

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ALBERT SOFIAN,)
)
 Petitioner,)
)
 v.) Docket No. 17960-12 L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER

On July 10, 2013, respondent (the IRS) moved for summary judgment, asserting that the only issue in this “collection due process” (CDP) case is the underlying liability of petitioner Albert Sofian for income tax for 2001, but arguing (1) that Mr. Sofian is precluded by section 6330(c)(2)(B) from challenging underlying liability because of a prior opportunity for such a challenge, and (2) that Mr. Sofian failed in any event to raise such a challenge in his CDP hearing. Mr. Sofian filed an opposition on August 19, 2013, and we hold that he thereby did raise a genuine dispute of fact that precludes summary judgment:

(1) The prior opportunity that the IRS alleges was an April 2011 final notice of intent to levy; but Mr. Sofian asserts that he did not receive it. He will therefore have an opportunity at trial to attempt to prove that he did not receive it.

(2) On the record before us, we cannot fault Mr. Sofian for failing to effectively challenge liability at his CDP hearing. IRS Appeals’ letter of April 12, 2012, explicitly told Mr. Sofian, “You are not able to dispute the liability because our records indicate that you had a previous opportunity to challenge the liability under IRC 6330 when you were issued a Notice of Intent to Levy on April 26, 2011. Therefore, you are precluded from raising the liability during this CDP hearing request.” Appeals cannot announce such preclusions to the taxpayer and

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then support taxpayer-adverse outcomes by saying that the taxpayer failed to dispute the liability.

We acknowledge that Appeals' letter went on to say, "However, we will consider your original Form 1040 for the tax year 2001 under general authority if you submit a completed and signed tax return to me within 21 days of the date of this letter"; and we have no doubt that Appeals made this offer in good faith. However, the letter made it clear that, for purposes of his CDP rights (which would include judicial review thereof) Mr. Sofian was precluded. Appeals cannot have it both ways--on the one hand telling the taxpayer that his submissions will not count for CDP purposes, but on the other hand arguing that the taxpayer's non-submissions should count against him in the Tax Court's review of the CDP hearing.

This case will therefore proceed to trial. For that purpose, the Court gives these instructions:

1. At trial Mr. Sofian's mere contradiction of the IRS's position will not carry the day, as it did here for purposes of summary judgment under Rule 121. Rather, Mr. Sofian will have the burden of proof to show that he did not have a prior opportunity to challenge his 2001 income tax liability.

2. If Mr. Sofian does prove that he lacked such an opportunity and is entitled to challenge his liability, he will have the burden of proof in making that challenge. His response to the IRS's motion states, "it is [the IRS's] obligation to prove that I owe money to them. It is not my obligation to prove that I don't owe money." That is not correct. The petitioner does have the burden of proof. See Rule 142(a).

3. The principal issue underlying the dispute about Mr. Sofian's liability appears to be his claim that his gain on sales of securities must be offset by his "basis" (usually, purchase price) in those securities. As a general matter, this is correct; but it is Mr. Sofian's burden to prove his basis, by presenting (for example) documentation showing the price he paid for his securities. He may have such information in his own possession, or he may be able to obtain it from his brokers. (And if he needs to subpoena his brokers or their records, he should consult Rule 147.) In any event, he should be prepared to offer his evidence at the trial of this case.

For the reasons stated above, it is

ORDERED that respondent's motion for summary judgment is denied. It is further

ORDERED that, in compliance with our standing pretrial order, the parties shall exchange with each other, no later than November 4, 2013, all the documentary evidence that they expect to offer at the trial of this case. They should not expect to be allowed to submit at trial evidence that they failed to exchange by November 4, 2013.

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
August 22, 2013