United States Tax Court

T.C. Memo. 2022-23

OXBOW BEND, LLC,
PARKWAY SOUTH, LLC, TAX MATTERS PARTNER,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 12718-19. Filed March 21, 2022.

Michael Todd Welty, *Andrew W. Steigleder*, and *Kevin M. Johnson*, for petitioner.

Marc L. Caine, *Alexandra E. Nicholaides*, *Shawna A. Early*, *Russell Scott Shieldes*, and *Phillip A. Lipscomb*, for respondent.

MEMORANDUM OPINION

LAUBER, *Judge*: This case involves a charitable contribution deduction claimed by Oxbow Bend, LLC (Oxbow), for a conservation easement. The Internal Revenue Service (IRS or respondent) issued petitioner a notice of final partnership administrative adjustment (FPAA) disallowing Oxbow's deduction and determining penalties. Currently before the Court are the parties' Cross-Motions for Partial Summary Judgment addressing the question whether the IRS complied with section 6751(b)(1) with respect to the penalties.[1]

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Served 03/21/22

[*2] Section 6751(b)(1) requires that the "initial determination" of a penalty assessment be personally approved (in writing) by the immediate supervisor of the person making that determination. Respondent contends that the "initial determination" of the penalties in question was communicated in the FPAA, which was issued two months after the examining agent secured her supervisor's approval. Petitioner urges that supervisory approval came too late because the "initial determination" occurred five months earlier, when the examining agent mentioned her penalty recommendations during a telephone call with Oxbow's representative. Concluding that respondent has the better argument, we will grant his Motion for Partial Summary Judgment and deny petitioner's.

Background

The following facts are derived from the pleadings, the parties' motion papers, and the exhibits and declarations attached thereto. They are stated solely for purposes of deciding the Cross-Motions and not as findings of fact in this case. *See Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). Oxbow had its principal place of business in Georgia when the Petition was timely filed.

In September 2014 Oxbow acquired roughly 133 acres of land in Elmore County, Alabama. On December 4, 2014, Oxbow granted to the National Wild Turkey Federation Research Foundation (NWT) a conservation easement over the land. Three weeks later, Oxbow donated a fee simple interest in the land to a passthrough entity wholly owned by NWT.

Oxbow timely filed Form 1065, U.S. Return of Partnership Income, for its short 2014 tax year. On that return it claimed a charitable contribution deduction of $12,375,000 for the donation of the easement. It also claimed a charitable contribution deduction of $4,125,000 for its donation of the fee simple interest.

The IRS selected Oxbow's return for examination and in February 2017 assigned the case to Revenue Agent (RA) Pamela Stafford. In October 2018 RA Stafford neared completion of her examination. On October 4, 2018, she began drafting Form 5701, Notice of Proposed Adjustment.

On November 1, 2018, RA Stafford and Christopher Pavilonis, an attorney in the IRS Office of Chief Counsel, participated in a telephone conference with Oxbow's representative to discuss "the current status of

[*3] the examination." (Catherine Brooks, RA Stafford's immediate supervisor, did not participate in the call.) During the call RA Stafford informed Oxbow's representative "what the adjustments would be" and indicated the "penalties that were currently under consideration." RA Stafford explained that, once she completed her work, she planned to recommend that the case be "closed to issue an FPAA instead of allowing [Oxbow] to go to Appeals." Because the case "w[as] extremely old," RA Stafford stated that the IRS would "go the FPAA route" without issuing a "summary report or F[orm] 886-A." RA Stafford did not provide Oxbow's representative, in conjunction with the call, any document setting forth her recommendations. Nor did she ask Oxbow's representative to sign any document.

That same day RA Stafford prepared a penalty lead sheet. This document reflects her recommendation that penalties be asserted against Oxbow under sections 6662 and 6662A. These included penalties for substantial and gross valuation misstatement. *See* § 6662(e), (h).

RA Stafford took a few more steps before formally closing the examination. On November 2, 2018, she "[c]ontinued working on" the notice of proposed adjustment (NOPA). She sent the draft NOPA to her manager for "approval/review" on November 5, 2018. Over the next two days RA Stafford "[f]inished [the] penalty NOPA," finalized her revenue agent report (RAR), and "[p]repared [a] transmittal letter for case closing." On November 9, 2018, she met briefly with her "manager . . . about potential penalties." She continued to work on the case through November 13, 2018.

On February 11, 2019, RA Stafford digitally signed the draft penalty lead sheet and sent it to Ms. Brooks, her immediate supervisor. Ms. Brooks signed the lead sheet that same day. Two months later, on April 10, 2019, the IRS issued the FPAA disallowing the charitable contribution deduction for the easement, reducing the deduction for the fee simple donation, and determining penalties. The IRS attached to the FPAA a copy of the penalty lead sheet as executed by Ms. Brooks.

Discussion

A. *Summary Judgment Standard*

The purpose of summary judgment is to expedite litigation and avoid costly, unnecessary, and time-consuming trials. *See FPL Grp., Inc. & Subs. v. Commissioner*, 116 T.C. 73, 74 (2001). We may grant

[*4] partial summary judgment regarding an issue as to which there is no genuine dispute of material fact and a decision may be rendered as a matter of law. Rule 121(b); *Sundstrand Corp.*, 98 T.C. at 520. The sole question presented at this juncture is whether the IRS complied with the requirements of section 6751(b)(1). The parties have filed Cross-Motions for Partial Summary Judgment on this question, and we find that it may be adjudicated summarily.

B. *Analysis*

Section 6751(b)(1) provides that "[n]o penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination." In a TEFRA case such as this, supervisory approval generally must be obtained before the IRS issues an FPAA to the partnership.[2] *See Palmolive Bldg. Inv'rs, LLC v. Commissioner*, 152 T.C. 75, 83 (2019). If supervisory approval is obtained by that date, the partnership must establish that the approval was untimely, i.e., "that there was a formal communication of the penalty before the proffered approval" was secured. *Frost v. Commissioner*, 154 T.C. 23, 35 (2020).[3]

Respondent has supplied the penalty lead sheet by which RA Stafford recommended assertion of penalties against Oxbow. RA Stafford's immediate supervisor, Ms. Brooks, signed the lead sheet on February 11, 2019. The definite decision to assert penalties was formally communicated to Oxbow two months later, in the FPAA dated April 10, 2019. Respondent thus contends that approval of these penalties was timely secured.

Petitioner argues that the IRS communicated to Oxbow its decision to assert penalties five months earlier, i.e., on November 1, 2018, when RA Stafford participated in a telephone conference with Oxbow's representative. RA Stafford proposed that call to discuss "the current status of the examination." During the call she informed Oxbow's representative "what the adjustments would be" and indicated the

[2] Before its repeal, TEFRA (the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §§ 401–407, 96 Stat. 324, 648–71) governed the tax treatment and audit procedures for many partnerships, including Oxbow.

[3] Although the Commissioner does not bear a burden of production with respect to penalties in a partnership-level proceeding, a partnership may raise section 6751(b) as an affirmative defense. *See Dynamo Holdings Ltd. P'ship v. Commissioner*, 150 T.C. 224, 236–37 (2018).

[*5] "penalties that were currently under consideration." And she explained that, once she finished her work, the case would be "closed to issue an FPAA" because the case "w[as] extremely old."

RA Stafford did not provide Oxbow's representative—before, during, or immediately after the call—with any document setting forth her proposed adjustments or penalty recommendations. Nor did she ask Oxbow's representative to sign any formal or binding document, such as an RAR or a waiver of restrictions on assessment. Petitioner nevertheless argues that the penalty lead sheet manifested RA Stafford's "initial determination" to assert penalties and that this "determination" was communicated to Oxbow during the telephone conference. Petitioner thus contends that RA Stafford was obligated to secure her supervisor's approval for the penalties before convening the telephone call.

We disagree. The word "determination" has "an established meaning in the tax context and denotes a communication with a high degree of concreteness and formality." *Belair Woods, LLC v. Commissioner*, 154 T.C. 1, 15 (2020). An "initial determination" signifies a "consequential moment" of IRS action. *Ibid.* (quoting *Chai v. Commissioner*, 851 F.3d 190, 221 (2d Cir. 2017), *aff'g in part, rev'g in part* T.C. Memo. 2015-42). A "mere suggestion, proposal, or initial informal mention" of penalties does not reflect an examining agent's "initial determination." *Tribune Media Co. v. Commissioner*, T.C. Memo. 2020-2, 119 T.C.M. (CCH) 1006, 1010. Rather, "the 'initial determination' of a penalty assessment will be embodied in a formal written communication" that notifies the taxpayer of the decision to assert penalties. *Belair Woods*, 154 T.C. at 10; *see Oropeza v. Commissioner*, 155 T.C. 132, 138 (2020) ("[A] taxpayer may receive this notification in a notice of deficiency, or he may receive the notification in a document that the IRS sent him at an earlier date.").

In ascertaining the timeliness of penalty approval, we have uniformly asked whether the examining agent obtained supervisory approval before the first "formal written communication" to the taxpayer of penalties. *Belair Woods*, 154 T.C. at 10. In *Frost*, 154 T.C. at 35–36, we held that the IRS had complied with section 6751(b) because supervisory approval was obtained before the penalties were "formally communicated" to the taxpayer. In that case the first formal communication of penalties occurred in the notice of deficiency. *Ibid.*; *cf. Oropeza*, 155 T.C. at 139 (finding supervisory approval untimely where the determination to assert penalties was previously communicated to the taxpayer in formal IRS documents).

[*6] In *Excelsior Aggregates, LLC v. Commissioner*, T.C. Memo. 2021-125, at *5, the examining agent convened a telephone conference with the taxpayer's counsel to discuss the status of the examination. Before the call she faxed the taxpayer's counsel an agenda, which set forth her tentative conclusions about the issues presented by the examination. During the conference she discussed the applicability of specified accuracy-related penalties, and she offered the taxpayer the opportunity to supply new information that might change her mind, such as the possible availability of defenses to the penalties. *Ibid.* We held that the agent was not required to secure her supervisor's approval for the penalties before participating in that call. Rather, we held that the IRS had complied with the requirements of section 6751(b) because the "first formal communication" of penalties did not occur until the IRS issued the FPAA, which was mailed after the agent had secured written supervisory approval. *Id.* at *16.

In *Tribune Media Co.*, 119 T.C.M. (CCH) at 1010, we considered the taxpayers' submission that "the [supervisory] approval requirement 'arises the moment when the [IRS] employee first proposes the imposition of penalties to the taxpayer.'" On that theory, the taxpayers asserted that the examining agent was required to obtain his supervisor's approval before discussing penalties at a meeting. That meeting, like the telephone conference here, included not only the examining agent but also an attorney from the IRS Office of Chief Counsel.

During the meeting in *Tribune Media* the Chief Counsel attorney informed the taxpayers' representatives "that the Commissioner would apply a penalty to any underpayment determined." *Id.* at 1007. We held that this statement did not embody the "initial determination" of any penalty because the IRS had yet to issue a "written communication purporting to determine a penalty with any sense of finality." *Id.* at 1010. To adopt the taxpayers' argument, we concluded, would "ignore[] the sense of formality implied by Congress' use of the word 'determination' and would render the examination of penalty issues unworkable." *Ibid.*

We regard the facts here as substantially similar to those in *Excelsior Aggregates* and *Tribune Media*. Here, as there, the examining agent convened a status conference with the taxpayer's representative and informed him that she intended to recommend assertion of penalties. When the telephone call concluded, Oxbow's representative was apparently certain enough of RA Stafford's position that he did not make any supplemental submissions to her. But it is undisputed that the first

[*7] "formal written communication" of penalties, *see Belair Woods*, 154 T.C. at 10, did not occur until the IRS issued the FPAA five months later.

Petitioner cites no case in which an informal, oral communication of an agent's penalty recommendations—without more—was deemed to constitute an "initial determination" requiring prior supervisory approval. Petitioner relies on *Beland v. Commissioner*, 156 T.C. 80 (2021). But that case reaffirmed the general principle that an "initial determination" is embodied in a formal document—in that case, an RAR. *Id.* at 85 (quoting *Belair Woods*, 154 T.C. at 15).

In *Beland* the IRS issued the taxpayers an administrative summons to appear before the examining agent, warning that "[l]egal proceedings may be brought against you . . . for not complying with [the] summons." *Id.* at 82. That meeting was held, and it "constituted [the taxpayers'] closing conference." *Ibid.* During the meeting the IRS exam team presented the taxpayers with an RAR that included the examining agent's signature, a fraud penalty of a determinate amount, and a signature box in which the taxpayers were asked to consent to the fraud penalty by affixing their signatures. *Id.* at 86–87.

During the closing conference in *Beland* the examining agent informed the taxpayers that, if they did not sign the RAR and thereby waive their right to appeal, then the IRS would issue a notice of deficiency. *Id.* at 83, 87–88. We held that delivery of the RAR in these circumstances reflected the examining agent's "initial determination" because it evidenced "a formal means of communicating" to the taxpayer that the fraud penalty would be asserted. *Id.* at 88. We deemed it immaterial that the RAR was hand-delivered to the taxpayers rather than sent by mail. "[T]he Court's focus," we explained, is not on the mode of delivery but "on the document and the events surrounding its delivery that formally communicate to the taxpayer the IRS' decision to definitively assert penalties." *Id.* at 87.

Petitioner's reliance on *Beland* is misplaced for several reasons. RA Stafford did not provide Oxbow's representative—before, during, or immediately after the telephone call—with an RAR or other document determining any penalties. In terms of formality, the telephone conference was at the opposite end of the spectrum from the meeting in *Beland*, to which the taxpayers were formally summonsed under threat of legal sanctions. As we said in *Beland*, our "focus is on the document and the events surrounding its delivery." *Ibid.* Here there was no

[*8] document, and the events surrounding the telephone call—a status conference—did not "formally communicate to [Oxbow] the IRS' decision to definitively assert penalties." *See ibid.*

We have never found a telephone call of the sort involved here to embody an "initial determination" within the meaning of section 6751(b)(1). Our case law in this respect follows the statutory text, which "denotes a communication with a high degree of concreteness and formality." *Belair Woods*, 154 T.C. at 15. We have also noted the practical difficulties that would arise on a contrary view: If oral communications of this kind "were deemed critical in ascertaining whether an 'initial determination' had been made, difficult evidentiary problems would arise in establishing who said what to whom." *Id.* at 14. Indeed, "a strategically minded taxpayer could seek to insulate himself from penalties by initiating a discussion of that subject at an early stage of the examination, conscious that the examining agent most likely would not have secured supervisory approval of any penalties by that time." *Ibid.*

Section 6751(b)(1) "requires approval for the initial determination of a penalty assessment, not for a tentative proposal or hypothesis." *Id.* at 9 (emphasis omitted). The timeliness inquiry thus turns on the timing of the first "formal written communication" to the taxpayer against whom the penalties are being asserted. *Id.* at 10. Although RA Stafford mentioned the likelihood of penalties during the telephone conference, "the first formal communication to the taxpayer of penalties," *see Frost*, 154 T.C. at 32, did not occur until two months after RA Stafford's supervisor approved her recommendation to assert penalties against Oxbow. Her approval was thus timely.[4]

To reflect the foregoing,

An order will be issued denying petitioner's Motion for Partial Summary Judgment and granting respondent's Cross-Motion.

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[4] Petitioner urges that RA Stafford's telephone call was in substance a formal communication of penalties because Mr. Pavilonis, a Chief Counsel attorney, participated in the call. But a Chief Counsel attorney also attended the meeting in *Tribune Media*; indeed, it was he who informed the taxpayer "that the Commissioner would apply a penalty to any underpayment determined." 119 T.C.M. (CCH) at 1007. We held that his statement did not embody the "initial determination" of any penalty because the IRS had yet to issue a "written communication purporting to determine a penalty with any sense of finality." *Id.* at 1010.