UNITED STATES TAX COURT
WASHINGTON, DC 20217

VINCENT J. FUMO, ET AL.,	)	
	)	**SR**
Petitioner(s),	)	
	)	
v.	)	Docket No. 17603-13, 17614-13.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

These two consolidated cases are calendared for trial beginning March 30, 2020, in Philadelphia, Pennsylvania. These case arises from respondent's determination that petitioner failed to report income on account of benefits, services, and funds he received through a fraudulent scheme directed against the State of Pennsylvania and a non-profit organization. On October 10, 2019, respondent filed a Motion for Partial Summary Judgment, and on February 3, 2020, petitioner filed a Motion for Summary Judgment. We shall deny both motions.

Background

In 2007 petitioner, a former Pennsylvania State Senator, was indicted in the U.S. District Court for the Eastern District of Pennsylvania on charges of defrauding the Pennsylvania Senate and a non-profit group, Citizens Alliance, during 2001-2005. The indictment consisted of 139 counts including violations of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1512(b)(2)(B) (obstruction of justice), 1519 (obstruction of justice), 371 (conspiracy), and 981(criminal forfeiture), and violations of I.R.C. § 7206(2) (willfully aiding or assisting in filing false tax returns). On March 17, 2009, petitioner was convicted of 137 counts including mail fraud, wire fraud, conspiracy to commit mail and wire fraud, conspiracy to defraud the United States, obstruction of justice, conspiracy to obstruct justice, and violation of I.R.C. § 7206(2).

The immediate victims of petitioner's fraudulent scheme were the Pennsylvania Senate and Citizens Alliance. They suffered losses through: (1) payments to

SERVED Feb 28 2020

employees and contractors for work that they performed for petitioner individually; (2) petitioner's use of their assets and funds for personal purposes; and (3) payment of excessive salaries to employees who were promoted solely because of loyalty to petitioner. The counts on which he was indicted and convicted did not require a specific finding by the District Court concerning the dollar value of the benefits that he received. And as respondent concedes, the District Court did not "decide whether petitioner omitted income." However, as part of petitioner's original sentence he was ordered to pay $2.3 million in restitution to the victims.

Pursuant to 28 U.S.C. § 2461(c) and 18 U.S.C. § 981(a)(1)(C), the grand jury charged petitioner and his co-defendant with forfeiture of "any property, real or personal, that constitutes or is derived from proceeds traceable to the commission" of the offenses. At trial the Government sought a forfeiture judgment exceeding $4 million. On May 13, 2009, the District Court rendered a verdict on that point, stating that the Government "ha[d] not met its burden of proof by a preponderance of the evidence of showing what property * * * [petitioner] received which constituted or was derived from proceeds traceable to the mail or wire fraud counts on which he was convicted." The District Court accordingly did not order a judgment of forfeiture, noting that its verdict in this respect had no bearing on the issue of restitution. Respondent did not appeal the forfeiture verdict.

Petitioner appealed his conviction and sentence to the U.S. Court of Appeals for the Third Circuit, which affirmed the conviction but vacated the sentence and remanded the case for resentencing. United States v. Fumo, 655 F.3d 288 (3rd Cir. Aug. 23, 2011, as amended Sept. 15, 2011). On remand the District Court found that the losses caused by petitioner's actions consisted of $2,517,274 to the Senate and $1,566,528 to Citizens Alliance. But it held that petitioner was liable for only half of the losses suffered by Citizens Alliance (finding a co-defendant liable for the other half). The case was appealed again and the Third Circuit remanded the case for redetermination of petitioner's share of the restitution. United States v. Fumo, 513 F. App'x 215 (3rd Cir. 2013). The Circuit Court suggested that petitioner may have "reaped approximately 96% of the gains and benefits of the fraud" while his co-defendant enjoyed the remaining 4%. Id. at 220. After a hearing following the second remand, the District Court ordered petitioner to pay 75% of the total restitution due to Citizens Alliance.

On May 14, 2013, respondent issued petitioner a notice of deficiency for 2001-2005. This notice determined that petitioner during 2001-2005 had received (in the aggregate) unreported income of $1,695,090 and $438,866 on account of taxable benefits derived from the Pennsylvania Senate and Citizens Alliance,

respectively. In an amended answer filed December 3, 2019, respondent supplied additional details concerning the taxable benefits petitioner allegedly received. The amendment increased the deficiencies arising from income attributable to benefits derived from the Pennsylvania Senate by $170,408, to $1,865,498 in the aggregate. This adjustment resulted from using a different averaging computation to estimate losses.

On October 10, 2019, respondent filed a motion for partial summary judgment contending: (1) that petitioner is collaterally estopped from relitigating facts established in his criminal case, including the fact that his fraudulent actions caused misappropriations from his victims; and (2) that his "misappropriations constitute taxable benefits received by petitioner * * * as a matter of law." On February 3, 2020, petitioner filed a motion for summary judgment contending that respondent is collaterally estopped from "relitigating whether petitioner received proceeds, income, or benefits as a result of the crimes for which he was convicted." That is so, petitioner says, because the District Court rendered a verdict in petitioner's favor on the forfeiture count. Petitioner further contends that he is entitled to summary judgment under an alternative theory that the period of limitations has expired.

Discussion

The purpose of summary judgment is to expedite litigation and avoid costly, time-consuming, and unnecessary trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Under Tax Court Rule 121(b) we may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). In deciding whether to grant summary judgment, we construe factual materials and inferences drawn from them in the light most favorable to the nonmoving party. Ibid. However, the nonmoving party may not rest upon the mere allegations or denials in his pleadings, but instead must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d), Tax Court Rules of Practice and Procedure; see Sundstrand Corp., 98 T.C. at 520.

Collateral estoppel precludes parties "from contesting matters that they have had a full and fair opportunity to litigate[,] protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. 147, 153-154 (1979). Six conditions

must be met for collateral estoppel to apply: (1) "there must be a final judgment rendered by a court of competent jurisdiction," (2) "the issue in the second suit must be identical with the one decided in the first suit," (3) "collateral estoppel may be asserted only against parties (or their privies) to the prior judgment," (4) "the parties must actually have litigated the issues, and the resolution of these issues must have been essential to the prior decision," (5) "the controlling facts and applicable legal rules must remain unchanged from those in the prior litigation," and (6) "there must not be any special circumstances that warrant an exception to its application." Atkinson v. Commissioner, T.C. Memo. 2012-226 (citing Peck v. Commissioner, 90 T.C. 162, 166-167 (1988), aff'd, 904 F.2d 525 (9th Cir. 1990)).

A. Respondent's Motion

We agree with respondent that collateral estoppel will prevent petitioner from relitigating numerous facts that were indisputably litigated and resolved against him in the criminal case. Given the complexity of the facts here, we are not prepared at this juncture to enumerate the precise matters as to which collateral estoppel will apply. On the other hand, we are certain that petitioner will not be precluded, by collateral estoppel or otherwise, from disputing the amounts of unreported income that the notice of deficiency determined him to have received.

At its heart this case is about unreported income. "Gross income includes income realized in any form, whether in money, property, or services." Sec. 1.61-1(a), Income Tax Regs. It is well established that gross income may include unlawful gains. See James v. United States, 366 U.S. 213, 218 (1961). In unreported income cases the Commissioner must establish a "minimal evidentiary showing" connecting the taxpayer with the alleged income-producing activity, see Blohm v. Commissioner, 994 F.2d 1542, 1548-1549 (11th Cir. 1993), aff'g T.C. Memo. 1991-636, or demonstrate that the taxpayer actually received unreported income, see Edwards v. Commissioner, 680 F.2d 1268, 1270 (9th Cir. 1982). "Once the Commissioner makes the required threshold showing, the burden shifts to the taxpayer to prove by a preponderance of the evidence that the Commissioner's determinations are arbitrary or erroneous." Walquist v. Commissioner, 152 T.C. 61, 67-68 (2019).

The facts established in the criminal case did not determine the amount of gross income that petitioner received for Federal income tax purposes. The District Court found that petitioner reaped improper benefits and that the Senate and Citizens Alliance were the victims of misappropriation. But it did not find that petitioner derived taxable benefits in a one-to-one ratio with his victims' losses.

The presence of a co-defendant is one of several factors that could affect the "taxable benefits" analysis. For example, the court of appeals suggested that petitioner might have culpability for as much as 96% of the losses suffered by Citizens Alliance, whereas the District Court ordered petitioner to pay only 75% of the total restitution due to that organization. Cf. Cipparone v. Commissioner, T.C. Memo. 1985-234, 49 T.C.M. (CCH) 1492, 1496 (declining to impose collateral estoppel where "[a]t most, there [wa]s an 'implication'" that funds were split evenly between co-defendants). And whereas an embezzler may be held to have received gross income in the dollar amount of funds embezzled, the result may be less obvious for certain of the benefits that petitioner received. For example, there may be disputes of material fact as to whether petitioner derived a dollar-for-dollar benefit from additional salary received by employees for whom he secured promotions to higher positions.

The facts of this case somewhat resemble those of Neder v. Commissioner, T.C. Memo. 2006-54, 91 T.C.M. (CCH) 919. There, the taxpayer purchased properties from third parties using shell corporations, then immediately sold the properties to himself. He was found guilty of several crimes, but notably the "jury was not asked to decide the amount of [the taxpayer's] unreported income." Id. at 922. We held that the taxpayer was barred from disputing that he had received some taxable benefit, but that he was not precluded from disputing the amount of gross income that he had received.

In the case at hand, the District Court and the Third Circuit devoted considerable effort to determining the proper amount of restitution that petitioner should be required to pay. But neither court was required to determine, among the facts underlying the criminal conviction, what taxable benefit petitioner derived from his wrongdoing. Quantificaton of the losses suffered by the victims arose only at sentencing, as relevant to calculation of restitution.

We have previously declined to equate a loss calculated for purposes of estimating restitution with taxable income for purposes of determining a tax deficiency. See Klein v. Commissioner, 149 T.C. 341, 359-360 (2017). In Klein the victim was the Internal Revenue Service, yet we concluded that its tax loss (as computed for sentencing purposes) was not necessarily the same as the taxpayer's civil tax liability. Such an equation may be even less obvious here because (1) the losses were not tax losses and (2) the facts found in the criminal case to do not establish a one-to-one correspondence between losses suffered by the victims and the gross income realized by petitioner.

Respondent directs our attention to two cases in which we found that a taxpayer was collaterally estopped where the sentencing court had issued a restitution order. In Johnson v. Commissioner, T.C. Memo. 1993-227, 65 T.C.M. (CCH) 2760, the taxpayer had pleaded guilty to embezzling and receiving the specific amount that was alleged in the indictment. "Due to the nature of the offense, the specific amounts embezzled were essential elements of each count in the indictment." Johnson, 65 T.C.M (CCH) at 2763. There, it was obvious that the taxpayer had received a one-for-one benefit from the embezzlement, and "[i]llegal gains from embezzlement clearly constitute taxable income." Ibid. In Shearer v. Commissioner, T.C. Memo. 1991-527, 62 T.C.M. (CCH) 1063, we applied collateral estoppel where the taxpayer had been found liable (civilly and criminally) for stealing $1.4 million. We found that the dollar amount of the theft "was actually litigated in the criminal case" and that the taxpayer had had a "full and fair opportunity to litigate the issue." Id. at 1064. Both cases are clearly distinguishable from this case.

In sum, construing the facts in the light most favorable to petitioner, we conclude that collateral estoppel does not prevent petitioner from contesting the dollar amounts of unreported income as alleged in respondent's answer. And we find that genuine disputes of material fact exist as to whether petitioner derived a one-to-one taxable benefit equal to the amount of restitution ordered by the District Court. At trial respondent will have the burden of connecting petitioner to receipt of unreported income. If respondent meets that burden, the burden will shift to petitioner to prove that respondent's determinations of unreported income are erroneous. See Walquist, 152 T.C. at 67-68.

B. Petitioner's Motion

Petitioner seeks summary judgment on the grounds that: (1) respondent should be collaterally estopped, by the District Court's decision not to enter a judgment of forfeiture, from asserting that petitioner received gross income; or alternatively, (2) the period of limitations on assessment has expired. See I.R.C. § 6501(a), (c).

The District Court declined to enter a verdict of forfeiture because of its finding that the Government had not proven that petitioner derived "proceeds traceable to the mail or wire fraud counts on which he was convicted." The term "proceeds," for purposes of 18 U.S.C. § 981, is not equivalent to "income" within the meaning of I.R.C. § 61. "Proceeds" is defined to mean property obtained "as

the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto." 18 U.S.C. § 981(a)(2)(A). "Proceeds" are forfeitable only if obtained as a result of violating certain enumerated statutes. See id. para. (1). "Income" under the Internal Revenue Code is not subject to such limitations. See I.R.C. § 61(a) ("[G]ross income means all income from whatever source derived."); Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 429-430 (1955) ("Congress applied no limitation as to the source of taxable receipts, nor restrictive labels as to their nature.").

Petitioner asserts that "'proceeds' and 'income' are the same," but he cites no authority for that proposition. We are aware of no case holding that a verdict with respect to forfeiture under 18 U.S.C. § 981 is preclusive with respect to a determination of gross income under I.R.C. § 61. Cf. McHan v. Commissioner, 558 F.3d 326, 332 (4th Cir. 2009) (finding that the outcome of a criminal forfeiture proceeding was not preclusive with respect to gross income). Because there is no identity between "proceeds" for purposes of 18 U.S.C. § 981 and "income" for purposes of I.R.C. § 61, the District Court's decision not to enter verdict of forfeiture should not be given collateral estoppel effect here. See Peck, 90 T.C. at 166.

Petitioner next contends that respondent has failed to adduce enough facts to show that the period of limitations on assessment for 2001-2005 has not expired. The period of limitations on assessment is generally three years from the date on which the return was filed. See I.R.C. § 6501(a). However, "in the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed * * * at any time." I.R.C. § 6501(c)(1). Respondent has the burden of proving fraud, and he must prove it by clear and convincing evidence. I.R.C. § 7454(a); Rule 142(b), Tax Court Rules of Practice and Procedure. To sustain his burden, respondent must establish: (1) that there was an underpayment of tax for each year at issue, and (2) that at least some portion of the underpayment for each year was due to fraud. Hebrank v. Commissioner, 81 T.C. 640, 642 (1983).

Genuine disputes of material fact clearly exist as to whether petitioner, for one or more of the years at issue, filed a "false or fraudulent return with the intent to evade tax." I.R.C. § 6501(c)(1). Petitioner was convicted of several counts of fraud and a host of other crimes. Those other crimes included willfully aiding and assisting in the filing of false tax returns. Construing the facts in the light most favorable to respondent, we conclude that petitioner is not entitled to summary judgment on the question whether the limitations period on assessment has expired.

In consideration of the foregoing, it is

ORDERED that Respondent's Motion for Partial Summary Judgment, filed in Docket No. 17603-13 on October 10, 2019, is denied to the extent forth in this Order. It is further

ORDERED that Petitioner's Motion for Summary Judgment, filed in Docket Nos. 17603-13 and 17614-13 on February 3, 2020, is denied.

(Signed) Albert G. Lauber
Judge

Dated: Washington, D.C.
February 27, 2020