United States Tax Court

T.C. Memo. 2022-43

CELIA MAZZEI,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent[1]

Docket No. 16702-09. Filed May 2, 2022.

Lewis Richard Walton and *Lewis Richard Walton, Jr.*, for petitioner.

Alicia E. Elliott and *Miles B. Fuller*, for respondent.

SUPPLEMENTAL MEMORANDUM OPINION

THORNTON, *Judge*: Pending before the Court is petitioner's Motion for Litigation Expenses pursuant to section 7430.[2] For the reasons explained below, we will deny petitioner's motion.[3]

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[1]This opinion supplements our previously filed Opinion *Mazzei v. Commissioner*, 150 T.C. 138 (2018), *rev'd*, 998 F.3d 1041 (9th Cir. 2021).

[2]Unless otherwise indicated, all statutory references are to the Internal Revenue Code (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.

[3]The instant case was consolidated for purposes of trial, briefing, and opinion with the case at docket No. 16779-09 for petitioners Angelo Mazzei and Mary Mazzei. Because Angelo Mazzei and Mary Mazzei have not filed any motion for reasonable litigation or administrative costs, for simplicity we discuss these consolidated proceedings only as they relate to petitioner Celia Mazzei.

Served 05/02/22

[*2] *Background*

On March 5, 2018, this Court filed and served upon the parties a Court-reviewed Opinion sustaining respondent's determination that petitioner was liable for excise taxes with respect to excess contributions to her Roth IRA as a result of funds that were routed to it through a Bermuda-based foreign sales corporation (FSC). *Mazzei v. Commissioner*, 150 T.C. 138 (2018). Petitioner appealed this Court's decision to the U.S. Court of Appeals for the Ninth Circuit, which reversed this Court's decision as to this issue. *Mazzei v. Commissioner*, 998 F.3d 1041 (9th Cir. 2021). On June 2, 2021, the Ninth Circuit entered judgment for petitioner and on July 26, 2021, issued its mandate to this Court, assessing costs of $340.10 against respondent. Pursuant to this mandate, on August 13, 2021, this Court entered a decision for petitioner.

In the meantime, on July 31, 2021, petitioner filed with the Ninth Circuit a motion for attorney's and expert witness' fees associated with both appeal and "pre-appeal work" pursuant to section 7430 (petitioner's appellate motion). Petitioner's appellate motion stated in pertinent part:

> To place this fee request into context, and also to avoid any possible jurisdictional issues in the event the Commissioner argues that the Tax Court lacks jurisdiction to rule upon a fee motion in that venue, since this Court reversed and rendered, Ms. Mazzei lodges herewith proof of her fees and costs pre-dating this appeal, and protectively also moves this Court for the award of those fees and costs.[1]
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> [1]Circuit Rule 39-1.8 provides that a party may "file a motion to transfer consideration of attorneys' fees on appeal to the district court or agency from which the appeal was taken." Ms. Mazzei suggests that the converse is true, and that a request for attorney fees from trial proceedings, successfully appealed to this Circuit, may be heard and awarded by this Circuit.
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> . . . .
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> Thus, if this Court is inclined to entertain a Motion as to the entirety of the attorneys' fees and costs sought by Ms. Mazzei as the prevailing party in her litigation with

[*3] the Internal Revenue Service, it is $369,670 in legal fees, and $26,264.80 in costs.

> If this Court only considers the fees and costs she incurred in connection with this Appeal the sum sought is $69,300 in legal fees, and $31.05 in costs.
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> . . . .
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> For the foregoing reasons, and premises considered, Ms. Mazzei hereby requests attorneys' fees, costs, and expert witness fees in:
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> 1. This Appeal, as shown on Form 9 ("Appeal") and its supporting documentation; and (protectively)
>
> 2. The Tax Court trial and matters associated with it.

In his opposition to petitioner's appellate motion, the Commissioner urged the Ninth Circuit to deny petitioner's request for attorney's fees for both the appellate and trial-level proceedings or, alternatively, to "remand the case to the Tax Court to consider appellant's request for Tax Court fees and costs." The Commissioner asserted that petitioner had failed to meet the requirements for any award of fees or costs under section 7430 because, he said, the Government's position in the Tax Court and in the Ninth Circuit had been substantially justified.[4] The Commissioner stated:

> Finally, we note that Ms. Mazzei "protectively" moves for "her fees and costs pre-dating this appeal" . . . . Such a protective measure is unnecessary, however, because the Commissioner will not argue "that the Tax Court lacks jurisdiction to rule upon a fee motion in that venue" . . . . To the contrary, the Tax Court not only has jurisdiction to review such a motion, it is also better situated to evaluate the amount of fees and costs requested for matters litigated in that court, if this Court were to determine that the Commissioner's position was not substantially justified.

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[4]Alternatively, the Commissioner argued that petitioner's request for enhanced litigation fees was unreasonable.

[*4] In its order filed August 17, 2021, the Ninth Circuit stated: "Petitioner-Appellant Celia Mazzei's motion for attorneys' and expert witness fees . . . is DENIED." The Ninth Circuit issued no other commentary with respect to petitioner's appellate motion.

On September 14, 2021, petitioner filed with this Court a Motion for Leave to File Out of Time a Motion for Litigation Expenses, lodging therewith the Motion for Litigation Expenses. By Order issued September 20, 2021, this Court (1) granted petitioner's Motion for Leave; (2) filed petitioner's Motion for Litigation Expenses; and (3) vacated and set aside the decision entered by this Court on August 13, 2021.

In her Motion for Litigation Expenses, petitioner seeks an award of attorney's fees of $300,370 and costs of $26,233.75, i.e., the identical amounts of legal fees and costs she had sought in petitioner's appellate motion with respect to proceedings in this Court.[5] The arguments that petitioner advances in her Motion for Litigation Expenses are essentially identical to those in petitioner's appellate motion.

In his response to petitioner's Motion for Litigation Expenses in this Court, respondent argues primarily—as he had argued to the Ninth Circuit—that the motion should be denied because his litigating position was substantially justified. He also asserts, alternatively, that petitioner's claimed litigation expenses are unreasonable and that she has not adequately shown that she is the party liable for the claimed expenses.

Discussion

Before petitioner filed in this Court her Motion for Litigation Expenses with respect to the trial proceedings, she had already filed in the Ninth Circuit—and the Ninth Circuit had already denied—petitioner's appellate motion, which "protectively" sought these same trial-level litigation expenses as well as fees associated with the appellate proceedings. These circumstances present a fundamental threshold issue about our authority to consider and decide petitioner's motion for litigation expenses.

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[5]As noted, petitioner's appellate motion sought, in connection with proceedings in this Court, after subtracting amounts associated with the appellate proceedings, legal fees of $300,370 ($369,670 minus $69,300) and other litigation costs of $26,233.75 ($26,264.80 minus $31.05).

[*5] Petitioner has not addressed this threshold issue.[6] And respondent does not press it. Rather, in his response to petitioner's motion, respondent states in a footnote that although he believes that the law of the case doctrine "would normally apply to deprive this Court of jurisdiction over the motion (in light of the Ninth Circuit's denial)," application of that doctrine in this case is "not clear." Respondent goes on to explain:

> It is not clear whether . . . [the law of the case doctrine] would apply here because of language contained in respondent's opposition to petitioner's motion filed with the Ninth Circuit. In his opposition, respondent indicated that he would not argue that the Tax Court lacked jurisdiction over the current motion but qualified that statement upon the condition that the Ninth Circuit made a determination that respondent's position was not substantially justified. . . . The Ninth Circuit's denial does not explicitly find that respondent was substantially justified.

Whether or not the parties choose to address or press this threshold issue, however, the Court has a continuing duty to confirm its jurisdiction and authority. *See, e.g.*, *Pollei v. Commissioner*, 94 T.C. 595, 596 (1990).

The "law of the case" doctrine requires that on remand a lower court follow the appellate court's resolution of a legal issue in all subsequent proceedings in the same case. *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186–87 (9th Cir. 2001); *see United States v. Garcia-Beltran*, 443 F.3d 1126, 1129 (9th Cir. 2006); *Herrington v. Cnty. of Sonoma*, 12 F.3d 901, 904–05 (9th Cir. 1993); *Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982); *Bedrosian v. Commissioner*, 143 T.C. 83, 112 (2014), *aff'd*, 940 F.3d 467 (9th Cir. 2019); *Pollei*, 94 T.C. at 601. This doctrine applies to the appellate court's "explicit decisions as well as those issues decided by necessary implication." *United States v. Cote*, 51 F.3d 178, 181 (9th Cir.

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[6]Petitioner's Motion for Litigation Expenses as filed with this Court fails to disclose that the Ninth Circuit had already denied petitioner's appellate motion, although petitioner's counsel's declaration, attached to petitioner's motion as filed with this Court, notes, without further discussion, this action by the Ninth Circuit.

[*6] 1995) (quoting *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989)).[7]

In *Pollei*, 94 T.C. 595, the taxpayers first presented their motion for costs and fees to the Court of Appeals for the Tenth Circuit after prevailing on appeal from an adverse decision of this Court. The taxpayers requested that the Tenth Circuit award them costs and attorney's fees under section 7430 for prosecuting the appeal and issue an order directing this Court to award them costs and attorney's fees under section 7430 with respect to the trial proceedings in this Court. The taxpayers filed a similar motion in this Court, requesting costs and fees with respect to the trial proceedings pursuant to section 7430. Before this Court had acted on that motion, the Tenth Circuit issued an order denying the application for attorney's fees and awarding the taxpayers only a portion of their appellate court costs. The Tenth Circuit provided no other commentary, issued no mandate regarding trial court costs and fees, and did not remand the case to this Court although the taxpayers had requested that it do so. Rather, upon reversing this Court the Tenth Circuit "entered judgment and made no attempt to restore our jurisdiction for any purpose." *Pollei*, 94 T.C. at 606. Consequently, this Court held:

> [B]ecause the Court of Appeals only awarded some costs and ordered judgment for petitioners, did not issue a mandate regarding trial court costs, either expressly or implicitly, and did not remand these cases to us for this or any purpose other than entry of decision, we do not have jurisdiction or authority to consider petitioners' motion for costs and attorneys' fees under section 7430.

Id. at 607. We further held that the law of the case doctrine deprived the Court of authority to consider the taxpayers' motion for fees and costs, stating:

> The "law of the case" doctrine precludes our reexamination of issues that have been decided expressly or by necessary implication by a superior court on appeal.

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[7]The Ninth Circuit has recognized limited exceptions to the law of the case doctrine, none of which is applicable here. "A court properly exercises its discretion to reconsider an issue previously decided in only three instances: (1) the first decision was clearly erroneous and would result in manifest injustice; (2) an intervening change in the law has occurred; or (3) the evidence on remand was substantially different." *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990).

[*7] *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895). In the present cases, petitioners asked the Court of Appeals to award them attorneys' fees that were incurred during the appeal and to direct us to award them costs and attorneys' fees incurred during the Tax Court proceeding. Although we cannot say that petitioners' request for a mandate regarding fees was *expressly* denied by the Court of Appeals, we are convinced, by "necessary implication," that this is what the Court of Appeals intended. If the appellate court wished our consideration of this issue, its mandate could have issued to that effect. To properly construe the appellate court's decree, "regard is to be had to the issues before the court on appeal, the findings applied for and the directions given." *Kansas City Southern Railway v. Guardian Trust Co.*, 281 U.S. 1, 10 (1930). The failure of the Court of Appeals to grant petitioners' request or to take any action in reference thereto goes to show a purpose to deny petitioners any award for costs under section 7430.

Id. at 607–08 (footnote omitted).

In the case at hand, unlike the Tenth Circuit in *Pollei*, the Ninth Circuit issued a formal mandate to this Court after entry of its judgment. That mandate assessed costs of $340.10 against respondent but otherwise was silent as to costs and fees. It would appear, then, that because the mandate otherwise left open the issue of costs and fees, it did not deprive this Court of jurisdiction on remand to consider the collateral issue regarding costs and fees at the trial level. *See Liberty Mut. Ins. Co.*, 691 F.2d at 441 ("Lower courts are free to decide issues on remand so long as they were not decided on a prior appeal."). Consequently, as was true in *Pollei*, 94 T.C. at 608, "[i]f petitioners had not requested the Court of Appeals . . . for relief on the costs and fees issue at the trial level, it would then appear that the matter would be within our authority for consideration and decision."

Unlike the taxpayers in *Pollei*, petitioner did not request that the Ninth Circuit direct this Court to consider her fees request on remand. Rather, petitioner requested that the Ninth Circuit itself award her fees for proceedings before this Court, arguing that the Ninth Circuit was authorized to do so under its rules. The Ninth Circuit denied petitioner's motion. Although the Ninth Circuit provided no additional commentary as to why it denied petitioner's motion, it does not appear that the court of appeals intended this Court to take up consideration of petitioner's

[*8] request, which expressly encompassed fees for both the trial and the appeal. Indeed, this Court would not be authorized to award fees for an appeal unless the court of appeals transferred the fees request to us for consideration. *See Cummings v. Connell*, 402 F.3d 936, 948 (9th Cir. 2005). The court of appeals, however, did not transfer any part of petitioner's fees request to this Court for consideration, even though the Commissioner had expressly requested—as an alternative to denying petitioner's appellate motion outright—that the court of appeals remand the case to this Court to consider petitioner's request for trial-level fees and costs. If the court of appeals had wished us to consider the issue of fees in any respect, it could have issued further directions on remand to us in this regard. It did not do so. Consequently, we are convinced by necessary implication that the court of appeals intended to deny petitioner any award for fees. To conclude otherwise would be to invite the type of potential inconsistency and confusion that the law of the case doctrine is designed to prevent.

Petitioner's appellate motion stated that she was making her request for fees associated with the Tax Court trial "protectively" so as "to avoid any possible jurisdictional issues in the event the Commissioner argues that the Tax Court lacks jurisdiction to rule upon a fee motion in that venue." We have found no case, however, and none has been cited, where the judicial denial of a "protective" claim was excepted from the operation of the law of the case doctrine or, more generally, acted as anything other than a complete rejection of the claim. In any event petitioner's so-called protective claim in petitioner's appellate motion does not appear to have differed in any meaningful sense from an actual claim. Petitioner did not suggest that she did not want the Ninth Circuit to act on her "protective" claim, she did not seek to have the Ninth Circuit issue further directions on remand to this Court in this regard, and she did not suggest that her "protective" claim was conditional or uncertain as to existence or amount. *Cf. Swietlik v. United States*, 779 F.2d 1306, 1307 (7th Cir. 1985) (stating that when a tax refund claim is conditional or uncertain as to existence or amount, filing a protective claim with the Internal Revenue Service is an appropriate measure). To the contrary, petitioner expressly requested that the Ninth Circuit award her, in connection with the trial proceedings in this Court, fees in exactly the same amount as requested in her motion presently pending before this Court, which she did not file until after petitioner's appellate motion was denied.

When the Ninth Circuit denied petitioner's appellate motion, petitioner's claim for costs and fees—in connection both with appellate

[*9] and trial-level proceedings—was litigated to completion, and the law of the case doctrine precludes our reconsidering petitioner's claim for costs and fees as presented in her Motion for Litigation Expenses before this Court. *See Bedrosian*, 143 T.C. at 111–13; *Pollei*, 94 T.C. at 607.

For the sake of completeness and the possible convenience of the Ninth Circuit, we note that if we were to conclude that we do have authority to decide petitioner's motion, we would decide it adversely to her. As relevant here, section 7430(a) generally provides that a "prevailing party" in a court proceeding may be awarded "reasonable litigation costs." A taxpayer will not be treated as the prevailing party if the Commissioner establishes that "the position of the United States in the proceeding was substantially justified." § 7430(c)(4)(B)(i). A litigation position is substantially justified if it has a reasonable basis in fact and law and is "justified to a degree that satisfies a reasonable person." *Pac. Fisheries Inc. v. United States*, 484 F.3d 1103, 1108 (9th Cir. 2007) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)); *see Swanson v. Commissioner*, 106 T.C. 76, 86 (1996). Section 7430(c)(4)(B)(iii) requires that courts "take into account whether the United States has lost in courts of appeal[s] for other circuits on substantially similar issues" in determining "whether the position of the United States was substantially justified."

This case involved petitioner's use of a marketed tax-saving strategy to avoid contribution limits to her Roth IRA by routing funds from the family business through an FSC and then into her Roth IRA. Respondent determined that the payments from the FSC to the Roth IRA represented, in substance, payments from the FSC to petitioner followed by her contribution of those funds to her Roth IRA, giving rise to excise taxes for excess contributions under section 4973. In a 12 to 4 Court-reviewed Opinion, this Court sustained respondent's determination of petitioner's liability for the excise taxes, finding that in substance petitioner, and not her Roth IRA, was the true owner of the FSC stock. *Mazzei*, 150 T.C. 138. The Ninth Circuit reversed. *Mazzei*, 998 F.3d 1041.

Respondent's litigating position in this Court had a reasonable basis in fact. This Court found, and the Ninth Circuit agreed, that petitioner's Roth IRA strategy lacked economic substance as a factual matter. The Ninth Circuit stated: "The taxpayers used what is essentially a shell corporation to engage in arbitrarily priced, self-dealing transactions that lacked economic substance and then funneled

[*10] those proceeds as 'dividends' to a tax-free Roth IRA. This would appear to present a paradigmatic case to apply such doctrines." *Id.* at 1054.

Respondent also had a reasonable basis in law for his litigating position. As to matters of law, generally the Government's position is considered substantially justified when the issue is one of first impression and its position is based on "supportable interpretations of federal tax statutes and case law." *TKB Int'l, Inc. v. United States*, 995 F.2d 1460, 1468 (9th Cir. 1993); *see Estate of Wall v. Commissioner*, 102 T.C. 391, 394 (1994) (denying attorney's fees in a case of first impression where the Commissioner's litigating position "was not contrary to any published decision" and "a reasonable person [could not] say that it lacked colorable justification"); *Vines v. Commissioner*, T.C. Memo. 2006-258, 2006 Tax Ct. Memo LEXIS 262, *12 ("Generally, the Commissioner's position is considered substantially justified when an issue is one of first impression."). The Commissioner's position may be incorrect but nevertheless substantially justified "if a reasonable person could think it correct." *Maggie Mgmt. Co. v. Commissioner*, 108 T.C. 430, 443 (1997) (quoting *Underwood*, 487 U.S. at 566 n.2). The mere fact that a Government position "is later determined to be contrary to the plain meaning of a statute" does not necessarily mean that it fails, for that reason, to be substantially justified; rather, "if on a question of first impression the Government takes a position that fails to give effect to the plain meaning of the statute but that is still colorable, its position, though unavailing, may be substantially justified and may not warrant an award of fees to its opponent." *Newman v. Commissioner*, T.C. Memo. 2012-74, 2012 Tax Ct. Memo LEXIS 73, at *20.

The legal issue before this Court—whether the substance over form doctrine may be applied to a transaction involving a Roth IRA and an FSC in the type of arrangement presented in this case—was an issue of first impression. Respondent's invocation of that doctrine in this case was consistent with well-established common law principles. As the Ninth Circuit observed: "It is a 'black-letter principle' that, in construing and applying the tax laws, courts generally 'follow substance over form.'" *Mazzei v. Commissioner*, 998 F.3d at 1054 (quoting *PPL Corp. v. Commissioner*, 569 U.S. 329, 340 (2013)). Indeed, as the Ninth Circuit further noted, the doctrine has properly been applied to similar transactions involving Roth IRAs receiving dividends from commonly controlled C corporations. *Id.* (citing *Repetto v. Commissioner*, T.C. Memo. 2012-168, 2012 WL 2160440, at *9–12). The Ninth Circuit ultimately concluded that the substance over form doctrine was

[*11] "negated" in the case at hand by "express statutory language" governing FSCs. *Id.* Nevertheless, respondent's litigating position, although ultimately found to be incorrect, was based on reasonably supportable interpretations of the Code and relevant caselaw. In this regard it is significant, if not dispositive, that 12 of 16 judges on this Court agreed with the Opinion of this Court sustaining respondent's determination. *See Ness v. Commissioner*, No. 92-70327, 1994 WL 35046, at *2 (9th Cir. Feb. 7, 1994) ("[W]hile . . . not dispositive, we find it significant that the government prevailed in the first instance in Tax Court. *See* H.R. Rep. No. 494, 97th Cong., 1st Sess. 15 (1981) ('when a taxpayer loses in the trial court and obtains a reversal of that decision in the appellate court, the appellate court would not normally award attorney's fees to the taxpayer. . . .').").

Citing section 7430(c)(4)(B)(iii), in her Motion for Litigation Expenses in this Court petitioner points to decisions of three appellate courts in which the Commissioner's litigating position was ultimately rejected with respect to his application of the substance over form doctrine in a group of cases addressing the interaction of Roth IRAs and domestic international sales corporations (DISCs). *Benenson v. Commissioner*, 910 F.3d 690 (2d Cir. 2018), *rev'g Summa Holdings, Inc. v. Commissioner*, T.C. Memo. 2015-119; *Benenson v. Commissioner*, 887 F.3d 511 (1st Cir. 2018), *rev'g Summa Holdings, Inc. v. Commissioner*, T.C. Memo. 2015-119; *Summa Holdings, Inc. v. Commissioner*, 848 F.3d 779 (6th Cir. 2017), *rev'g* T.C. Memo. 2015-119. Petitioner asserts that in the case at hand respondent attempted to "evade" the holdings of these three appellate courts "even though there was no principled reason to distinguish the other three Circuit's holdings from the facts of this case." Petitioner's argument improperly ignores that two of these three appellate decisions—those of the Courts of Appeals for the First and Second Circuits—were not issued until *after* this Court had entered its decision in the instant case and hence could not reasonably be thought to have had any significant bearing on respondent's litigating position in the trial proceedings before this Court.[8] The only one of these appellate decisions to have been issued before this Court entered its decision in the instant case was the decision of the Court of Appeals for the Sixth Circuit in *Summa Holdings*. The existence of a single adverse

[8]This Court entered its decision in the case at hand on March 6, 2018. The First Circuit issued its *Benenson* decision on April 6, 2018. *Benenson v. Commissioner*, 887 F.3d 511. The Second Circuit issued its *Benenson* decision on December 14, 2018. *Benenson v. Commissioner*, 910 F.3d 690.

[*12] judicial decision does not necessarily render a contrary litigating position unreasonable. As the Supreme Court has observed:

> Obviously, the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified. Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose. Nevertheless, a string of losses can be indicative; and even more so a string of successes.

Underwood, 487 U.S. at 569.

In any event, in the case at hand our Opinion addressed the Sixth Circuit's *Summa Holdings* decision and concluded that it was not directly on point because (1) it addressed only a corporate-level issue rather than the shareholder-level issue and (2) differences between DISCs and FSCs distinguished *Summa Holdings* from the case at hand. Similarly, in its opinion in the case at hand the Ninth Circuit observed that none of these appellate DISC cases "addressed the exact question presented here" and noted that the decisions of the Sixth and Second Circuits were "less directly relevant" than the decision of the First Circuit in *Benenson*. *Mazzei v. Commissioner*, 998 F3d at 1059, 1060. Moreover, the First Circuit decided *Benenson* by a divided panel. In dissenting, Judge Lynch was of the opinion that "[t]he Commissioner was correct to recharacterize the transaction." *Benenson v. Commissioner*, 887 F.3d at 523 (Lynch, J., dissenting). For this additional reason, the First Circuit's decision in *Benenson*—particularly coming after this Court had already entered its decision in the case at hand—does not render respondent's litigating position in this Court unreasonable.[9]

An appropriate order and decision will be entered.

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[9]Because we would conclude that respondent's litigating position in this Court was substantially justified, thereby precluding any award under section 7430, we do not address the additional issues respondent raised, that petitioner's claimed litigation expenses are unreasonable and that she has not adequately shown that she is the party liable for the claimed expenses.