer has “control” if anytime during the tax year the taxpayer owns more than 50 percent of total voting power of all classes of stock or more than 50 percent of the total value of all classes of stock.¹⁶

III. Period of Limitations Under Section 6501(c)(8)

Section 6501 sets forth the period of limitations on assessment and collection. The general rule states that, except as provided in the section, tax must

¹¹Sec. 404.6048-1(a)(1), Temporary Proced. & Admin. Regs., 42 Fed. Reg. 41856 (Aug. 19, 1977).

¹²I.R.S. Notice 97-34, 1997-1 C.B. 422.

¹³Sec. 6038(a)(1).

¹⁴Sec. 6038(a)(1).

¹⁵Sec. 1.6038-2(a)(2), Proced. & Admin. Regs.

¹⁶Sec. 1.6038-2(b), Proced. & Admin. Regs.

be assessed within three years of a return being filed.¹⁷ The general rule clarifies that a “return” is the “return required to be filed by the taxpayer”.¹⁸

Section 6501(c) lists various exceptions to the general 3-year rule. One exception is the taxpayer’s failure to notify the Secretary of certain foreign transactions.¹⁹ The exception states:

In the case of any information which is required to be reported to the Secretary pursuant to an election under section 1295(b) or under section 1298(f), 6038, 6038A, 6038B, 6038D, 6046, 6046A, or 6048, the time for assessment of any tax imposed by this title with respect to any tax return, event, or period to which such information relates shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported under such section.²⁰

Therefore, if a taxpayer has reporting requirements under the listed sections, the three-year period of limitations does not begin to run until the taxpayer meets those additional reporting requirements.

The Fairbanks claim the period of limitations ended before the Commissioner issued the notice of deficiency underlying this case. The Commissioner claims the period of limitations remained open because (1) the Fairbanks did not meet their reporting requirements under section 6048, and (2) the notice of deficiency was mailed within three years of the Fairbanks meeting their reporting requirements under section 6038.

Because the Fairbanks moved for summary judgment, we view the facts in the light most favorable to the Commissioner. As such, we assume that the Fairbanks had additional reporting requirements under section 6048, relating to Ms. Fairbank’s foreign trust, and section 6038, relating to Ms. Fairbank’s 100% ownership of a foreign corporation.

There exists a genuine dispute between the parties about whether the Fairbanks met their reporting requirements. The Fairbanks claim they met

¹⁷Sec. 6501(a).

¹⁸Sec. 6501(a).

¹⁹Sec. 6501(c)(8).

²⁰Sec. 6501(c)(8)(A).

reporting requirements for Ms. Fairbank's Xavana Establishment account when they met with and provided information to a revenue agent in July 2012. The Commissioner claims the Fairbanks never met their reporting requirements because they did not file Forms 3520 or 3520-A. The Fairbanks also insist they met reporting requirements for Xong Services, Inc. when they submitted FBARs in March 2014. The Commissioner disagrees, stating that the Fairbanks met their reporting requirements only when they filed Form 5471 in June 2015.

The Fairbanks did not provide sufficient information for the Court to conclude that summary judgment must be granted in their favor.

Conclusion

Certain foreign transactions require additional reporting requirements before the period of limitations may begin to run. Because we must consider facts in the light most favorable to the nonmoving party, we assume that the Fairbanks had additional reporting requirements on their foreign accounts. A genuine dispute of material facts exists as to whether the Fairbanks met these reporting requirements. Accordingly, it is

ORDERED that the Fairbanks' motion for summary judgment filed April 16, 2019, is denied. It is further

ORDERED that this case is restored to the general trial docket. Jurisdiction is no longer retained by the undersigned.

**(Signed) Ronald L. Buch
Judge**

Dated: Washington, D.C.
December 12, 2019