United States Tax Court

T.C. Memo. 2022-9

HOOPS, LP, HEISLEY MEMBER, INC., TAX MATTERS PARTNER,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 11308-18. Filed February 23, 2022.

Andrew R. Roberson and *Kevin John Feeley*, for petitioner.

David Conrad, *Naseem Jehan Khan*, *Sarah M. Raben*, and *David Weiner*, for respondent.

MEMORANDUM OPINION

NEGA, *Judge*: This case is before the Court on a petition for readjustment of a notice of final partnership administrative adjustment (FPAA) respondent issued to Heisley Member, Inc. (Heisley Member), as tax matters partner of Hoops, LP (Hoops), for the partnership's tax year ended December 31, 2012.[1] In the FPAA, dated March 12, 2018, respondent disallowed an additional deduction of $10,673,327 for salaries and wages that Hoops claimed on its Form 1065X, Amended Return or Administrative Adjustment Request (AAR), for tax year 2012 using the accrual method of accounting. The additional deduction Hoops claimed for salaries and wages related to unpaid deferred compensation

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

[*2] liabilities (collectively, deferred compensation liability) assumed by the purchaser of substantially all of Hoops' assets in 2012.

On June 11, 2020, the parties filed a Stipulation of Settled Issues resolving the issue concerning the allocation of Hoops' net section 1231 gain among its partners for tax year 2012. Accordingly, the only unresolved issues remaining for decision are whether Hoops: (1) is entitled to an additional deduction of $10,673,327 for tax year 2012, relating to the deferred compensation liability assumed by the purchaser in the sale in 2012 (2012 sale); or, alternatively, (2) is entitled to reduce or offset its amount realized by $10,673,327 for the deferred compensation liability assumed by the buyer in computing its section 1231 gain arising from the 2012 sale.

Background

This case was submitted fully stipulated pursuant to Rule 122. The stipulation of facts and the exhibits attached thereto and the stipulation of settled issues are incorporated herein by this reference. When the petition was filed, Hoops' principal place of business was in Warrenville, Illinois.[2]

I. *Hoops*

On March 30, 2000, Hoops was established as a Delaware limited partnership by and between Heisley Member, Inc. (Heisley Member),[3] a Nevada corporation, and Heico Holding, Inc. (Heico),[4] a Delaware corporation, for the purpose of acquiring, owning, operating, and conducting a sports franchise within the rules, guidelines, and other requirements established by the National Basketball Association (NBA).[5] Heisley Member has been Hoops' only general partner since its

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[2] Absent stipulation to the contrary, appeal of this case lies with the U.S. Court of Appeals for the Seventh Circuit. *See* § 7482(b)(1)(E), (2).

[3] Heisley Member was incorporated in the state of Nevada on March 20, 1997.

[4] Heico was formerly known as Pettibone Corp. Pettibone Corp. was formerly known as Pettibone Mulliken Corp., which was incorporated in the state of Delaware on June 10, 1937. On December 27, 1988, Pettibone Mulliken Corp. filed a Restated Certificate of Incorporation dated December 20, 1998, changing its name to Pettibone Corp. before ultimately changing its name to Heico.

[5] From 2000 through 2012, Heico was a subchapter S corporation and Heisley Member was a qualified subchapter S subsidiary of Heico treated as a disregarded entity for federal tax purposes. *See* § 1361(b)(3)(B).

[*3] formation and was designated the tax matters partner for Hoops' taxable year ending December 31, 2012.

Pursuant to an Amendment to Agreement of Limited Partnership dated July 31, 2001, Heisley Holding, LLC, a Delaware limited liability company, was admitted as a limited partner of Hoops. Pursuant to the First Amended and Restated Agreement of Limited Partnership, dated August 9, 2001, Memphis Basketball Partners, LP, was admitted as a limited partner of Hoops.

II. *Memphis Grizzlies*

On May 11, 2000, Hoops acquired the Vancouver Grizzlies, a professional basketball franchise. In 2001 the Vancouver Grizzlies moved to Memphis, Tennessee, and the name of the franchise was changed to the Memphis Grizzlies (collectively, Grizzlies). The Grizzlies are a member of the NBA, a professional basketball league currently consisting of 30 teams in the United States and Canada.[6] Hoops owned and operated the Grizzlies from the date it acquired the franchise until it sold the franchise in 2012.

III. *The 2012 Sale*

In 2012 Memphis Basketball, LLC (Buyer),[7] agreed to purchase substantially all of the assets and to assume substantially all of the liabilities and obligations of Hoops. As of October 29, 2012, Hoops sold substantially all of its assets and transferred substantially all of its liabilities and obligations to Buyer in the 2012 sale. One of the liabilities Buyer assumed in the 2012 sale was the liabilities and obligations under certain binding agreements, which included NBA Uniform Player Contracts for Zach Randolph and Michael Conley.

IV. *Deferred Compensation*

A. *Zach Randolph*

On November 1, 2004, Mr. Randolph, a professional basketball player, entered into an NBA Uniform Player Contract with Trail Blazers, Inc., the owner of the Portland Trail Blazers, an NBA

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[6] Each NBA team plays 82 games during a normal NBA season. The regular season generally starts in the fall and ends in the spring, with the NBA finals concluding in June.

[7] Buyer was formerly known as RJP Group, LLC, a Nevada entity.

[*4] professional basketball team.[8] On or around June 28, 2007, the Portland Trail Blazers traded Mr. Randolph to the New York Knicks, an NBA professional basketball team. On or around November 21, 2008, the New York Knicks traded Mr. Randolph to the Los Angeles Clippers, an NBA professional basketball team, and on or around July 17, 2009, the Los Angeles Clippers traded Mr. Randolph to the Grizzlies.

Mr. Randolph was employed by the Grizzlies from July 17, 2009, through the end of the 2016–17 NBA season. Mr. Randolph earned deferred compensation of $4,800,000 for performance of services for Hoops during the 2009–10 NBA season, due to be paid by Hoops as determined on dates after the 2012 sale. Additionally, for the services Mr. Randolph performed for Hoops during the 2010–11 NBA season, he earned a deferred compensation of $5,200,000, also due to be paid by Hoops as determined on dates after the 2012 sale.

On April 20, 2011, Mr. Randolph entered into a second NBA Uniform Player Contract with Hoops. The contract provided for Mr. Randolph to earn deferred compensation of $2,280,000 for services performed for Hoops during the 2011–12 NBA season. However, during the 2011–12 NBA season, the NBA locked out the players from July 1 through December 8, 2011, reducing the number of regular season games from 82 to 66. As a result of that NBA lockout, Mr. Randolph earned deferred compensation of only $1,835,122 for performance of services for Hoops during the 2011–12 season due to be paid by Hoops as determined on dates after the 2012 sale.

B. *Michael Conley*

Mr. Conley, a professional basketball player, was employed by the Grizzlies from the 2007–08 NBA season until on or around July 6, 2019, when he was traded to the Utah Jazz, an NBA professional basketball team. On November 2, 2010, Mr. Conley entered into an NBA Uniform Player Contract with Hoops. The contract provided for Mr. Conley to earn deferred compensation of $1 million for performance of services for Hoops during the 2011–12 NBA season. However, as a result of the NBA lockout, during the 2011–12 season, Mr. Conley earned deferred compensation of only $804,878 that was due to be paid by Hoops as determined on dates after the 2012 sale.

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[8] The 2004 Randolph contract provided a six-year term of employment from September 1, 2005, through the end of the 2010–11 NBA season.

[*5] V. *Gain on the 2012 Sale and Tax Reporting*

In computing its gain on the 2012 sale Hoops reported a total amount realized of $419,394,032, consisting of $200,690,000 of cash, $218,704,032 of liabilities assumed by Buyer, and other adjustments. Hoops reported an adjusted basis of $120,370,493 in the assets that it sold to Buyer. Thus, Hoops recognized gain of $299,023,539 on the 2012 sale.

As mentioned above, one of the liabilities that Buyer assumed, and Hoops was relieved of on the sale, was the obligation to pay the deferred compensation portion for performance of services earned while Messrs. Randolph and Conley were employed by Hoops, at later dates as determined after the 2012 sale. As of the date of the 2012 sale the deferred compensation liability had an accrued value of $12,640,000. For purposes of computing the amount realized by Hoops on Buyer's assumption of the deferred compensation liability, Hoops discounted the sum of the future payments to be made to Messrs. Randolph and Conley with a discount rate of 3%. The computations Hoops calculated, applying that 3% discount rate to the present value of the total future payments owed to Messrs. Randolph and Conley, totaled $10,673,327 as of the date of the 2012 sale. Hoops included $10,673,327, the present value of the deferred compensation liability, in its amount realized in computing its gain on the 2012 sale.

VI. *Tax Returns, FPAA, and Petition*

On September 16, 2013, Hoops filed Form 1065, U.S. Return of Partnership Income, for its taxable year ending December 31, 2012 (original 2012 tax return), using the accrual method of accounting. On its original 2012 tax return, Hoops: (1) did not claim an ordinary deduction of $10,673,327 relating to the deferred compensation liability, (2) did not reduce its amount realized on the sale by $10,673,327 for the deferred compensation liability, and (3) did not adjust its basis in any property it owned as a result of the deferred compensation liability.

On October 10, 2013, Hoops filed Form 1065X for its taxable year ending December 31, 2012 (amended 2012 tax return), which respondent received on October 14, 2013. On its amended 2012 tax return Hoops claimed an additional deduction of $10,673,327 relating to the deferred compensation liability. Hoops explained that it was claiming the additional deduction because no deduction was claimed on the original 2012 tax return under Treasury Regulation § 1.461-4(d)(5)

[*6] to reduce the partnership's deferred compensation liability included in the amount realized.

On March 12, 2018, respondent issued to Heisley Member, as tax matters partner of Hoops, an FPAA for the partnership's tax year ended December 31, 2012, disallowing the additional deduction Hoops claimed on its amended 2012 tax return relating to the deferred compensation liability. On June 7, 2018, Heisley Member, as tax matters partner of Hoops, filed a petition for readjustment of the partnership items set forth in the FPAA dated March 12, 2018.

Discussion

I. *Jurisdiction*

The Tax Court is a court of limited jurisdiction and may exercise jurisdiction only to the extent authorized by Congress. *Judge v. Commissioner*, 88 T.C. 1175, 1180–81 (1987); *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). We nevertheless have jurisdiction to determine whether we have jurisdiction. *Hambrick v. Commissioner*, 118 T.C. 348, 350 (2002); *Pyo v. Commissioner*, 83 T.C. 626, 632 (1984); *Kluger v. Commissioner*, 83 T.C. 309, 314 (1984). Even where the parties do not raise the issue, as in this case, we are required to resolve a question as to our jurisdiction on our own initiative. *Powell v. Commissioner*, 96 T.C. 707, 710 (1991).

The Court's jurisdiction over a TEFRA partnership-level proceeding is invoked upon the Commissioner's issuance of a valid FPAA and the proper filing of a petition for readjustment of partnership items for the year or years to which the FPAA pertains. *See Harbor Cove Marina Partners P'ship v. Commissioner*, 123 T.C. 64, 78 (2004). Heisley Member, as the tax matters partner, timely filed a petition with this Court within 90 days after respondent mailed the FPAA. *See* § 6226(a). Heisley Member, a disregarded entity for federal tax purposes but a general partner under state law, may be designated the tax matters partner of Hoops, a partnership subject to the TEFRA partnership provisions. *See* Rev. Rul. 2004-88, 2004-2 C.B. 165; *see also*, *e.g.*, *Seaview Trading, LLC v. Commissioner*, 858 F.3d 1281, 1285–88 (9th Cir. 2017); *Bedrosian v. Commissioner*, 143 T.C. 83, 104 (2014), *aff'd*, 940 F.3d 467 (9th Cir. 2019). Thus, we have jurisdiction.

[*7] II. *Burden of Proof*

Generally, the Commissioner's determinations in an FPAA are presumed correct, and the party challenging the FPAA bears the burden of proving that those determinations are erroneous. Rule 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *Republic Plaza Props. P'ship v. Commissioner*, 107 T.C. 94, 104 (1996). Deductions are a matter of legislative grace, and the burden is on the challenging party to prove entitlement to any claimed deductions. *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934).

The submission of this case to the Court under Rule 122 does not change or otherwise lessen petitioner's burden of proof. *See* Rule 122(b). Under section 7491(a), the burden of proof may shift to respondent if petitioner produces credible evidence with respect to any relevant factual issue and meets other requirements. Petitioner does not contend that the burden of proof should shift to respondent under section 7491. In any event only legal issues remain, so the burden of proof is irrelevant. *See*, *e.g.*, *Nis Fam. Tr. v. Commissioner*, 115 T.C. 523, 538 (2000).

III. *Whether Hoops Is Entitled to a Deduction for the Deferred Compensation Liability in 2012*

Section 162(a) allows a deduction for all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered. § 162(a)(1). Ordinarily, the deductibility of compensation paid or incurred by an employer to or on account of an employee is governed by section 162. However, if amounts are contributed by an employer under a pension, annuity, stock bonus, or profit-sharing plan, or under any plan of deferred compensation, section 404(a) governs the deductibility of such amounts and prescribes limitations as to the amount deductible for any year. Treas. Reg. § 1.404(a)-1(a)(1); *see also* Treas. Reg. § 1.162-10(c).

The parties agree that the compensation at issue was a nonqualified plan of deferred compensation, the deductibility of which is governed by section 404(a). Specifically, the parties agree that the deferred compensation liability at issue reflects an arrangement as described in section 404(a)(5), which covers all cases for which deductions are allowable under section 404(a) but not allowable under

[*8] paragraph (1), (2), (3), (4), or (7) of that subsection. Treas. Reg. § 1.404(a)-12(a).

A. *Deductibility Under Section 404(a)(5)*

Section 404(a) provides, in pertinent part, that

> if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such . . . compensation shall not be deductible under this chapter; but, if [the compensation] would otherwise be deductible, [it] shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year.

Thus, in order to be deductible under section 404(a), compensation "must be expenses which would be deductible under section 162 (relating to trade or business expenses) or section 212 (relating to expenses for production of income) if it were not for the provision in section 404(a) that they are deductible, if at all, only under section 404(a)." Treas. Reg. § 1.404(a)-1(b). Relevant to this case is that the compensation, which would otherwise be deductible, is further subject to the limitations under section 404(a)(5) as to the amount deductible for any year.

Section 404(a)(5) provides that, in a case of a nonqualified plan, a deduction for deferred compensation paid or accrued is allowable for the taxable year for which an amount attributable to the contribution is includible in the gross income of the employees participating in the plan. The regulations under section 404(a)(5) further confirm that

> [a] deduction is allowable for a contribution paid after August 1, 1969, . . . only in the taxable year of the employer in which or with which ends the taxable year of an employee in which an amount attributable to such contribution is includible in his gross income as compensation, and then only to the extent allowable under section 404(a).

Treas. Reg. § 1.404(a)-12(b)(1).

Under the plain terms of section 404(a)(5), Hoops is not allowed to deduct deferred compensation until the taxable year for which an

[*9] amount attributable to the compensation is includible in the employee's gross income. The parties agree that Hoops had not paid any amounts owed to Messrs. Randolph and Conley with respect to the deferred compensation liability in 2012 and, therefore, no amounts were includible in their gross incomes as compensation. Thus, even if the deferred compensation liability was otherwise deductible under section 162, Hoops is not entitled to a deduction for the deferred compensation liability for 2012 because no amounts attributable to the compensation were includible in the gross incomes of Messrs. Randolph and Conley. Instead, pursuant to section 404(a)(5), any deduction for an amount attributable to the compensation is allowed when the amount is includible in the gross incomes of Messrs. Randolph and Conley. Accordingly, we sustain respondent's determination to disallow the additional deduction of $10,673,327 relating to the deferred compensation liability that Hoops claimed on its amended 2012 tax return.

B. *Petitioner's Economic Performance Argument*

Despite the plain text of section 404(a)(5), petitioner argues that section 461(h) and the regulations promulgated thereunder nevertheless allow Hoops to deduct the deferred compensation liability for the year of the sale. Specifically, petitioner argues that the timing rule in section 404 is incorporated into the economic performance requirement of section 461(h) and, in the present case, is accelerated under Treasury Regulation § 1.461-4(d)(5)(i) (sale provision).[9] Petitioner's reliance on the economic performance requirement of section 461(h) is misplaced.

Section 461 provides general rules with respect to the proper year for taking deductions, which in turn rest in part on the taxpayer's method of accounting under section 446. An accrual method taxpayer is generally entitled to deduct expenses for the years in which the taxpayer

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[9] The sale provision provides:

> If, in connection with the sale or exchange of a trade or business by a taxpayer, the purchaser expressly assumes a liability arising out of the trade or business that the taxpayer but for the economic performance requirement would have been entitled to incur as of the date of the sale, economic performance with respect to that liability occurs as the amount of the liability is properly included in the amount realized on the transaction by the taxpayer.

Treas. Reg. § 1.461-4(d)(5)(i).

[*10] incurred the expenses, regardless of the actual payment dates. § 461(h)(4); *Caltex Oil Venture v. Commissioner*, 138 T.C. 18, 23 (2012); Treas. Reg. § 1.461-1(a)(2). Under an accrual method, a liability is incurred, and generally taken into account for federal income tax purposes, in the taxable year in which all the events have occurred that: (1) establish the fact of the liability, (2) the amount of the liability can be determined with reasonable accuracy, and (3) economic performance has occurred with respect to the liability. § 461(h); Treas. Reg. §§ 1.446-1(c)(1)(ii)(A), 1.461-1(a)(2)(i). In this case the parties agree that Hoops incurred the deferred compensation liability, as of the date of the 2012 sale, because all the events had occurred that establish the fact of the deferred compensation liability, the amount can be determined with reasonable accuracy, and economic performance occurred.[10]

The regulations under section 461, however, further instruct that if, as here, the taxpayer uses an accrual method of accounting, "[a]pplicable provisions of the Code, the Income Tax Regulations, and other guidance published by the Secretary prescribe the manner in which a liability that has been incurred is taken into account." Treas. Reg. §§ 1.461-1(a)(2)(i), 1.446-1(c)(1)(ii)(A). Thus, under the regulations, the initial question is whether another provision of the Code or the Regulations prescribes the manner in which the deferred compensation liability is taken into account. *See JP Morgan Chase & Co. v. Commissioner*, 458 F.3d 564, 568 (7th Cir. 2006), *aff'g in part*, *vacating in part, and remanding Bank One Corp. v. Commissioner*, 120 T.C. 174 (2003).

As discussed in the previous section, section 404(a)(5) is the applicable Code provision that governs the deductibility of and prescribes the manner in which a deferred compensation liability is taken into account. Under the plain text of section 404(a)(5), a deduction for deferred compensation is taken into account only for the taxable year in which an amount attributable to the contribution is includible in the gross income of the employee and then only to the extent allowable under section 404(a). *See* Treas. Reg. § 1.404(a)-12(b)(1). As we concluded above, Hoops is not entitled to deduct the deferred compensation liability for the year of the sale because no amounts

[10] Respondent concedes that economic performance occurred under the general rule in Treasury Regulation § 1.461-4(d)(2), and petitioner argues that economic performance occurred under the sale provision in Treasury Regulation § 1.461-4(d)(5)(i). Since the parties agree that economic performance occurred, we will not opine on this issue.

[*11] attributable to the compensation were includible in the gross income of Messr. Randolph or Conley. *See Jacobs v. Commissioner*, 45 T.C. 133, 136 (1965). This result remains the same, regardless of the fact that Hoops files its returns using the accrual method of accounting. *See* Treas. Reg. § 1.404(a)-1(c). Accordingly, petitioner's reliance on the sale provision is misplaced because it is the section 404(a)(5) limitation as to the amount deductible for any year that precludes deduction for the year of the 2012 sale, not any purported failure to satisfy the economic performance requirement.

Petitioner also argues that, if section 404(a)(5) and the tax accounting rules were applied in a manner that would deny Hoops a deduction, it would "lead to the ridiculous result" of Hoops including the deferred compensation liability in its sale proceeds but potentially never obtaining an offsetting deduction. Thus, petitioner contends that allowing Hoops to deduct the deferred compensation liability for the year of the 2012 sale comports with the purpose of clearly reflecting income. In contrast respondent contends that section 404(a)(5) is a congressionally mandated deviation from the clear reflection of income principle, citing H.R. Rep. No. 77-2333 (1942), 1942-2 C.B. 372, 452, and S. Rep. No. 77-1631 (1942), 1942-2 C.B. 504, 609. We agree with respondent.

In *Jacobs*, 45 T.C. at 135, this Court stated that section 404(a)(5) removes arrangements from the normal rules of tax accounting, regardless of which method of accounting a taxpayer uses. In looking at Congress's intent for the special timing rule for deferred compensation, the U.S. Court of Appeals for the Ninth Circuit noted in *Albertson's, Inc. v. Commissioner*, 42 F.3d 537, 543 (9th Cir. 1994), *aff'g* 95 T.C. 415 (1990), that

> Congress provided a single explanation for the timing restrictions of section 404: to ensure matching of income inclusion and deduction between employee and employer under nonqualified plans. As both the House and Senate Reports note, "if an employer on the accrual basis defers paying any compensation to the employee until a later year or years * * * he will not be allowed a deduction until the year in which the compensation is paid." H.R. Rep. No. 2333, 77th Cong., 2d Sess. (1942), 1942-2 Cum. Bull. 372, 452; S. Rep. No. 1631, 77th Cong., 2d Sess. (1942), 1942-2 Cum. Bull. 504, 609.

[*12] The Ninth Circuit further noted that Congress exempted contributions to qualified retirement plans from the special timing rule in section 404(a) because Congress "compensates employers for meeting the burdensome requirements associated with qualified plans by granting them favorable tax treatment." *Albertson's, Inc. v. Commissioner*, 42 F.3d at 543.

Accordingly, in the light of Congress' intent to deviate from the clear reflection of income principle and to ensure matching of income inclusion and deduction between employee and employer under nonqualified plans, we conclude that disallowing a deduction for the year of sale would not lead to a "ridiculous result." To the contrary, under the facts of this case, such a result comports with the clear purpose of section 404.

IV. *Whether Hoops Must Include the Deferred Compensation Liability in Its Amount Realized in Computing Its Gain on the Sale*

In the alternative petitioner argues that, if the Court finds that the deferred compensation liability is not deductible for the year of the 2012 sale, as we have, then either the deferred compensation liability should not have been included in the sale price or Hoops should be entitled to offset or reduce its amount realized on the 2012 sale by the amount of the deferred compensation liability. We disagree.

Section 1001(a) provides that the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis. The "amount realized" is the sum of any money received plus the fair market value of the property (other than money) received, including the amount of liabilities from which the transferor is discharged as a result of the sale or other disposition. § 1001(b); Treas. Reg. § 1.1001-2(a)(1).

Petitioner argues that accrued expenses assumed by a buyer should be included in the sale price only if they were deducted by the seller. In effect petitioner argues that the deferred compensation liability is not a liability within the meaning of section 1001 because it was not included in basis and did not give rise to a deduction. In support of its position, petitioner asserts that Congress intended for section 404(a)(5) to delay the employer's deduction to the year for which the payment is includible in the employee's gross income, not to create an asymmetry in which a liability was never included in basis or deducted. Thus, petitioner contends that the Court should avoid applying section

[*13] 404(a)(5) and avoid this asymmetry by adopting the definition of liability already applied in *Tufts v. Commissioner*, 461 U.S. 300 (1983), *Focht v. Commissioner*, 68 T.C. 223 (1977), and Treasury Regulation § 1.752-1(a)(4).

Here, the parties agree that Messrs. Randolph and Conley had already performed the services and, therefore, Hoops had an obligation to pay the deferred compensation. When Buyer assumed the deferred compensation liability, Hoops was discharged from its obligation to pay deferred compensation as a result of the 2012 sale. Thus, pursuant to section 1001, Hoops was required to take into account the amount of the deferred compensation liability in computing its gain or loss from the sale. *Com. Sec. Bank v. Commissioner*, 77 T.C. 145, 148–49 (1981) (*citing Crane v. Commissioner*, 331 U.S. 1 (1947)).

Petitioner further argues that Hoops should be entitled to offset or reduce its amount realized on the 2012 sale by the amount of the deferred compensation liability. Petitioner cites *James M. Pierce Corp. v. Commissioner*, 326 F.2d 67 (8th Cir. 1964), *rev'g* 38 T.C. 643 (1962), and *Commercial Security Bank* for the proposition that either the buyer assumes the liability and pays the seller the net cash amount or the buyer pays the gross cash amount and the seller uses a portion to satisfy the liability. *See James M. Pierce Corp v. Commissioner*, 326 F.2d at 71–72. Thus, in substance, by accepting less cash than the seller otherwise would have received had it retained the liability, it effectively made a constructive payment to the buyer to satisfy the liability. *Com. Sec. Bank*, 77 T.C. at 149 (*citing James M. Pierce Corp. v. Commissioner*, 326 F.2d at 71–72).

However, *Commercial Security Bank* and *James M. Pierce Corp.* are distinguishable, namely, because they did not involve deferred compensation subject to section 404(a)(5). Section 404(a)(11)(B) provides that, for purposes of determining when deferred compensation is paid, no amount shall be treated as received by the employee, or paid, until it is actually received by the employee. This result is consistent with Congress' intent for nonqualified plans under section 404, as discussed in the previous section, to deviate from the clear reflection of income principle and require matching of income inclusion and deduction between the employee and employer. Accordingly, Hoops must include the deferred compensation liability in its amount realized on the 2012 sale and is not entitled to offset or reduce its amount realized by the amount of the deferred compensation liability.

[*14] V. *Conclusion*

We have considered all arguments made by the parties and, to the extent not discussed above, consider those arguments to be irrelevant, moot, or without merit.

To reflect the foregoing,

An appropriate decision will be entered.