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T.C. Summary Opinion 1996-194

UNITED STATES TAX COURT

CONCETTA D. CONRAD, Petitioner y.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 6082-96S

Filed November 5, 1996.

Concetta D. Conrad, pro se.

Jason M. Silver, for respondent.

NAMEROFF, Special Trial Judge: This case was heard pursuant to section 7463.¹ The case is before the Court on:

- (1) Respondent's Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted;
- (2) petitioner's Motion For Substitution Of Party As Petitioner;
- and (3) petitioner's Motion To Strike And Dismiss.

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code. All Rule references are to the Tax Court Rules of Practice and Procedure.

Petitioner resided in Los Angeles, California, when the petition was filed.

Background

On January 10, 1996, respondent issued a notice of deficiency to petitioner which determined a deficiency in her Federal income tax for the 1993 taxable year in the amount of \$2,984, plus an addition to tax under section 6654(a) in the amount of \$409. The adjustments giving rise to the above deficiency and addition to tax are based upon respondent's determination that petitioner failed to report \$16,756 of interest income.

The petition was filed on April 3, 1996, but it did not contain the signature of petitioner. It did contain, however, the signature of Reed White (White), designated as "Trustee or Counsel . . . in behalf of Concetta D. Conrad, Petitioner/Trustee". White is not admitted to practice before this Court, and he did not submit evidence establishing he is a fiduciary of the petitioner within the meaning of Rule 60.

In lengthy detail, the petition alleges, inter alia, that the proposed tax increase as set forth in the notice of deficiency encroaches upon various constitutional rights including the First, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Fourteenth Amendments to the United States Constitution. In addition, it claims that the proposed tax increase is not within the scope or definition of taxable income.

In a somewhat fragmentary manner, however, the petition did assert that respondent's proposed tax increase is based upon inaccurate information sent to the Internal Revenue Service (IRS) from the Boy Scouts of America (BSA). The petition states that, although the BSA issued certain checks to petitioner, they were not accepted, cashed or used by her and were subsequently voided in the presence of her attorney. Presumably, these checks pertain to the determined deficiency.

Petitioner filed a Motion For Substitution Of Parties (First Motion to Substitute) on May 16, 1996. Both petitioner and White signed the motion. By way of this motion, White moves to substitute himself as petitioner. The motion is based on the alleged facts that Concetta D. Conrad is elderly and needs assistance with her financial and legal responsibilities. The motion asserts that since White is trustee and fiduciary of the Concetta D. Conrad Trust (the Trust), he is qualified to represent its beneficiary, petitioner, in all matters before the Court.²

Respondent filed a Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted (Motion to Dismiss) on May 20, 1996. Respondent's motion states, inter alia, that the petition fails to allege any justiciable error with respect to respondent's determination in the notice of deficiency, and that

² While we do not have the trust instrument before us, we assume the trust was established under California law naming petitioner as beneficiary and that Reed White is trustee.

no justiciable facts in support of such error are present therein, as required by Rule 34(b)(4) and (5). Further, respondent alleges that the petition contains typical tax protester-type arguments.

The Court received petitioner's Motion To Strike, Bar, Quash And Dismiss on May 21, 1996 (First Motion to Strike). Petitioner did not sign the motion and accompanying memorandum. White signed them instead. They contain an abundance of disjointed paragraphs giving rise to typical tax protester-type allegations, including a claim that the notice of deficiency is willfully oppressive on petitioner in violation of her constitutional and statutory rights.

By order dated June 19, 1996, we denied petitioner's First Motion to Substitute and ordered that, "petitioner, on or before August 31, 1996, shall file an amended petition, signed by her, and stating, if such be the case, that she has read the contents of the petition and ratifies and affirms such contents as her own". In the alternative, petitioner could request that a court of appropriate jurisdiction appoint a personal representative or fiduciary who could then be substituted in the place of petitioner. We further stated that, in the absence of either of the above, the Court would consider dismissing the case for lack of jurisdiction on the grounds that the petition was not filed by a proper party. In addition, the order stated that petitioner's First Motion to Strike would not be considered because it was not signed by petitioner.

In response to the above order, petitioner filed a First Amended Petition on August 30, 1996, as well as two renewed motions: A Motion For Substitution Of Party As Petitioner (Second Motion to Substitute) filed concurrently with "Objections Or Exceptions To U.S.T.C. 'Order'", and a Motion To Strike And Dismiss (Second Motion to Strike) with accompanying memorandum. Both petitioner and White signed all documents. In addition, the First Amended Petition and Second Motion to Substitute each contain a signed statement by petitioner expressing that she is aware of their contents. The First Amended Petition and two renewed motions mirror their earlier counterparts and do not materially differ in content.

Discussion

In deciding the motions at hand, we must consider the following issues: (1) Whether petitioner filed a valid petition establishing the Court's jurisdiction; (2) whether Reed White, trustee, should be substituted as petitioner in the place of Concetta D. Conrad; and (3) whether the petition for redetermination of deficiency should be dismissed for failing to state a claim as specified under Rule 34(b)(4) and (5).

Jurisdiction

Two events are necessary to invoke this Court's jurisdiction: A validly issued notice of deficiency and a timely filed petition for determination of that deficiency. Secs. 6212, 6213(a), 7502; Rule 13. Rule 34 sets forth the requirements for filing a valid petition. One requirement is that the petition

must contain the signature of the person against whom the Commissioner determined the deficiency. Rule 34(b)(7).

Where a petition lacking the appropriate signature improperly invokes Tax Court jurisdiction, ratification has been accepted as the proper means for correction. Abeles v. Commissioner, 90 T.C. 103, 106 (1988); see Carstenson v. Commissioner, 57 T.C. 542 (1972). A properly executed amended petition containing the appropriate signature is clear ratification. See Abeles v. Commissioner, T.C. Memo. 1988-25. An amended petition filed after the requisite filing period relates back to its corresponding timely filed original petition and is considered timely. Rule 60(a)(1); e.g., Carstenson v. Commissioner, supra at 546.

In our order of June 19, 1996, we held that since the petition did not contain the signature of the person named in the notice of deficiency, Concetta D. Conrad, nor the signature of a duly authorized representative, it did not comply with Rule 34(b)(7). We therefore found the petition invalid as not being filed by the proper party.

Petitioner, however, did file the First Amended Petition in response to our order. Petitioner signed the amended petition and clearly expressed that she is aware of its contents. We are satisfied that by this action petitioner ratified her petition. The First Amended Petition establishes our jurisdiction because it contains the signature of the proper party and relates back to

the timely filed petition. The fact that the petition also contained the name of White is of no significance.

Substitution of Party

Rule 60(a) states that a case must be brought by a person against whom the Commissioner determined a deficiency or by a fiduciary entitled to institute a case on behalf of such person. A fiduciary must show that under local law he is authorized to act on behalf of the person he purports to represent. Rules 60(c), 63; see Fehrs v. Commissioner, 65 T.C. 346, 349 (1975); Estate of Jakel v. Commissioner, T.C. Memo. 1987-421. If a party dies or becomes incompetent, or for other cause, the Court may order substitution for a proper party pursuant to Rule 63.

In the Second Motion to Substitute, White attempts to show he is the proper party to litigate this matter. He claims that since he is trustee of the Trust, he is qualified to represent petitioner as the beneficiary of that trust in all matters before us. We are not convinced.

White fails to demonstrate that under local law his powers as trustee of the Trust grant him authority to institute a case on petitioner's behalf. White cites no relevant California law in support of his contention. He lists a random selection of California Code sections pertaining to a medley of trustee powers and duties including the following: Trustee's power to sue without joining a beneficiary, trustee's duty to administer trust according to trust instrument, trustee's duty to make trust

property productive, and trustee's duties to co-trustees.³ These code sections do not pertain to a trustee's power to initiate litigation on behalf of a beneficiary in legal matters personal to the beneficiary.

Further, White fails to establish that a court of appropriate jurisdiction has appointed him fiduciary of the person of Concetta D. Conrad. White would be considered a proper party for substitution under Rules 60(c) and 63 if he demonstrates through relevant documentation that under California law he has been appointed petitioner's personal legal representative. Absent this showing, the Rules require us to deny his substitution.

Finally, White's citation to Rule 24(b), which states that a trust may be represented by a fiduciary thereof, does not support his contention that he is a proper party. The Commissioner determined a deficiency only against Concetta D. Conrad. No deficiency was determined against the Trust. Any representational authority White has with regard to the Trust, therefore, is insignificant since the Trust is not a party to this action. Further, inasmuch as the Trust is a separate legal entity from petitioner, White's relationship with the Trust bears no connection to his relationship with petitioner. As such, his

³ White cites Cal. Civ. Proc. Code secs. 358.5 and 369. We found sec. 369 in the Cal. Civ. Proc. Code (West 1973 & Supp. 1996). We were unable to locate sec. 358.5. White further cites Cal. Prob. Code secs. 15600(a)(1) and (b), 15620, 15622, 15640(a) and (b), 16000, and 16007 (West 1991).

fiduciary duties and obligations to the Trust, without more, do not create a fiduciary relationship between petitioner and himself. See Krantz v. Commissioner, T.C. Memo. 1992-396 (A trustee of a trust is not a fiduciary of the trust's beneficiary for the purpose of commencing an action before the Tax Court).

White further alleges in the motion that petitioner is elderly and needs assistance with her financial and legal responsibilities. This fact may be relevant to a court that determines issues of capacity and personal representation, but it is not relevant to us. This Court is a court of limited jurisdiction and does not have the authority to rule on those matters. Clearly, in this case, substitution is inappropriate.

For the above reasons, petitioner's Second Motion to Substitute shall be denied.

Motion to Dismiss

Rule 40 provides that a party may file a motion to dismiss for failure to state a claim upon which relief can be granted. We may grant such a motion when it appears beyond doubt that the party's adversary can prove no set of facts in support of a claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Price v. Moody, 677 F.2d 676, 677 (8th Cir. 1982).

Rule 34(b)(4) requires that a petition filed in this Court contain clear and concise assignments of each and every error which the taxpayer alleges has been committed by the Commissioner

in the determination of the deficiency. Rule 34(b)(5) further requires that the petition contain clear and concise lettered statements of fact on which the taxpayer bases these errors. See Jarvis v. Commissioner, 78 T.C. 646, 658 (1982). The failure of a petition to conform with these requirements may be grounds for dismissal. Rule 34(a)(1), 123(b).

Almost all of petitioner's efforts in her petition and Second Motion to Strike pertain to typical tax protester-type arguments which have no factual or legal foundation. These arguments have been heard and rejected by this Court on many occasions. We see no need to respond to each of petitioner's tax protester-type contentions; to do so would suggest that these arguments have some colorable merit. Crain v. Commissioner, 737 F.2d 1417 (5th Cir. 1984). We shall, therefore, deny petitioner's Second Motion to Strike.

We do find, however, one circumstance that does prevent us from granting respondent's Motion to Dismiss. Petitioner, in her original petition, alleges that respondent's proposed tax increase is based upon inaccurate information sent to the IRS from the BSA. The petitioner further states that checks were issued by BSA but were never accepted, cashed, or used by her. She does not supply, however, any additional information.

We find it inappropriate to grant respondent's motion in light of petitioner raising this one factual issue. She advances at least one assignment of error and presents at least one set of

facts in support of a claim which may entitle her to relief. We shall therefore deny respondent's Motion to Dismiss.

Nevertheless, we caution petitioner that tax protester-type arguments will not be tolerated. Petitioner has wasted judicial resources with her countless pages of unintelligible argument. Petitioner is warned that penalties of up to \$25,000 may be imposed under section 6673 if she continues to pursue frivolous or groundless positions.

Reviewed and adopted as the report of the Small Tax Case Division.

Appropriate orders
will be issued.