United States Tax Court

167 T.C. No. 13

BARRY HOLMES FINE AND MONICA DIAS,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 24390-21. Filed September 30, 2026.

R selected Ps' 2015 and 2016 tax returns for examination. During the pendency of the examination, Ps consented to extending the period for assessment pursuant to I.R.C. § 6501(a) and sent to R signed Forms 872, Consent to Extend the Time to Assess Tax, for 2015 and 2016. After failed settlement negotiations, Ps faxed to R Forms 872–T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, purporting to terminate the previously executed Forms 872. R subsequently issued Ps Notices of Deficiency for 2015 and 2016.

Ps filed a Petition, raised the statute of limitations as an affirmative defense, and contended that the Notices were untimely because R failed to send them within 90 days of receiving Forms 872–T. R filed an Answer contending that the Notices were timely. R thereafter moved for partial summary judgment on the grounds that the Notices are not barred by the statute of limitations because Form 872–T does not terminate Form 872. Ps filed an objection.

Held: Form 872–T does not terminate a properly executed Form 872.

Served 09/30/26

Held, further, the Notices are not barred by the statute of limitations, and therefore partial summary judgment in R's favor is appropriate.

James Vincent Bitonti, for petitioners.

Deborah Aloof, for respondent.

OPINION

ASHFORD, *Judge*: This deficiency case is before the Court on respondent's Motion for Partial Summary Judgment (Motion).[1] Respondent contends that the Internal Revenue Service (IRS)[2] issued Notices of Deficiency (Notices) to petitioners for the 2015 and 2016 taxable years (years at issue) within the time prescribed by section 6501[3] after execution of Forms 872, Consent to Extend the Time to Assess Tax. Petitioners filed a document titled "Response to Respondent's Motion for Partial Summary Judgment and Petitioner's Cross Motion for Patrial [sic] Summary Judgement [sic]" in opposition to respondent's Motion, contending that they executed and remitted to the IRS Forms 872–T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, which terminated the Forms 872 and placed the IRS on notice that it had 90 days to issue the Notices for the years at issue. Thereafter, respondent filed a document titled "Response to Petitioners' Cross Motion for Partial Summary Judgment," maintaining that Form 872–T does not terminate a properly executed Form 872.

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[1] This case is consolidated with Docket No. 33340-21. The Motion decided in this case is not before the Court in that case.

[2] The Court uses the term "IRS" to refer to administrative actions taken outside of the Tax Court proceedings. The Court uses the term "respondent" to refer to the Commissioner of Internal Revenue, who is the head of the IRS and is respondent in this case, and to actions taken in connection with this case.

[3] Unless otherwise indicated, statutory references are to the Internal Revenue Code (Code), Title 26 U.S.C., in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure. All dollar amounts have been rounded to the nearest dollar.

The question before the Court is whether petitioners' Forms 872–T faxed to certain IRS representatives terminated the properly executed Forms 872 for the years at issue. In *Coggin v. Commissioner*, T.C. Memo. 1993-209, 1993 Tax Ct. Memo LEXIS 215, at *51–52, *aff'd*, 71 F.3d 855 (11th Cir. 1996), this Court held that a properly executed Form 872 cannot be terminated by a Form 872–T. On appeal, the U.S. Court of Appeals for the Eleventh Circuit declined to address whether a Form 872–T could terminate a Form 872 and affirmed the Tax Court on other grounds. *See Coggin v. Commissioner*, 71 F.3d at 861 n.4. Absent stipulation to the contrary, *see* § 7482(b)(2), this case is appealable to the Eleventh Circuit, *see* § 7482(b)(1)(A), and as a result, we will take this opportunity to address the question left open by the Eleventh Circuit, *see Coggin v. Commissioner*, 71 F.3d at 864 n.5. For the reasons stated below, we hold that Form 872–T does not terminate Form 872, and accordingly we will grant respondent's Motion.

Background

The following facts are derived from the pleadings and the parties' papers filed in connection with the Motion (including the Declarations and the Exhibits attached to the Declarations). These facts are stated solely for the purpose of deciding the Motion 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).

Petitioners filed their federal income tax returns for 2015 and 2016 on October 16, 2016, and October 15, 2017, respectively. The IRS selected these returns for examination. On June 5, 2019, petitioners each executed Form 872 extending the time for the IRS to assess any tax related to the 2015 taxable year until December 31, 2020.[4] The IRS acknowledged receipt of these Forms 872 by countersigning on June 10, 2019. Petitioners executed a second Form 872 on July 2, 2020, further extending the time for the IRS to assess any tax related to the 2015 taxable year until December 31, 2021. The IRS acknowledged receipt of this second Form 872 by countersigning on July 6, 2020. On January 28, 2020, petitioners each executed Form 872 extending the time for the IRS to assess any tax related to the 2016 taxable year until June 30, 2021. The IRS acknowledged receipt of this Form 872 by countersigning on February 4, 2020.

[4] Petitioners divorced sometime in 2017.

The parties were unable to reach an agreement regarding the years at issue during case consideration by the IRS Independent Office of Appeals (Appeals). As a result, on September 11, 2020, counsel for petitioners[5] transmitted on their behalf via facsimile (1) Form 872–T for 2015 to the Appeals officer assigned to their case and (2) Form 872–T for 2016 to the IRS's Examination Division group manager assigned to their case. The cover letters transmitted with the Forms 872–T indicated that petitioners sought to terminate the examination and the previously executed Forms 872 and requested expeditious issuance of a Notice of Deficiency. Because Form 872–T does not list an option for terminating Form 872, the box was checked on the Forms 872–T to notify the IRS of petitioners' intent to terminate Form 872–A, Special Consent to Extend the Time to Assess Tax. Copies of the executed Forms 872 were attached to the Forms 872–T.

By Notices dated April 15, 2021, the IRS determined the following deficiencies in petitioners' federal income tax and section 6662(a) accuracy-related penalties for the years at issue:

Year	*Deficiency*	*§ 6662(a) Penalty*
2015	$405,943	$81,189
2016	210,003	42,001

Petitioners, while residing in Florida, timely filed their Petition with the Court, disputing the Notices. In addition to disputing the proposed income tax adjustments and section 6662(a) accuracy-related penalties, petitioners contend that the Notices are barred by the statute of limitations because the IRS issued the Notices to them more than 90 days after they sent the IRS the Forms 872–T. Respondent filed an Answer, denying petitioners' material allegations and raising the above facts as a defense to petitioners' assertion that the statute of limitations barred the assessment and collection of the deficiencies and penalties for the years at issue.

Thereafter, respondent filed his Motion seeking partial summary adjudication that he properly issued the Notices within the period for assessment. A remote trial was ultimately conducted on the merits of petitioners' cases, but at the beginning of the remote trial the Court held a hearing on the Motion.

[5] This individual is also counsel of record for petitioners in this case.

Discussion

I. *Summary Judgment Standard*

Summary judgment serves to "expedite litigation and avoid unnecessary and expensive trials." *Fla. Peach Corp. v. Commissioner*, 90 T.C. 678, 681 (1988). We may grant (even partial) summary judgment when the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Rule 121(a)(2). The burden is on the moving party to demonstrate that there is no genuine dispute of material fact; consequently, factual inferences will be viewed in a light most favorable to the party opposing summary judgment. *Dahlstrom v. Commissioner*, 85 T.C. 812, 821 (1985); *Jacklin v. Commissioner*, 79 T.C. 340, 344 (1982). The nonmoving party may not rest upon mere allegations or denials in his or her pleadings but must set forth specific facts showing there is a genuine dispute for trial. Rule 121(d); *Sundstrand Corp.*, 98 T.C. at 520; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

II. *Limitations on Assessment*

A. *Burden of Proof*

The bar of the statute of limitations is an affirmative defense, and the party raising it bears the burden of proof. *See* Rules 39, 142(a); *see also Adler v. Commissioner*, 85 T.C. 535, 540 (1985). When a taxpayer raises the statute of limitations, he or she bears the burden of proving that defense, and, upon his or her providing evidence that the assessment occurred outside the statutorily defined period, the burden shifts to the Commissioner to show the existence of a consent to extend the time for assessment. *Feldman v. Commissioner*, 20 F.3d 1128, 1132 (11th Cir. 1994), *aff'g* T.C. Memo. 1993-17. If the Commissioner makes the requisite showing, the burden shifts back to the taxpayer to prove the waiver was invalid. *Id.* (citing *Adler*, 85 T.C. at 540). "The ultimate burden of proof on the limitations defense always rests on the taxpayer." *Id.* (citing *Adler*, 85 T.C. at 540).

Petitioners raised the statute of limitations in their Petition, and they provided evidence that the Notices were not sent to them within three years of their filing federal income tax returns for the years at issue. *See* § 6501(a). Respondent contends that the parties executed agreements to extend the periods for assessment for the years at issue and provided the signed Forms 872. Respondent further contends that the Forms 872–T faxed to the IRS did not terminate or otherwise

invalidate the Forms 872. Petitioners do not dispute that they signed and properly executed Forms 872 but instead maintain that the forms are invalid because they terminated them by faxing to the IRS Forms 872–T. Thus, petitioners argue that the IRS had 90 days, after its receipt of the Forms 872–T, to issue statutory Notices of Deficiency for the years at issue and because it did not issue the Notices within that time, they are barred by the statute of limitations. For the reasons stated below, we disagree with petitioners that the Notices were untimely and find that they have failed to meet their burden regarding the statute of limitations.

B. *General Rule*

Section 6501(a) generally provides that taxes imposed by the Code must be assessed within three years from the time that the return is filed. The Notices were not sent to petitioners within three years of filing their returns for the years at issue. Thus, the IRS's determinations will be time barred unless they fall within an exception to the general rule. *See* § 6501(c). Section 6501(c)(4)(A) provides that

> [w]here, before the expiration of the time prescribed . . . for the assessment of any tax . . . , both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

"A consent to extend the statute of limitations under section 6501 'is essentially a voluntary, unilateral waiver of a defense by the taxpayer,' not a contract." *Feldman v. Commissioner*, 20 F.3d at 1132 (quoting *Stange v. United States*, 282 U.S. 270, 276 (1931)); *see also Mecom v. Commissioner*, 101 T.C. 374, 384 (1993), *aff'd*, 40 F.3d 385 (5th Cir. 1994) (unpublished table decision); *Kronish v. Commissioner*, 90 T.C. 684, 693 (1988). While the consent is a waiver and not a contract, contract principles are useful in assessing mutual assent because section 6501(c)(4)(A) requires that both the taxpayer and the IRS "consent in writing" to the extension. *Feldman*, 20 F.3d at 1132 (first citing *Kronish*, 90 T.C. at 693; and then citing *Piarulle v. Commissioner*, 80 T.C. 1035, 1042 (1983)).

"It is the objective manifestation of mutual assent as evidenced by the parties' overt acts, not the parties' secret intentions, that determines whether the parties have made an agreement." *Kronish*, 90 T.C. at 693. The parties are free to set forth the terms governing their agreement to extend the period for assessment. *Mecom*, 101 T.C. at 384; *Pursell v. Commissioner*, 38 T.C. 263, 278 (1962), *aff'd per curiam*, 315 F.2d 629 (3d Cir. 1963). When analyzing an agreement between a taxpayer and the IRS, the Court generally looks within the "four corners" of the agreement to ascertain the parties' intent. *Rink v. Commissioner*, 100 T.C. 319, 325 (1993), *aff'd*, 47 F.3d 168 (6th Cir. 1995); *see also Geringer v. Commissioner*, T.C. Memo. 1991-32.

Because an agreement to extend the time for assessment must be evidenced by a writing, the IRS has the taxpayer sign one of two forms: Form 872 or Form 872–A. *See* Rev. Proc. 79-22, § 2.02, 2.03, 1979-1 C.B. 563, 563. Form 872 is a fixed-date extension that provides a specified date, bargained on and agreed to between the parties, on which the extension expires. *Id.* § 2.02. Conversely, Form 872–A is an indefinite extension that expires 90 days after either the taxpayer or the IRS sends the prescribed notice terminating the agreement. *See id.* §§ 2.03, 3.01, 1979-1 C.B. at 563. Form 872–A can be terminated in one of three ways, including the execution and remittance of a Form 872–T. *Id.* § 3.01, 3.03, 1979-1 C.B. at 563.

The three methods for terminating Form 872–A are listed on the form itself, and this Court has previously held that they are the exclusive methods for terminating this form. *E.g.*, *Grunwald v. Commissioner*, 86 T.C. 85, 89–90 (1986); *Kinsey v. Commissioner*, T.C. Memo. 1987-92, *aff'd*, 859 F.2d 1361 (9th Cir. 1988); *Myers v. Commissioner*, T.C. Memo. 1986-518. In *Estate of Camara v. Commissioner*, 91 T.C. 957, 962 (1988), we held that agreements to extend the period for assessment made on Form 872–A do not expire by operation of law after a reasonable time. Instead, such agreements terminate only by the express provisions of the agreement. *Id.*; *see also Muir v. Commissioner*, T.C. Memo. 2000-304, 2000 Tax Ct. Memo LEXIS 357, at *7, *aff'd*, 11 F. App'x 701 (8th Cir. 2001).

Longstanding contract principles generally provide for treating agreements with a specified date for performance differently from those of an indefinite duration. Agreements of an indefinite duration, such as those pursuant to Form 872–A, are generally terminable at will by either party. *See New York v. New Jersey*, 143 S. Ct. 918, 925 (2023) (holding that New Jersey could unilaterally withdraw from a compact

with New York because the agreement was for an unspecified period and was silent as to whether a party could unilaterally withdraw); *see also* 1 Williston on Contracts § 4:23 (4th ed. 2022) ("This rule is adopted by the Uniform Commercial Code with respect to contracts . . . that are indefinite in duration; in such circumstances, the contract is valid for a reasonable time but is terminable at any time by either party. Many other cases reach a similar result, holding that a promise contemplating continuing performance for an indefinite time is to be interpreted as stipulating only for performance terminable at the will of either party." (footnote omitted)). When the terms of an agreement are specified and well defined, such as those pursuant to Form 872, courts must adhere to those terms. *See Rink*, 100 T.C. at 325.

C. *Whether Form 872 Dictates an Exclusive Method of Termination*

By the terms of Form 872, the extended period for assessment terminates on the date agreed upon by the parties. If at that time the IRS has not issued a Notice of Deficiency or alternatively the parties have not agreed in writing to a subsequent extension pursuant to section 6501(c)(4)(A), then the agreement expires. The date listed on Form 872 reflects the mutual assent of the parties that the IRS may have additional time to act and places a limitation on the IRS's authority. This negotiated deadline creates a specified period for performance for the IRS. If the IRS believes it may fail to complete its task in that timeframe, it may request another extension, but a taxpayer may decline, at which point the IRS must issue a Notice of Deficiency or take no further action. *See* § 6501(c)(4)(B) (requiring the IRS to inform taxpayers of their right to limit or refuse an extension every time a request for an extension is made).

By contrast, Form 872–A explicitly states that it can be terminated by signing and remitting to the IRS Form 872–T. Likewise, Form 872–T requires a taxpayer to check a box indicating that he or she is using the form to terminate Form 872–A. Indeed, both the IRS and numerous courts have stated that Form 872–T was designed to terminate Form 872–A. *See Silverman v. Commissioner*, 86 F.3d 260, 262 (1st Cir. 1996) ("A plain need for certainty prompted IRS to devise Form 872–T as the exclusive means, apart from mailing a deficiency notice, for either the IRS or taxpayers to terminate a Form 872–A consent to extend a limitation period."), *aff'g* 105 T.C. 157 (1995); *Kinsey v. Commissioner*, 859 F.2d at 1364 ("[P]olicy considerations support a requirement that a Form 872–A waiver can be terminated by a taxpayer

only by use of a Form 872–T."); Rev. Proc. 79-22, § 4.04, 1979-1 C.B. at 563. Notably, Form 872–T does not list an option for terminating Form 872, and conversely, Form 872 makes no mention of Form 872–T.[6] The IRS's decision to omit that option underscores that Form 872–T's purpose is to terminate Form 872–A, not Form 872.

Petitioners contend that fairness dictates that they should be allowed to unilaterally terminate Form 872 because the IRS has the "unilateral ability to terminate the Form 872 by issuing a [Notice of Deficiency] or ceasing Appeals consideration." This contention obfuscates the purpose of Form 872. Form 872 evidences a taxpayer's consent to unilaterally waive the statute of limitations defense and the power to waive that defense is solely in the hands of the taxpayer. *See Coggin v. Commissioner*, 71 F.3d at 861. The date on Form 872 simply provides a new deadline for the IRS, and that deadline is set via an agreement between the parties. *See id.* When the IRS issues a Notice of Deficiency before the expiration of that waiver, it is merely taking timely action pursuant to its statutory mandate. If the IRS believes it will be unable to issue a Notice of Deficiency by that date, then it can request a subsequent waiver, *see* § 6501(c)(4)(A), and should the taxpayer decide not to extend the deadline again, the IRS faces a choice: issue a Notice of Deficiency or be barred from taking further assessment action. Today, we determine that only the passage of time can terminate Form 872.

In essence, petitioners are requesting that the Court rewrite the terms of their properly executed agreements for the years at issue. The parties were free to negotiate on the terms of the extensions for the years at issue. Petitioners, through their counsel, could have set a shorter timeframe or limited the IRS's examination to certain issues if they were concerned about the length of the process. Petitioners also could have elected not to execute subsequent extensions for the years at issue. By

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[6] Petitioners rely on *Kelley v. Commissioner*, 45 F.3d 348 (9th Cir. 1995), *aff'g* T.C. Memo. 1990-158, to attempt to bolster their argument that Form 872–T may terminate Form 872. *Kelley* does not, however, support that contention. In *Kelley v. Commissioner*, 45 F.3d at 350 n.3, the U.S. Court of Appeals for the Ninth Circuit stated that Form 872–T may terminate Form 872 in a passing footnote in the Facts and Prior Proceedings section of the opinion, not in the Discussion or Conclusion sections. The Ninth Circuit merely recited the specific facts of that case, not opining as to the legal effect of using Form 872–T to terminate Form 872. Even if the Ninth Circuit did opine as to whether Form 872–T could be used to terminate Form 872, such a holding would be persuasive at best and would have no binding effect on this case, which is appealable to the Eleventh Circuit. *See Golsen v. Commissioner*, 54 T.C. 742, 756–57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

their own admission, petitioners wanted to terminate the extensions only because they did not receive a favorable outcome from the Appeals settlement process and wanted the IRS to expeditiously issue the Notices. Petitioners' unhappiness with settlement negotiations, however, is not sufficient grounds for contravening longstanding contract principles or undoing valid agreements.

Form 872 includes text that the form evidences the entire agreement of the parties, and its express provisions are definite and unambiguous. Here, the Forms 872 executed by petitioners and the IRS were not altered in any way and, standing alone, are unconditional and unrestricted. The record does not provide any evidence that the agreements did not reflect the mutual assent of petitioners and the IRS. Thus, we see no reason why this Court should ignore the plain text of the forms or allow petitioners to unilaterally terminate the agreements they voluntarily signed. "A deal is after all a deal, and fairness dictates that both parties adhere to the provisions of the document[s] they both voluntarily signed." *Grunwald*, 86 T.C. at 89.

III. *Conclusion*

In short, this Court must adhere to the express provisions of Form 872 and cannot rewrite the agreement made therein between the taxpayer and the IRS. Form 872 unambiguously provides that the agreement expires on the agreed-upon date, and as a result, Form 872–T may not be used to terminate Form 872. Accordingly, in completing Forms 872–T and faxing them to the IRS, petitioners did not terminate the Forms 872. The Notices sent to petitioners for the years at issue were timely, and this Court has jurisdiction over those years. Respondent has established that there is no genuine dispute as to any material fact regarding the timeliness of the Notices, and that he is entitled to judgment as a matter of law on that issue. *See Sundstrand Corp.*, 98 T.C. at 520. Pursuant to Rule 121, partial summary judgment in respondent's favor is therefore appropriate.

We have considered all of the arguments made by the parties and, to the extent they are not addressed herein, we find them to be moot, irrelevant, or without merit.

To reflect the foregoing,

An appropriate order will be issued.