

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

MEDI-SAVE PHARMACY, INC.,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 30058-13 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER AND DECISION

This case is set for trial at the Court’s September 22, 2014, Chicago, Illinois, trial session. On July 2, 2014, respondent filed a motion for summary judgment seeking to sustain a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 (notice of determination) dated November 22, 2013. On July 8, 2014, the Court directed petitioner to file a response to respondent’s motion for summary judgment by July 29, 2014, and to date no response has been filed.

There are no genuine issues of material fact in this case, and we conclude that respondent is entitled to judgment as a matter of law provided herein.

Petitioner is represented by counsel. By failing to respond to respondent’s motion, petitioner waived its right to contest it. Rule 121(d); see, e.g., Lunsford v. Commissioner, 117 T.C. 183, 187 (2001).

Unless otherwise indicated, all section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Background

Petitioner was a corporation with its principle place of business in West Virginia when it filed the petition.

Respondent determined that petitioner failed to disclose its participation in a listed transaction as required under section 1.6011-4, Income Tax Regs., for the tax year 2007. Petitioner failed to disclose its participation in the Sterling Benefit Plan. Pursuant to section 6707A respondent proposed a penalty of \$10,000. Petitioner’s counsel filed a protest with respondent’s Appeals Office to dispute the penalty. The Appeals Office determined that the civil penalty should be sustained in full. After Appeals Office review, respondent assessed the penalty against petitioner for tax year 2007 on August 18, 2012.

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On April 27, 2013, respondent sent petitioner a Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing (levy notice). On June 10, 2013, petitioner's counsel submitted a Form 12153, Request for a Collection Due Process Hearing, in response to the levy notice.

On August 5, 2013, an Appeals officer sent petitioner a letter scheduling a telephonic Collection and Due Process hearing for September 5, 2013. The letter also stated that if petitioner wished to have the Appeals officer consider any type of collection alternative, petitioner must provide the Appeals officer with certain required documents.

On September 5, 2013, the Appeals officer sent petitioner another letter because petitioner's representative failed to call for the scheduled telephonic CDP hearing. The letter provided petitioner with a final opportunity to submit the documents required in order for the Appeals officer to consider a collection alternative.

On November 22, 2013, the Appeals officer issued petitioner the notice of determination sustaining the levy notice.

On December 23, 2013, petitioner filed a timely petition which states that it is entitled to abatement of the penalty based on "an unexplained determination that related transaction and a provision of the Internal Revenue Code that is unconstitutional as a deprivation of due process."

Discussion

Summary judgment may be granted where the pleadings and other materials show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law. Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). The burden is on the moving party (in this case, respondent) to demonstrate that there is no genuine dispute as to any material fact and that he or she is entitled to judgment as a matter of law. FPL Grp., Inc. & Subs. v. Commissioner, 116 T.C. 73, 74-75 (2001). In considering a motion for summary judgment, evidence is viewed in the light most favorable to the nonmoving party. Bond v. Commissioner, 100 T.C. 32, 36 (1993). The nonmoving party may not rest upon the mere allegations or denials of his or her pleading but must set forth specific facts showing there is a genuine dispute for trial. Sundstrand Corp. v. Commissioner, 98 T.C. at 520. Petitioner in the instant case has failed to demonstrate, by affidavits or other acceptable materials, that there is a genuine issue for trial. Rule 121(d). Consequently, we conclude that there is no dispute as to any material fact and that a decision may be rendered as a matter of law.

Section 6331(a) authorizes the Secretary to levy upon the property and property rights of a taxpayer who fails to pay a tax within 10 days after a notice and demand. Before the Secretary may levy upon the taxpayer's property, the Secretary must notify him or her of the Secretary's intention to make the levy. Sec. 6331(d)(1). The Secretary must also notify the taxpayer of his or her right to a CDP hearing. Sec. 6330(a)(1).

If the taxpayer requests a CDP hearing, the hearing is conducted by the Appeals Office. Sec. 6330(b)(1). At the hearing the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed collection actions. Sec. 6330(c)(2)(A). Once the settlement officer makes a determination, the taxpayer may appeal the determination to this Court. Sec. 6330(d)(1). The Court has jurisdiction to review the Commissioner's administrative determinations. Id.

Where the validity of the underlying tax liability is properly in issue, we review the underlying tax liability de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 182 (2000). A taxpayer may challenge the underlying tax liability during a CDP hearing if he or she did not receive a statutory notice of deficiency for such liability or did not otherwise have the opportunity to dispute such liability. Sec. 6330(c)(2)(B); see also Montgomery v. Commissioner, 122 T.C. 1, 9 (2004).

A prior opportunity to dispute a liability includes an opportunity for a conference with the Appeals Office offered either before or after assessment of the liability. Secs. 301.6320-1(e)(3), Q&A-E2, 301.6330-1(e)(3), Q&A-E2, Proc. & Admin. Regs. This Court has upheld the validity of these regulations. Lewis v. Commissioner, 128 T.C. 48 (2007). An opportunity to dispute tax liability under section 6330(c)(2)(B) includes an opportunity to dispute taxes to which deficiency procedures do not apply with the Appeals Office. See Mason v. Commissioner, 132 T.C. 301 (2009).

Petitioner raised no other issues in its petition. Pursuant to Rule 331(b)(4), all other issues are conceded. See Lunsford v. Commissioner, 117 T.C. 183 (2001).

Upon due consideration, it is

ORDERED that respondent's motion for summary judgment dated July 2, 2014, is granted. It is further

ORDERED that this case is stricken for trial from the Court's Chicago, Illinois trial session commencing on September 22, 2014. It is further

ORDERED and DECIDED that the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 dated November 22, 2013, is sustained.

**(Signed) Kathleen Kerrigan
Judge**

Entered: **AUG 27 2014**