

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOHN LEE SOUTHERN & DEBRA KAY)	
SOUTHERN,)	
)	
Petitioners,)	
)	
v.)	Docket No. 16222-12 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
)	

ORDER

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioners and to respondent a copy of the pages of the transcript of the trial in the above case before Judge David Laro at Detroit, Michigan, containing his Oral Findings of Fact and Opinion rendered at the trial session at which this case was heard.

In accordance with the Oral Findings of Fact and Opinion, we will issue an Order and Decision granting respondent’s Motion for Summary Judgment, sustaining Appeals’ determinations, and allowing respondent to proceed with the collection actions upon which this case is based.

(Signed) David Laro
Judge

Dated: Washington, D.C.
June 24, 2013

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1 Bench Opinion by Senior Judge David Laro
2 May 20, 2013
3 John Lee & Debra Kay Southern v. Commissioner
4 Docket No. 16222-12L

5 THE COURT: The Court has decided to render
6 an Oral Opinion in this case, and the following is
7 the Court's oral opinion. This bench opinion is made
8 under the authority granted by section 7459(b) and
9 Rule 152. Presently before the Court is respondent's
10 motion for summary judgment under Rule 121. The
11 Court ordered petitioners to respond to the motion,
12 and petitioners filed a timely opposition. The
13 record reveals there is no genuine dispute of
14 material fact, and the Court may render a decision as
15 a matter of law. We shall do so here.

16 Unless otherwise indicated, section
17 references are to the Internal Revenue Code.
18 Petitioners refers to John L. Southern and Debra K.
19 Southern, SO Roney refers to Settlement Officer John
20 A. Roney, IRS refers to the Internal Revenue Service,
21 and Appeals refers to the IRS Office of Appeals.
22 Petitioners resided in Michigan when they filed the
23 petition.

24 Background

25 Petitioners were the subject of an audit

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1 for years 2006 through 2008 (subject years). During
2 their audit, on April 28, 2009, petitioners filed
3 with respondent three signed Forms 1040X, Amended
4 U.S. Individual Income Tax Return, for the subject
5 years. The amended returns stated petitioners'
6 names, social security number, and address, and
7 reported zero taxable income and requested refunds
8 for all three years. Petitioners also submitted
9 Forms 4852, Substitute for Form W-2, Wage and Tax
10 Statement, or Form 1099-R, Distributions From
11 Pensions, Annuities, Retirement or Profit Sharing
12 Plans, IRA, Insurance Contracts, etc. (substitute W-2
13 and 1099-R) for the subject years. Each substitute
14 W-2 and 1099-R showed zero wages from Form W-2 and
15 zero taxable income from distributions from Form
16 1099-R, but stated amounts of Federal income tax,
17 state income tax, social security tax, and/or
18 Medicare tax withheld for petitioners. Petitioners
19 claimed in their amended returns that they did not
20 receive income or wages, within the meaning of the
21 "relevant law", for work performed for any government
22 agency or in connection with any performance of such
23 work. Petitioners sent additional correspondence on
24 at least four separate occasions, sometimes attaching
25 the same amended returns and substitute W-2 and 1099-

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1 R, insisting that respondent accept their amended
2 returns.

3 On July 28, 2009, respondent issued to
4 petitioners a statutory notice of deficiency for the
5 subject years. In addition to the tax deficiencies
6 stated in the statutory notice, respondent also
7 determined that petitioners were liable for a \$5,000
8 frivolous return penalty under section 6702(a) for
9 each of the subject years. After petitioners filed a
10 timely petition, docketed at 24940-09, for our review
11 of the notice of deficiency, respondent filed an
12 answer on November 19, 2009, stating, among other
13 things, the following: "Respondent concedes the
14 Frivolous Return Penalties for purposes of the
15 Court's jurisdiction. Respondent still asserts that
16 petitioners filed frivolous documents incurring the
17 penalties pursuant to procedures other than the
18 notice of deficiency procedures." The parties
19 subsequently settled the case, and on September 3,
20 2010, the Court entered a stipulated decision, which
21 stated, among other things, that there were no
22 penalties due from petitioners for the subject years
23 under the provisions of section 6662(a) (i.e.,
24 accuracy-related penalties).

25 While the deficiency case was pending, on

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1 December 21, 2009, respondent assessed a \$5,000
2 penalty under section 6702 against Mr. Southern for
3 filing a frivolous income tax return for each of the
4 three subject years. On July 11, 2011, respondent
5 assessed a \$5,000 penalty under section 6702 against
6 Ms. Southern on the same basis for each of the three
7 years.

8 On June 14, 2010, respondent issued to Mr.
9 Southern a Letter 11, Notice of Intent to Levy and
10 Notice of Your Right to a Hearing (Mr. Southern's
11 levy notice), to collect the frivolous return
12 penalties assessed against Mr. Southern under section
13 6702. On June 25, 2010, Mr. Southern filed a Form
14 12153, Request for a Collection Due Process or
15 Equivalent Hearing (CDP request), to dispute
16 respondent's proposed collection action stated in Mr.
17 Southern's levy notice. In the CDP request, Mr.
18 Southern stated that the asserted penalties "were
19 being conceded" by respondent in the deficiency case.
20 He did not request respondent to consider any
21 collection alternative.

22 On November 1, 2011, respondent issued a
23 Letter 3172, Notice of Federal Tax Lien Filing and
24 Your Right to a Hearing under IRC section 6320 (Ms.
25 Southern's NFTL notice), to collect the frivolous

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1 return penalties assessed against Ms. Southern under
2 section 6702. On November 3, 2011, Ms. Southern
3 filed a CDP request disputing respondent's proposed
4 collection action stated in her NFTL notice. In her
5 CDP request, Ms. Southern stated that she had settled
6 the deficiency case and believed the penalties under
7 section 6702 should be removed. The CDP request also
8 stated that Ms. Southern intended to discuss an offer
9 in compromise (OIC).

10 Respondent consolidated the CDP requests
11 and assigned them to SO Roney to address petitioners'
12 respective CDP cases.

13 On May 19, 2011, SO Roney held a CDP
14 hearing in Mr. Southern's CDP case by telephonic
15 conference. During the hearing, Mr. Southern
16 contested the penalty liabilities underlying his CDP
17 notice and made an OIC; he raised no other issue. SO
18 Roney explained that the frivolous return penalties
19 were conceded in the deficiency case for
20 jurisdictional purposes only. SO Roney also
21 reiterated that respondent's counsel had already
22 explained this to petitioners before they settled the
23 deficiency case. As to the OIC, SO Roney indicated
24 that he could not accept the offer because, even
25 after respondent's counsel had explained to

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1 petitioners about the frivolous return penalties,
2 petitioners still filed--and had failed to correct--a
3 similar frivolous return showing zero tax liability
4 for 2010. The record shows that the 2010 return was
5 filed a month before the CDP hearing on April 13,
6 2011.

7 On March 8, 2012, SO Roney held a CDP
8 hearing in Ms. Southern's case by telephonic
9 conference; Mr. Southern appeared in the hearing on
10 Ms. Southern's behalf under a power of attorney.
11 During the hearing, Mr. Southern stated that Ms.
12 Southern would not challenge the penalty liabilities
13 underlying Ms. Southern's NFTL notice and that they
14 wanted to resolve the issue through an OIC. Mr.
15 Southern raised no other issue.

16 The record shows that as of April 9, 2012,
17 petitioners had yet to correct the 2010 frivolous
18 return.

19 On May 30, 2012, respondent separately
20 issued a Notice of Determination to Mr. Southern and
21 Ms. Southern in their respective CDP cases.

22 Mr. Southern's Notice of Determination
23 restated that respondent conceded the frivolous
24 return penalties in the deficiency case on
25 jurisdictional ground only and that petitioners had

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1 to pay the penalties and file a refund suit in the
2 district court to dispute them. The notice also
3 pointed out that petitioners were made aware of the
4 jurisdictional issue and the refund process by
5 respondent's Letter 555-T, Reconsideration after
6 Statutory Notice, sent to petitioners on October 14,
7 2009. In addition, the notice stated that
8 respondent's counsel had also explained the same
9 refund process to petitioners during the pretrial
10 conference in petitioners' deficiency case. The
11 notice concluded that Appeals could not abate the
12 penalties under section 6702(d) because petitioners
13 continued to file frivolous returns. Finally, the
14 notice rejected petitioners' OICs because petitioners
15 had yet to correct their frivolous return for 2010
16 and thus accepting the OICs would not be in the
17 government's best interest.

18 Ms. Southern's Notice of Determination
19 acknowledged that the only issue raised in her CDP
20 hearing was her OIC. Appeals rejected Ms. Southern's
21 OIC because petitioners had yet to correct their
22 frivolous return for 2010 and thus accepting the OICs
23 would not be in the government's best interest.

24 Petitioners filed a timely petition for our
25 review of respondent's Notices of Determination

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1 (petition). We note that petitioners' petition
2 incorrectly states that respondent's notices were
3 issued for years 2006 through 2009 when the notices
4 were issued for 2006 through 2008 only. Because
5 there is no evidence showing Appeals made a
6 "determination" with respect to 2009, the only years
7 that can be at issue here are 2006, 2007, and 2008.
8 See sec. 6330(d); Offiler v. Commissioner, 114 T.C.
9 492, 498 (2000).

10 Discussion

11 **Summary judgment may be granted with**
12 **respect to all or any part of the legal issues in**
13 **controversy where the record establishes "that there**
14 **is no genuine dispute as to any material fact and**
15 **that a decision may be rendered as a matter of law."**
16 **Rule 121(a) and (b). Respondent as the moving party**
17 **bears the burden of proving that there is no genuine**
18 **dispute of material fact, and factual inferences are**
19 **viewed in the light most favorable to petitioners as**
20 **the nonmoving party. Craig v. Commissioner, 119 T.C.**
21 **252, 260 (2002). Where a motion for summary judgment**
22 **is made, an adverse party "must set forth specific**
23 **facts showing that there is a genuine dispute for**
24 **trial." Rule 121(d). Here, respondent supported his**
25 **motion with the pleadings and various exhibits.**

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1 Petitioners filed a timely opposition with exhibits.
2 After reviewing the parties' moving papers and
3 accompanying exhibits, we find there is no genuine
4 dispute as to any material fact and conclude this
5 case is ripe for summary judgment.

6 In their opposition to respondent's motion
7 for summary judgment, petitioners argue only that the
8 frivolous return penalties were "dropped" in the
9 deficiency case and that their OICs should have been
10 accepted. To the extent that petitioners do not
11 assert in their opposition any claims that they made
12 in their petition or any other issues, we deem them
13 abandoned. See Lemann v. Commissioner, T.C. Memo
14 2006-37, 91 T.C.M. (CCH) 846, 849 n. 9 (2006).

15 We review the Commissioner's determinations
16 in a CDP hearing generally for abuse of discretion;
17 except that if the validity of a taxpayer's
18 underlying liability is properly at issue, we review
19 the matter de novo. See Giamelli v. Commissioner, 129
20 T.C. 107, 111 (2007). Here, we review respondent's
21 imposition of the frivolous return penalties de novo
22 in Mr. Southern's CDP case because Mr. Southern did
23 not receive a statutory notice of deficiency for the
24 liabilities or have a prior opportunity to dispute
25 such liabilities. See Callahan v. Commissioner, 130

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1 T.C. 44, 49-51. We review the remaining issues in
2 Mr. Southern's case for abuse of discretion.
3 However, because Ms. Southern did not raise the
4 penalty issue at the CDP hearing, the underlying
5 liability is not properly at issue; thus we review
6 respondent's determinations in Ms. Southern's CDP
7 case for abuse of discretion only. Schwartz v.
8 Commissioner, T.C. Memo. 2008-117, 95 T.C.M. (CCH)
9 1427, 1430 n.9, aff'd, 348 Fed. Appx. 806 (3d. Cir.
10 2009) (noting liability is not at issue because,
11 while taxpayer raised it in their requests for a CDP
12 hearing, taxpayer did not pursue the claim at the
13 hearing). Under the abuse of discretion standard, we
14 will reverse respondent's determinations only if they
15 were arbitrary, capricious, or without sound basis in
16 fact or law.

17 I. Mr. Southern's CDP case

18 The amended section 6702(a) imposes a
19 \$5,000 penalty if three requirements are met: (1)
20 the individual filed a purported income tax return;
21 (2) the purported return lacked information needed
22 for the Commissioner to judge the substantial
23 correctness of the self-assessment or contained
24 information that on its face indicated that the
25 self-assessment was substantially incorrect; and (3)

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1 the individual's conduct in this regard was based on
2 a position identified in a list of frivolous
3 positions prescribed by the Secretary under section
4 6702(c) or a desire to delay or impede the
5 administration of Federal income tax laws. The
6 amended section 6702(a) is effective for submissions
7 made and issues raised after the date on which the
8 Secretary of Treasury first prescribed such a list.
9 Notice 2008-14, 2008-4 I.R.B. 310, applicable to
10 submissions made and issues raised after January 4,
11 2008, applies to petitioners' zero returns for the
12 subject years.

13 The first two requirements of section
14 6702(a) are clearly present in this case. As to the
15 third requirement, petitioners' filing of "zero
16 returns" claiming that they did not receive income or
17 wages because they did not perform any work for a
18 government agency implicates two types of frivolous
19 positions described in Notice 2008-14: (1) "A
20 taxpayer * * * elect[ing] to file a tax return
21 reporting zero taxable income and zero tax liability
22 even if the taxpayer received taxable income during
23 the taxable period for which the return is filed",
24 and (2) "Only certain types of taxpayers are subject
25 to income and employment taxes, such as employees of

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1 the Federal government". Thus, respondent did not
2 err in assessing the penalties under section 6702(a).

3 The fact that respondent conceded the
4 frivolous tax return penalties in the prior
5 deficiency case on jurisdictional ground does not
6 change our conclusion. The assessments and
7 collection of section 6702 penalties are not subject
8 to the deficiency procedures described in sections
9 6211 through 6216. Sec. 6703(b). Thus, it was
10 improper for respondent to assert the penalties in
11 his notice of deficiency under section 6212, and this
12 Court had no jurisdiction under section 6213 to
13 review their assessments. **Moreover, the Court would**
14 **not have jurisdiction to enforce any settlement**
15 **agreement the parties might have reached over an**
16 **issue if the original jurisdiction over that issue**
17 **was lacking. United States v. Orr Const. Co., 560**
18 **F.2d 765, 768-769 (7th Cir. 1977).** Thus, as a matter
19 of law, the stipulated decision we entered in the
20 deficiency case could not have settled the issue
21 relating to the section 6702(a) frivolous return
22 penalties.

23 Moreover, petitioners have not provided any
24 evidence disputing respondent's claim that
25 respondent's counsel had explained to them in the

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1 pretrial conference that to dispute the penalties,
2 petitioners had to pay the penalties first and then
3 file a refund suit in the district court. Respondent
4 had also stated substantially the same in his Letter
5 555-T provided to petitioners well before petitioners
6 signed the stipulated decision. Thus, in all
7 fairness, petitioners were on notice.

8 Finally, we do not find any abuse of
9 discretion in Appeals' rejection of Mr. Southern's
10 OIC. First, we note that the record shows Appeals
11 complied with the requirements under section
12 6330(c)(3). And in light of the fact that
13 petitioners continued to file frivolous returns well
14 after their deficiency case and also the fact that
15 they failed to correct their wrongs before the
16 conclusion of Mr. Southern's CDP hearing, we cannot
17 say Appeals abused its discretion when it determined
18 that it would not be in the government's best
19 interest to accept petitioners' OICs.

20 II. Ms. Southern's CDP case

21 The only issue raised in Ms. Southern's CDP
22 hearing was her OIC. We review Appeal's rejection
23 of Ms. Southern's OIC for abuse of discretion. For
24 the same reasons we stated above with respect to
25 Appeals' rejection of Mr. Southern's OIC, we conclude

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1 that Appeals did not abuse its discretion when it
2 rejected Ms. Southern's offer.

3 And even if Ms. Southern raised the
4 frivolous return penalty issue at her CDP hearing, we
5 would sustain respondent's assessments of the
6 penalties for the same reasons we stated earlier in
7 Mr. Southern's case since both Mr. Southern and Ms.
8 Southern signed and filed the same frivolous returns.

9 In reaching our decision today, we have
10 considered all arguments raised by the parties. To
11 the extent not discussed herein, we find them to be
12 irrelevant, moot, or without merit. Accordingly, we
13 will issue an Order and Decision granting
14 respondent's motion for summary judgment, sustaining
15 Appeals' determinations, and allowing respondent to
16 proceed with the collection actions that are the
17 subject of this proceeding. This concludes the
18 Court's Oral Findings of Fact and Opinion in this
19 case.

20 MR. SOUTHERN: I really didn't understand
21 what you were getting at.

22 THE COURT: I appreciate it, sir. You'll
23 have to get a copy of the opinion and then you can
24 read it. A copy of the opinion will be made
25 available to you.

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1 MR. CHMIELEWSKI: Okay. So, in other
2 words, you're going with what they said and then I
3 have to appeal that decision.

4 THE COURT: The Court has rendered an
5 opinion and you may have a ground of appeal with
6 respect to it. Thank you, sir.

7 MR. CHMIELEWSKI: Your Honor, for the
8 record, I want to clarify that at times during your
9 opinion, I misunderstood you to say Mr. and Mrs.
10 Southerland. I just wanted to clarify that it's Mr.
11 and Mrs. Southern.

12 THE COURT: It is, thank you. The record
13 is corrected, and thank you for bringing that to my
14 attention. We're done in this case.

15 (Whereupon, at 11:33 a.m., the above-
16 entitled matter was concluded.)

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