UNITED STATES TAX COURT

WASHINGTON, DC 20217

ALBERT BRONT & VICTORIA Y. PAVLENKO,	)	
Petitioner	)	Docket No. 16198-10S.
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER

On April 14, 2010, respondent issued a notice of deficiency to petitioners for their 2006 tax year showing a deficiency in income tax of $14,369 and a section 6662(a) accuracy-related penalty of $2,873.80.[1] Petitioners mailed a petition to this Court on July 13, 2010, which was timely filed on July 19, 2010. On August 16, 2010, petitioners filed an amended petition. On September 1, 2010, respondent filed an answer to the amended petition. On October 18, 2010, petitioners filed a reply to respondent's answer to the amended petition. On July 25, 2011, respondent filed an amendment to answer in which he asserted petitioners were liable for a section 6663 civil fraud penalty in the amount of $10,776.75.

On December 1, 2011, respondent filed a motion for partial summary judgment, asserting that petitioner Albert Bront (Mr. Bront) is estopped from disputing certain adjustments contained in the notice of deficiency and the section 6663 fraud penalty because of his conviction under section 7206(1) for willfully filing a false tax return for the 2006 tax year. Petitioners were ordered to file any

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[1]Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended and in effect for the year at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

response to respondent's motion for partial summary judgment on or before January 16, 2012. Petitioners did not file any response, although on February 1, 2012, Mr. Bront filed a status report in which he asserted that respondent had made both legal and factual mistakes in his motion for partial summary judgment. He also stated "I propose that the Tax Court hearing scheduled for March of 2012, be postponed". On February 13, 2012, respondent filed a response to Mr. Bront's status report in which he stated he had no objection to continuing this case. Neither party ever filed a formal motion for continuance.

Background

Mr. Bront was the defendant in the criminal case of United States v. Albert Bront, Criminal No. 2:09-cr-00717-ODW, in the United States District Court for the Central District of California. Mr. Bront, a former grade 14 revenue agent with the Internal Revenue Service, was represented by criminal defense attorneys during the criminal case.

On July 28, 2009, the United States Attorney filed an Indictment, charging Mr. Bront with the sole count of violating 18 U.S.C. section 115(a)(1)(B) for threatening to assault and murder a Federal law enforcement officer, with intent to impede, intimidate, and interfere with such Federal law enforcement officer while engaged in the performance of official duties.

On April 8, 2010, the United States Attorney filed a First Superceding Indictment, charging Mr. Bront with sixteen violations (First Superceding Indictment). The violations were: Counts 1-5, filing a false tax return in violation of section 7206(1) for the 2003 through and including 2007 tax years; counts 6-14, assisting individual persons in filing false tax returns in violation of section 7206(2) for the 2003 through and including 2007 tax years; count 15, submitting false documents in violation of section 7212; and count 16, threatening to assault and murder a Federal law enforcement agent officer in violation of 18 U.S.C. section 115(a)(1)(B).

On January 4, 2011, the United States Attorney's Office and Mr. Bront executed a Plea Agreement which was later filed with the United States District Court for the Central District of California. Mr. Bront pled guilty to count 4, filing a false tax return in violation of section 7206(1) for the 2006 tax year and counts 10 and 13, assisting individuals in filing false tax returns in violation of

section 7206(2) for the 2005 and 2007 tax years, of the First Superceding Indictment.

On January 5, 2011, Mr. Bront appeared with his criminal counsel in front of the Honorable Otis D. Wright and entered his plea of guilty to counts 4, 10, and 13 of the first Superceding Indictment. After an extended discussion with Mr. Bront, the court found that the plea was a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense and accepted Mr. Bront's guilty plea.

On May 31, 2011, the United States District Court for the Central District of California entered a judgment of guilty as to counts 4, 10, and 13 of the First Superceding Indictment. Mr. Bront has appealed the judgment insofar as it relates to his sentencing and the computation of tax loss. Mr. Bront has taken no action in the United States District Court or on appeal to withdraw his guilty plea.

Discussion

"Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials." Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). A party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists and that he or she is entitled to judgment as a matter of law. Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994), cert. denied 513 U.S. 821 (1994). Facts are viewed in the light most favorable to the nonmoving party. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985). Where a motion for summary judgment has been properly made and supported by the moving party, the nonmoving party "may not rest upon the mere allegations or denials" contained in that party's pleadings but must by affidavits or otherwise "set forth specific facts showing that there is a genuine issue for trial." Rule 121(d).

Statements made by a taxpayer in a prior case, whether written or oral, are judicial admissions and bind the taxpayer in future actions. United States v. Bentson, 947 F.2d 1353, 1356 (9th Cir. 1991), cert. denied 504 U.S. 958 (1992).

Collateral estoppel precludes a party to a prior suit from relitigating in a later suit issues of fact and law that were actually and necessarily decided by the prior court in reaching judgment in the prior suit. United States v. Mendoza, 464 U.S. 154, 158 (1984). It exists for "the dual purpose of protecting litigants from

the burden of relitigating an identical issue and of promoting judicial economy by preventing unnecessary or redundant litigation." Meier v. Commissioner, 91 T.C. 273, 282 (1988). There is no difference between a judgment of conviction based on a guilty plea and one rendered after a trial on the merits. Arctic Ice Cream Co. v. Commissioner, 43 T.C. 68, 75 (1964) see also Smith v. Commissioner, T.C. Memo. 1995-402, aff'd, 116 F.3d 492 (11th Cir. 1997).

For Federal tax litigation, collateral estoppel applies when (1) the issues of law and fact in the second suit are the same as the issues in the first suit; (2) a court of competent jurisdiction has rendered a final judgment; (3) the parties in the second suit are the same or in privity with the parties in the first suit; (4) the issues were actually litigated in the first suit; and (5) the controlling facts and legal principles are unchanged. Peck v. Commissioner, 90 T.C. 162, 166-167 (1988), aff'd, 904 F.2d 525 (9th Cir. 1990).

Respondent is seeking to estop Mr. Brunt from disputing certain adjustments contained in the notice of deficiency as well as the section 6663 fraud penalty. We address each separately.

A. Adjustments

The five adjustments contained in the notice of deficiency that respondent argues Mr. Brunt should be estopped from contesting are (1) Schedule E mortgage interest deduction of $16,819, (2) alimony deduction of $12,000, (3) Schedule A mortgage interest deduction of $14,614,[2] and (4) receipt of unreported income in the amount of $10,312.[3]

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[2]On Schedule A of their 2006 tax return, petitioners claimed a total home interest deduction of $26,352. In the notice of deficiency, respondent disallowed only $14,614 of the claimed $26,352 deduction, allowing $11,738 for interest petitioners paid for their Norfolk, California, residence. The claimed amount of $14,614 related to a house in Russia. We note that in documents petitioners presented to the examining agent during the audit of their 2006 tax return, petitioners claimed they had paid $14,620 in interest for the house in Russia, a $6 increase from $14,614 claimed on their 2006 tax return.

[3]The notice of deficiency also contained adjustments not reflected in counts

(continued...)

Count 4 of the First Superceding Indictment alleges that Mr. Bront filed a false tax return in violation of section 7206(1) for the 2006 tax year because he falsely claimed deductions and falsely omitted income including:

> (1) Falsely claimed approximately $16,819 in mortgage interest paid to banks for the Birmingham Property, even though defendant knew that he had paid substantially less mortgage interest to banks for the Birmingham [Place Santa Clarita, California] Property;
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> (2) falsely claimed an approximately $12,000 deduction for "Alimony paid," even though defendant knew he had paid substantially less alimony;
>
> (3) falsely claimed approximately $26,352 in home mortgage interest and point payments, even though defendant knew he had paid substantially less in mortgage interest and point payments;
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> (4) fraudulently omitted the income he received from Y.Z.'s approximately $7,508 federal tax refund; and
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> (5) fraudulently omitted the income he received from Y.Z.'s approximately $2,804 California state tax refund.

Mr. Bront admitted and pled guilty to Count 4 of the First Superceding Indictment. He agreed "[he] received unreported income, and claimed illegal deductions and improper credits for Tax Years 2003, 2004, 2005, 2006, and 2007." He agreed that in order to be guilty, he willfully made and signed a tax return under penalties of perjury that he knew contained false information as to a material matter.

The problem is that Mr. Bront never agreed to the specific factual allegations contained in the First Superceding Indictment regarding his 2006 tax

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[3](...continued)
4, 10, or 13 of the First Superceding Indictment. Respondent is not asserting that petitioners are estopped from challenging those adjustments.

year and the ones respondent argues he should be estopped from contesting.[4] We agree with respondent that "a guilty plea is an admission of all the elements of a formal criminal charge." United States v. Cazares, et al., 121 F.3d 1241, 1246 (9th Cir. 1997) (quoting McCarthy v. United States, 394 U.S. 459, 466 (1969). But establishing specific tax liabilities is not an element of section 7206(1) and consequently none need to be determined. See Morse v. Commissioner, T.C. Memo. 2003-332, aff'd, 419 F.3d 829 (8th Cir. 2005).

In his status report, Mr. Bront states:

> I shall present all the necessary evidence which will establish beyond any doubt that all deductions claimed in my personal returns were bona-fide trade or business Sec. 162, or Investment related Sec. 212, expenditures AND THAT ALL PAYMENTS WERE PROPERLY MADE, INCLUDING those in regards the Birmingham Rental property Mortgage Deductions. Likewise, tax refunds received by me were either short term loans, which were fully repaid, and/or were reported as Rental Income on Sch. E where appropriate.

We recognize that Mr. Bront's status report was not an affidavit, it was not signed under penalties of perjury, and he presented no evidence. However, on the basis of the record before us now, we conclude that Mr. Bront is not collaterally estopped from disputing the adjustments contained in the notice of deficiency.[5]

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[4]The factual basis contained in the Plea Agreement and recited aloud when Mr. Bront pled guilty to count 4 of the First Superceding Indictment in an appearance before the District Court for the Central District of California relates to Mr. Bront's 2005 tax year, not his 2006 tax year.

[5]Mr. Bront argues that collateral estoppel does not apply in this case because the decision of the District Court is not final because "I retain the right to file a 'habeas corpus' action". Mr. Bront has yet to file a motion requesting such relief and it would be speculative for this court to imagine how the granting of the motion might impact the finality of Mr. Bront's criminal conviction for purposes of collateral estoppel in this and other civil cases. See Anderson v. Commissioner, T.C. Memo. 2009-44. He has cited no authority and the Court is aware of none, to

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B. Section 6663 Penalty

A conviction under section 7206(1) does not collaterally estop a petitioner from challenging the section 6663 civil fraud penalty for the same year, although the conviction is persuasive evidence of fraud. Wright v. Commissioner, 84 T.C. 636, 642-644 (1985); Plotkin v. Commissioner, T.C. Memo. 2011-260. This is because a conviction under section 7206(1) does not establish all of the elements needed to impose a section 6663 fraud penalty.

Mr. Bront was convicted under section 7206(1) for willfully filing a false Federal income tax return for his 2006 tax year. Section 6663 imposes a civil tax penalty for underpayments "due to fraud." The 'due to fraud' language has been consistently interpreted to require proof of specific intent to evade a tax believed to be owing. See, e.g, Hebrank v. Commissioner, 81 T.C. 640, 642 (1983). The intent to evade taxes is not a necessary element of the crime covered by section 7206(1). Wright v. Commissioner, 84 T.C. at 641. And a conviction under section 7206(1) does not establish as a matter of law that the taxpayer violated the legal duty with an intent, or an attempt, to evade taxes. Id. at 643.

We recognize that Mr. Bront, in addition to his guilty plea and conviction, agreed in the Plea Agreement that "[he] is liable for the fraud penalty imposed by the Internal Revenue Code, 26 U.S.C. § 6663, on the understatement of tax liability for tax years 2003, 2004, 2005, 2006, and 2007." But Mr. Bront was never found guilty of this by the District Court for the Central District of California nor was this issue fully litigated, and therefore Mr. Bront is not estopped from contesting his liability for the civil fraud penalty of section 6663.[6]

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[5](...continued)
suggest that a criminal conviction lacks finality for purposes of collateral estoppel unless and until all potential habeas corpus motions are resolved.

[6]The Ninth Circuit has recognized that a key question in dealing with collateral estoppel is whether the parties had "a full and fair opportunity to litigate" the issue in the earlier case. Maciel v. Commissioner, 489 F.3d 1018, 1023 (9th Cir. 2007) (quoting Littlejohn v. United States, 321 F.3d 915, 923 (9th Cir. 2003), aff'g in part and rev'g in part T.C. Memo. 2004-28. Deciding this
(continued...)

His statement might be considered a judicial admission, but for the fact that judicial admissions are concessions of fact, not law. See, e.g., International Paper Co. v. United States, 39 Fed. Cl. 478, 482 (1997) (stating that a defendant's admissions were not dispositive of the controlling question of law).

Additionally, at this time the Court will continue this case from the March 12, 2012, Los Angeles, California, calendar, sua sponte. For the above reasons, it is

ORDERED: That respondent's motion for partial summary judgment, filed December 1, 2011, is denied. It is further

ORDERED: That this case is stricken from the session of the Court commencing on March 12, 2012, in Los Angeles, California, and jurisdiction is retained by the undersigned. This order constitutes official notice of the same to the parties herein.

(Signed) Robert A. Wherry, Jr.
Judge

Dated: Washington, D.C.
March 7, 2012

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[6](...continued)
requires at least two considerations. First, the court must compare the procedures in the prior and subsequent actions. Second, the court must consider the parties' incentives to litigate in the two actions. Id.