United States Tax Court
Washington, DC 20217

Indu Rawat,	)	
	)	
Petitioner	)	
	)	
v.	)	Docket No. 15340-16.
	)	
Commissioner of Internal Revenue,	)	
	)	
Respondent	)	

O R D E R

This case involves the tax consequences for a nonresident alien individual upon the sale of her interest in a U.S. partnership when a portion of the sale proceeds is attributable to inventory items of the partnership. Now pending before the Court is petitioner's motion for summary judgment (Doc. 32). The motion asserts two issues--first, a so-called "Non-Inventory Gain issue" that respondent now concedes (see Docs. 54-55), and second, a so-called "Inventory Gain" issue that we address here. Except to the extent of respondent's concession, we will deny petitioner's motion.

Background

Consistent with Rule 121 (discussed below), the facts pertinent to petitioner's motion are those shown by petitioner and not disputed by respondent. Some numbers below are rounded.

Petitioner and Innovation Ventures, LLC

Petitioner, Indu Rawat, was a Canadian citizen and was a nonresident alien individual for U.S. Federal tax purposes during 2008 and 2009. Petitioner filed U.S. Federal income tax returns as a nonresident alien for the 2000 through 2007 tax years. Petitioner did not file tax returns for the 2008 or 2009 tax years.

Innovation Ventures, LLC ("Innovation Ventures"), is a U.S. business that manufactures and sells popular consumer products including 5-Hour Energy

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drinks. Innovation Ventures was treated as a partnership for federal tax purposes during all relevant years.

Between December 15, 2000, and January 1, 2007, petitioner acquired 300,000 Class A membership units (approximately a 30% interest) in Innovation Ventures. On December 28, 2007, petitioner contributed 5,000 of her membership units to Rural India Supporting Trust, and on January 4, 2008, petitioner executed a note for the sale of her remaining 295,000 units (an approximately 29% interest) to Manoj Bhargava for $438 million. The note provided for interest-only payments to petitioner until 2028, when the note would mature.

At the time the note was executed, Innovation Ventures had inventory items with a basis of $6.4 million, which it held for future sale. Innovation Ventures later sold those inventory items for a profit of $22.4 million, and petitioner's share of income attributable to the inventory was agreed to be $6.5 million. Thus, of the $438 million sales price paid to petitioner (by the note from Mr. Bhargava) for her interest in Innovation Ventures, $6.5 million was allocable to inventory.

Partnership examination and Form 5701

The IRS conducted an examination of Innovation Ventures for the 2007 and 2008 tax years. In December 2010 the IRS issued a Form 5701, "Notice of Proposed Adjustment" (Doc. 40, Ex. 4), to Mr. Bhargava (Innovation Ventures's tax matters partner ("TMP")) and Gerald Stein (petitioner's representative under a Form 2848, "Power of Attorney and Declaration of Representative", which she executed in August 2010). The Form 5701 proposed a $6.5 million adjustment to petitioner's income for 2008 arising from the Inventory Gain issue. The form states the "Account or Return Line" as "Form K-1 - Line 11(f)".[1] Under "Reasons for Proposed Adjustment", the Form 5701 states "See attached Form 886-A".

[1]The 2008 version of "Schedule K-1 (Form 1065)" had a Box 11 entitled "Other income (loss)". The instructions for Box 11 included codes A through F with directions for reporting specific items as "other income". "Code F" for Line 11 stated "[a]mounts with code F are other items of income, gain, or loss not included in boxes 1 through 10 or reported in box 11 using codes A through E"; and the instructions indicated that the partnership should provide a description and the amount of the partner's share for each of these items.

Form 886-A

The Form 886-A, "Explanation of Items", that is attached to the Form 5701 provides in part:

> **Facts:**
> On January 4, 2008, Ms. Indu Rawat sold her 29.2% interest in Innovation Ventures to Mr. Manoj Bhargava for $438,075,000. Ms. Rawat received an interest only note for $438,075,000 that matures in 2028 from Mr. Bhargava. The interest rate on the note is 4.39%. At the time of Ms. Rawat's sale, Innovation Ventures' [sic] had inventory of $6,426,056. This inventory was later sold for a profit of $22,339,644. Ms. Rawat's 29.2% of this profit is $6,523,176. IRC 751 requires the seller to recognize ordinary income to the extent of this inventory's fair market value exceeds its basis. Thus, Ms. Rawat must recognize ordinary income in the amount of $6,523,176. [Emphasis added.]
>
> **Law and Argument:**
> IRC 751 provides that the amount of money, or the fair market value of any property, received by a transferor partner in exchange for all or part of his interest in the partnership attributable to...(2) inventory items of the partnership, shall be considered as an amount realized from the sale or exchange of property other than a capital asset. Based on the fair market value of Ms. Rawat's 29.2% share of the inventory ($6,426,056) at the time of sale, she must recognize ordinary income in the amount of $6,523,176. [Emphasis added.]
>
> **Taxpayer's Position:**
> The taxpayer [presumably Innovation Ventures] is in agreement with this adjustment.

Agreement on Form 870-LT

Consistent with the Form 5701, petitioner later signed and transmitted to the IRS a Form 870-LT, "Agreement for Partnership Items and Partnership Level Determinations as to Penalties, Additions to Tax, and Additional Amounts and Agreement for Affected Items". (Doc. 40, Ex. 3; emphasis added.) The Form 870-LT offered terms to settle contested items at the partnership-level and the partner-level, as follows.

Settlement of partnership items in Part I

The Form 870-LT has two pages and consists of two parts: Part I (on page 1)--entitled "Offer of Agreement to Partnership Items * * *"--begins as follows (emphasis added):

> Under sections 6224(c) and 7121 of the Internal Revenue Code (IRC) of 1986, the Commissioner of the Internal Revenue Service and the undersigned taxpayer(s) agree to the determination of partnership items and partnership level determinations as to penalties, additions to tax, and additional amounts that relate to adjustments to partnership items as shown on the attached Schedule of Adjustments.

Part I refers to the attached Schedule of Adjustments, and it provides a signature line for petitioner to agree to the partnership adjustments.

Settlement of partner-level items in Part II

Part II of the Form 870-LT (on page 2)--entitled "Offer of Agreement for Affected Items * * *"--similarly begins as follows (emphasis added):

> Under sections 6224(c) and 7121 of the Internal Revenue Code (IRC) of 1986, the Commissioner of the Internal Revenue Service and the undersigned taxpayer(s) agree to the determination of partner level determinations (affected items) as shown on the attached schedule of adjustments.

Part II also refers to the attached Schedule of Adjustments; and it provides another signature line for petitioner to agree to the partner-level adjustments.

Each part references sections 6224(c) and 7121 and the Commissioner's authority to agree with taxpayers to conclusively settle the items as set out in the respective parts of the Form 870-LT and the attached Schedule of Adjustments.

Schedule of Adjustments and Form 886-A

The attached Schedule of Adjustments (incorporated into both Part I and Part II of the Form 870-LT) includes, under "Other income (loss)", an adjustment of $6,523,176.00. The "Remarks" section of the Schedule of Adjustment explains:

> Other income relates to unrealized receivables[2] as defined under Section 751. For additional information please refer to Form 886-A.

We infer that the Form 886-A attached to the Form 870-LT was the same Form 886-A that had been attached to the earlier Form 5701. As quoted above, the Form 886-A twice states that Ms. Rawat "must recognize ordinary income in the amount of $6,523,176."

The finality of Form 870-LT

Each of the two parts of Form 870-LT states that, when both parties sign the form,"[t]his is a binding settlement". That is, when they sign Part I, they "agree to the determination of partnership items"; and when they sign Part II, they "agree to the determination of partner level determinations (affected items)". (Emphasis added.) Finally, each part explains the finality of the agreement as follows:

> [Part I] The undersigned taxpayer(s), in accordance with IRC section 6224(b) and 6213(d), also waive(s) the restrictions provided by IRC sections 6225(a) and 6213(a) and consent(s) to the assessment and collection of any deficiency attributable to partnership items, penalties, additions to tax, and additional amounts that relate to partnership items, as set forth in the attached Schedule of Adjustments, plus any interest provided by law....
>
> This is a binding settlement only when you sign this form, it is returned to us, and we sign on behalf of the Commissioner....
>
> [Part II] The undersigned taxpayer(s), in accordance with IRC section 6224(b) and 6213(d), also waive the restrictions provided by IRC sections 6225(a) and 6213(a) and consent to the assessment and collection of any deficiency attributable to partner level determinations, as set forth in the attached Schedule of Adjustments, plus any interest provided by law. This is a binding settlement only when you sign this form, return it to us and we sign on behalf of the Commissioner.

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[2]Respondent plausibly explains (and we assume) that the reference in the "Remarks" to "unrealized receivables" is a "scrivener's error" that should instead refer to inventory.

> If Part II of this agreement form is signed for the Commissioner, the treatment under this agreement of the specified affected items and the partner level determinations as to penalties, additions to tax, and additional amounts that relate to adjustments to partnership items will not be reopened in absence of fraud, malfeasance, or misrepresentation of fact. In addition, no claim for an adjustment of affected items or partner level determinations as to penalties, additions to tax, and additional amounts, or a refund or credit based on any change in the treatment of these affected items or partner level determinations as to penalties, additions to tax, and additional amounts may be filed or prosecuted.

In February 2011 petitioner signed both parts of the Form 870-LT; and in April 2011 the IRS accepted and countersigned both parts.

Notice of Computational Adjustment

In February 2012 the IRS issued to petitioner a Notice of Computational Adjustment for her 2008 tax year. (Doc. 40, Ex. 6.) The text of the notice indicates that "[t]he adjustments are being made as a result of" several possible alternatives, including "an agreement you signed", and a copy of the Form 870-LT agreement was attached. The notice included a Form 4549-A, "Income Tax Discrepancy Adjustments", that listed a $6.5 million increase in income for "Sch E - Inc/Loss - Partnership - Innovation Ventures LLC" (i.e., the Inventory Gain issue settled under the Form 870-LT) and a tax liability of $2.3 million. Additionally, the IRS determined nearly $1 million in additions to tax under section 6651(a)(1) and (2) and section 6654.

In March 2012 the IRS assessed these amounts (though they were later reduced to reflect a $1.9 million charitable contribution deduction carryover from the prior year).

Statutory notice of deficiency and petition

In May 2016 the IRS issued to petitioner a statutory notice of deficiency ("SNOD") for her 2008 and 2009 tax years. (Doc. 1, Ex. A.) The SNOD reflected the previously assessed amounts for 2008 and determined additional income attributable to the installment obligation (Mr. Bhargava's note for the sale of the partnership interest) under section 453A(c)(2)(B) for each of 2008 and 2009. The

SNOD indicated a $3.8 million increase in income for 2008 and $2.6 million in income for 2009. The deficiencies in tax in the SNOD that resulted from that additional income totaled $4.8 million in tax and additions for 2008 and $3.8 million for 2009. (These amounts relate to the Non-Inventory Gain Issue that the Commissioner now concedes.)

In June 2016, petitioner paid $2.9 million in tax, interest, and additions to tax attributable to the initial assessments for the 2008 tax year (i.e., the computational adjustments for the Inventory Gain issue). In July 2016, petitioner filed her petition with this Court in order to challenge the items in the SNOD and to invoke the Court's overpayment jurisdiction under section 6512(b) with respect to her $2.9 million payment for the computational adjustment.[3]

Petitioner's motion for summary judgment

Petitioner's motion for summary judgment (Docs. 32, 33) contends that our decision in Grecian Magnesite Mining, Industrial & Shipping Co., SA v. Commissioner, 149 T.C. No. 3 (2017), aff'd, 926 F.3d 819 (D.C. Cir. 2019), effectively resolves both issues in this case, including in particular the Inventory Gain issue now before us. Petitioner's general position is that under Grecian Magnesite a nonresident alien individual is not subject to U.S. income tax on the sale of the individual's interest in a U.S. partnership because those gains would be sourced outside the U.S. under the general rule of section 865(a)(2), irrespective of whether any portion of the gains would be attributable to inventory items under section 751(a). Petitioner contends that, under the rationale of this Court's decision in Grecian Magnesite, her nonresident status resolves both the inventory gain and the non-inventory gain issues in her favor. Petitioner's motion did not address the Form 870-LT.

Respondent's response

Respondent did not file a cross-motion for summary judgment but opposes petitioner's motion on various grounds. As an initial matter (and addressed in this

[3]The SNOD states that petitioner filed a claim for refund on May 24 and August 8, 2012, and that the issue raised in her claim was "[t]he propriety of an assessment using TEFRA procedures". Unless we have overlooked it, the refund claim or claims do not appear in the record of this case. It would seem appropriate that the refund claim on which our overpayment jurisdiction presumably depends would appear in the Court's record.

order), respondent contends that the Form 870-LT executed by the parties resolves the disputed inventory gain issue because both parties signed both parts of the Form 870-LT and thereby agreed to settle all partnership and partner-level items, including petitioner's recognition of $6.5 million of ordinary income attributable to the inventory gains. Respondent also disputes the merits of petitioner's motion on grounds that we need not address here.

Petitioner's reply

In reply to respondent's argument concerning the Form 870-LT, petitioner does not contend that either party failed to execute the agreement or that the agreement was not binding with respect to partnership-level determinations. Petitioner contends that the agreement did not resolve any partner-level items because neither the Schedule of Adjustments nor the Form 886-A reflected any partner-level determinations that could have given rise to a deficiency. (Petitioner seems to question whether the Form 886-A was indeed attached to the Form 870-LT, but petitioner contends that even if the Form 886-A was attached, "[a]ll that the Form 886-A reflected was a partnership-level adjustment--an allocation of $6,523,176 of ordinary income--to petitioner based on the fair market value of her 29.2% share of inventory at the time of her sale of her partnership interest, *i.e.*, the Inventory Gain.") Petitioner contends that respondent made a computational adjustment to petitioner's income based on the partnership adjustments agreed to under the Form 870-LT, but that petitioner is permissibly challenging the computational adjustments under section 6230(c)(1)(A)(ii) on the grounds that the IRS failed to account for petitioner's nonresident status for purposes of whether or not to apply the adjustment.

For the reasons discussed below, we will deny petitioner's motion.

Discussion

I. Summary judgment

In Sundstrand Corp. and Consol. Subs. v. Commissioner, 98 T.C. 518, 520 (1992), we explained that summary judgment is appropriate if the pleadings and other materials show that there is no genuine issue as to any material fact and a decision may be rendered as a matter of law. See also Rule 121(b); Naftel v. Commissioner, 85 T.C. 527, 529 (1985). The moving party bears the burden of showing that no genuine dispute exists as to any material fact and that she is entitled to judgment on the substantive issues as a matter of law. Celotex Cord. v.

Catrett, 477 U.S. 317, 323 (1986); Espinoza v. Commissioner, 78 T.C. 412, 416 (1982). In deciding whether to grant summary judgment, we view the factual materials and inferences drawn from them in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986); Naftel v. Commissioner, supra at 529. If there exists any genuine dispute as to the facts at issue, the motion must be denied. Espinoza v. Commissioner, supra at 416.

Petitioner has moved for summary judgment, so she has the burden to show that there are no material facts in dispute and that she is entitled to judgment on the substantive issues as a matter of law. Respondent contends that the closing agreement on Form 870-LT forecloses petitioner's contentions about the effect of her nonresident status and should resolve the Inventory Gain issue against her. Consequently, we will limit our discussion herein to the Form 870-LT issue and will deny petitioner's motion.

II. General legal principles

To address petitioner's motion and respondent's opposition, we must consider principles of closing agreements and the extent to which such agreements are final. As we explained in Silverman v. Commissioner, 105 T.C. 157, 161 (1995), closing agreements are specifically authorized by section 7121(a),[4] and section 7121(b) provides:

> If such agreement is approved by the Secretary (within such time as may be stated in such agreement, or later agreed to) such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact--
>
> (1) the case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States, and
>
> (2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or

[4] "The Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period." Sec. 7121(a).

> credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

Therefore, to the extent of matters agreed upon, a closing agreement under section 7121 is final and will not be set aside absent a showing of fraud or malfeasance, or a misrepresentation of a material fact. Silverman v. Commissioner, 105 T.C. 161.

III. Analysis

The Form 870-LT agreement states that it is made "[u]nder sections 6224(c)[5] and 7121". Neither party disputes that the Form 870-LT was a valid closing agreement. See McAvey v. Commissioner, T.C. Memo. 2018-142 (acknowledging Form 870-LT as a valid closing agreement for purposes of section 7121). Neither party asks us to set aside the Form 870-LT in this case. Rather, the parties disagree about the extent of the items included in and agreed upon in the Form 870-LT. Petitioner would limit the scope of the agreement to partnership-level determinations without any binding effect upon partner-level consequences. That is, petitioner contends that any partner-level tax consequences of the agreed adjustments are subject to further individual determinations--such as whether or not she is liable for income tax as a nonresident (which petitioner challenges). Petitioner bases her construction of the Form 870-LT on the supposed fact that the Schedule of Adjustments and the Form 886-A did not effect adjustments at the partner-level.

Respondent, on the other hand, urges that the Form 870-LT reflects agreement as to adjustments at both the partnership and partner levels, and that the agreement yields a resulting liability with respect to petitioner's income for the inventory items. Respondent's position is based on petitioner's having executed Part I (for the partnership items) and Part II (for the affected items and partner-level determinations) of the Form 870-LT, which respondent contends included the attached Schedule of Adjustments and corresponding Form 886-A that together establish the resulting liability to petitioner. The Form 886-A twice states that Ms. Rawat "must recognize" the Inventory Gain; and "the word 'recognized' means 'taken into account in computing taxable income'". Venture Funding, Ltd. v. Commissioner, 110 T.C. 236, 241 (1998), aff'd, 198 F.3d 248 (6th Cir. 1999)

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[5]Section 6224(c)(1) authorizes a "settlement agreement between the Secretary or the Attorney General (or his delegate) and 1 or more partners in a partnership with respect to the determination of partnership items".

(quoting Bittker & McMahon, Federal Income Taxation of Individuals, par. 28.2, at 28–2 (2d ed.1995)).[6]

To resist this contention, petitioner's reply brief refers to "the unsigned Form 886A, which does not indicate that it was attached to the Form 870-LT." If petitioner means to suggest that the Form 886-A was not attached to the Form 870-LT, then for purposes of her motion, the suggestion fails. As movant, she must not merely raise questions about the non-movant's factual assertions but must affirmatively show the facts that her own position relies on. She fails to do so for two reasons:

First, the Form 870-LT undeniably "refer[s] to Form 886-A", and the Commissioner, though unable to present a signed copy of a Form 886-A, proffers as Exhibit 4 the Form 886-A that had previously been generated in the case and that appears in the IRS's records.[7] If, as Rule 121 requires, we draw inferences in favor of the non-movant, then we infer that the Form 886-A that the Commissioner proffers is the one referred to in the Form 870-LT. Petitioner does not even assert affirmatively that Exhibit 4 was not the referenced Form 886-A; much less does she offer her own declaration or that of her representative denying that the form was associated with the agreement she signed.

Second, the Form 870-LT undeniably includes a Part II ("Offer of Agreement for Affected Items * * *") that expressly recounts "agree[ment] to the determination of partner level determinations (affected items)", "agreement of the specified affected items", and "agreement with respect to affected items".

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[6]Cf. sec. 7701(a)(45) ("The term 'nonrecognition transaction' means any disposition of property in a transaction in which gain or loss is not recognized in whole or in part for purposes of subtitle A" (emphasis added)). The word "recognized" may be contrasted with "realized". If someone has economically "realized" gain, it may remain to be seen whether she is required to "recognize" it as income. See, e.g., Hughes v. Commissioner, T.C. Memo. 2015-89, *22-*25.

[7]The Commissioner's declarant states: "Attached as Exhibit 4 is a true and correct electronic copy of Form 5701, Notice of Proposed Adjustment with Form 886-A, Explanation of Items, issued to Innovation Ventures, LLC, Mr. Manoj Bhargava, TMP, and Mr. Gerald Stein, CPA/POA dated December 15, 2010 (Form 886-A). Respondent is still in the process of seeking the original audit file for Innovation Ventures 2008 tax year and expects that file may contain a copy of the Form 886-A countersigned by Mr. Stein."

(Emphasis added.) It is not absolutely impossible that the IRS and a taxpayer might execute an agreement that purported to bind them to partner-level determinations when in fact there were no such determinations agreed to, but it seems unlikely. Neither petitioner nor any declarant states that this occurred, or explains why it occurred, or shows that there were agreed-to partner-level adjustments other than the Inventory Gain issue.

The Commissioner has, by his declaration and Exhibit 4, raised a genuine dispute as to whether there was (as petitioner argues) no agreement in the Form 870-LT to a partner-level adjustment for inventory gain.

Closing agreements are contracts governed by Federal common law and interpreted under ordinary principles of contract law. S & O Liquidating Partnership v. Commissioner, 291 F.3d 454, 459 (7th Cir. 2002). Contract law principles generally direct that we look within the "four corners" of the agreement, unless it is ambiguous as to essential terms. Rink v. Commissioner, 100 T.C. 319, 325 (1993). Respondent contends--and we agree--that the Form 870-LT is unambiguous; that the four corners of the Form 870-LT incorporate the Schedule of Adjustments, which include an adjustment of $6.5 million of other income and which "refer[s] to Form 886-A"; and that the Form 886-A states that "Ms. Rawat must recognize ordinary income in the amount of $6,523,176." Respondent is the non-moving party, and if we draw inferences and resolve doubts in his favor, then we must conclude, for purposes of petitioner's motion, that petitioner entered into a binding agreement as to the partner-level inventory gain determination and the resulting liability at issue in this case. Thus, there is a genuine dispute that prevents our granting petitioner's motion.

Based on the foregoing it is

ORDERED that petitioner's motion for summary judgment is granted in part as to the Non-Inventory Gain issue that respondent concedes and is denied in part as to the Inventory Gain issue. It is further

ORDERED that, no later than August 6, 2021, the parties shall file a joint status report (or if that is not expedient, then separate reports) that shall include their recommendations as to further proceedings in this case.

(Signed) David Gustafson
Judge