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UNITED STATES TAX COURT

WASHINGTON, DC 20217

ESTATE OF JOHN W. HOUSTON, DECEASED, SARAH V. HOUSTON, PERSONAL REPRESENTATIVE,	)	
Petitioner	)	Docket No. 11561-12L.
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER

On May 8, 2012, petitioner filed a petition with the Court to contest a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330. Respondent filed a motion for summary judgment on March 21, 2013, requesting the Court to uphold the notice of determination sustaining the proposed levy collection activity. On April 22, 2013, petitioner objected to respondent's motion for summary judgment and simultaneously filed a motion for summary judgment. A hearing on the opposing motions was held on May 20, 2013, in Omaha, Nebraska. On the basis of the following, the Court will deny respondent's motion for summary judgment.

Background

John W. Houston (decedent) lived in Nebraska when he died on February 26, 2010. The petition was filed on behalf of the estate by Sarah V. Houston (petitioner), decedent's wife and the estate's personal representative. Petitioner resided in Nebraska when she filed the petition.

Decedent worked for Merit Transportation Company, LLC (Merit) during the period at issue. Decedent's responsibilities were that of a chief financial officer. He was also in charge of overseeing the "comp controller [sic]" and the individual in charge of the company's payroll. Decedent was listed on one copy of Merit's bank account signature cards, which appeared to give him authority to direct funds on behalf of the company. This signature card was not dated and the other bank cards were not signed by decedent and there is no evidence that decedent actually used this authority to write any checks. Decedent was terminated from his employment with Merit in June 2007.

Merit did not pay employment tax reflected on Form 941, Employer's Quarterly Federal Tax Return, filed on May 25, 2007, for the tax period ending on March 31, 2007. Respondent assessed Merit a tax of $714,329.45 and a $555,440.47 penalty on September 3, 2007. Later, Merit filed for bankruptcy.

Respondent sought to collect a penalty against several individuals --including decedent--under section 6672. Respondent interviewed three taxpayers who were potentially liable for a penalty under section 6672 but did not contact decedent about the potential penalty or to schedule an interview. Thus, respondent did not question decedent about his position or his role to withhold employment taxes. Instead, respondent used transcripts from the bankruptcy proceedings to determine that petitioner was responsible for a penalty under section 6672.

Respondent's records indicate that a notice of proposed trust fund recovery penalty assessment, Letter 1153 (DO), was sent through certified mail with a return receipt to three of Merit's company officers--including decedent--on October 6, 2009. Respondent's records show that two of the three envelopes were returned to respondent. Decedent's Letter 1153 was purportedly sent to decedent and petitioner's undisputed address in Omaha, Nebraska. On October 8, 2009, the Postal Service directed the envelope back to the sender because it was "not deliverable as addressed" and "unable to forward". The same day, October 8, 2009, respondent received and acknowledged the envelope returned from the Postal Service. The envelope was returned within 48 hours of the initial deposit into the mail and upon return, the revenue officer in charge of the case determined that besides waiting 60 days, no further notice action was needed to assess a trust

fund penalty against decedent. The revenue officer determined the mere lapse of 60 days from posting the envelope was adequate notice.

On the copy of the envelope introduced into evidence, decedent's address does not appear on the front side of the envelope that was supposedly sent to him. The envelope has a clear window, which is supposed to align with an address printed on a sheet inserted into the envelope's enclosure. The clear window of Letter 1153 does not show any address; instead the window shows what appears to be a security pattern on either the inside of the envelope or paper within the envelope. In any case, the envelope does not display decedent's address and raises the issue of whether a letter was ever properly inserted into the envelope or if the Postal Service's prompt return reflecting that it was "not deliverable as addressed and unable to forward" should have alerted the revenue officer of a failed mailing. Neither decedent nor petitioner protested the proposed assessment.

Respondent assessed decedent a $555,440.47 penalty under section 6672 on June 21, 2010. Respondent sent petitioner a Final Notice of Intent to Levy and Notice of Your Right to a Hearing on January 31, 2011--almost a year after decedent's death and 42 months after his termination from Merit. In response, petitioner requested a collection due process or equivalent hearing. Initially respondent attempted to schedule a telephone meeting but petitioner requested a face-to-face meeting in Omaha, Nebraska. The case was transferred to the Omaha appeals office and reassigned to Settlement Officer Thomas Murphy (SO Murphy). After reviewing the case file, SO Murphy decided that petitioner had not been given a chance to dispute the underlying liability and would allow the issue to be raised at the in-person conference.

An in-person conference was held on February 16, 2012. At the conference, petitioner contested the validity of the assessment because decedent did not receive Letter 1153. Petitioner's counsel requested more time to research the legal implications of not receiving Letter 1153. SO Murphy and petitioner agreed not to discuss decedent's responsibility or wilfulness for the penalty until they each further researched the issue.

After the February 16, 2012, conference, SO Murphy questioned whether the assessment was valid and upon further inquiry from his superiors, SO Murphy

was told that respondent could rely on Keado v. United States, 853 F.2d 1209 (5th Cir. 1988), to assess a penalty so long as Letter 1153 was sent to the last known address by certified mail. SO Murphy relied on petitioner's correct, unchanged address and the certified mail return receipt to determine that the notice requirement of section 6672 was satisfied. SO Murphy informed petitioner of respondent's position through a letter sent on February 23, 2012. On March 16, 2012, petitioner called respondent to confirm whether another conference was scheduled. During this phone call, petitioner acknowledged receipt of respondent's February 23, 2012, letter. Respondent reiterated that petitioner was allowed to submit any documents or other information. Petitioner declined to do so and instead indicated that she would "take the next step", which respondent presumed meant petitioner would file a petition with the Court.

On April 4, 2012, respondent issued to petitioner a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 for a penalty under section 6672 for the taxable period ending March 31, 2007. In that notice, SO Murphy expressed respondent's position that Letter 1153 was sent to decedent's last known address and that respondent satisfied all the statutory requirements to sustain the proposed levy. On May 8, 2012, petitioner filed a petition with the Court alleging, inter alia, respondent failed to satisfy the notice requirements in section 6672(b) and that the statute of limitations barred respondent from collecting on the penalty.

Discussion

Rule 121(a) provides that either party may move for summary judgment upon all or any part of the legal issues in controversy. Full or partial summary judgment may be granted only if it is demonstrated that no genuine dispute exists as to any material fact and that the issues presented by the motion may be decided as a matter of law. See Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994).

Sections 3102(a) and 3402(a) require employers to withhold Federal income taxes from the wages of their employees. Although employers collect this money each salary period, payment to the Federal government takes place on a quarterly basis. In the interim, employers hold the collected taxes in "a special fund in trust

for the United States." Sec. 7501(a). These taxes are known as "trust fund taxes". Slodov v. United States, 436 U.S. 238, 243 (1978). If an employer fails to pay over collected trust fund taxes, "the officers or employees of the employer responsible for effectuating the collection and payment of trust fund taxes who willfully fail to do so are made personally liable to a 'penalty' equal to the amount of the delinquent taxes" under section 6672. Id. at 244-245. The penalty is referred to as the "trust fund recovery penalty" (TFRP). Weber v. Commissioner, 138 T.C. 348, 357 (2012).

I. Section 6672

Section 6672(b)(1) and (2) provides: (1) that no penalty may be assessed unless the Secretary "notifies the taxpayer in writing by mail to an address as determined under section 6212(b) or in person that the taxpayer shall be subject to assessment of such penalty"; and (2) that in person delivery or mailing of the notice must precede any notice and demand for payment of the TFRP by at least 60 days. Thus, in every section 6672 penalty inquiry, the factual question of whether a notification was either sent "in writing by mail" or delivered "in person" to a taxpayer must be answered.

Respondent, as the moving party, must prove that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. See FPL Group, Inc. & Subs. v. Commissioner, 115 T.C. 554, 559 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993). In deciding whether to grant summary judgment, the Court considers the facts, and any inferences drawn from the facts, in the light most favorable to petitioner, the nonmoving party. FPL Group, Inc. & Subs. v. Commissioner, 115 T.C. at 559. A genuine issue exists if the evidence could allow a reasonable trier of fact to return a verdict for petitioner. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact constitutes a material fact if its resolution in a given party's favor might affect the outcome of the case. Id.

II. Standard of Review

Where the validity of the underlying tax liability is properly at issue, the Court will review the matter de novo. Sego v. Commissioner, 114 T.C. 604, 610

(2000). Where the underlying tax liability is not properly at issue, the Court will review the Commissioner's administrative determination for abuse of discretion. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). The underlying tax liability may be properly at issue in a collection due process hearing only when the petitioner has not received a notice of deficiency or has not otherwise had an opportunity to challenge the liability. Sec. 6330(c)(2)(B). Decedent did not receive Letter 1153 and did not otherwise have an opportunity to dispute the underlying liability. Accordingly, petitioner was permitted to challenge the underlying liability in the CDP hearing.

One way that a taxpayer can challenge the underlying liability is by disputing whether a proper assessment was made. See Hoffman v. Commissioner, 119 T.C. 140, 145 (2002). Petitioner challenged the validity of the assessment in the February 16, 2012, CDP hearing. Specifically, petitioner disputed whether the assessment was valid because decedent did not receive Letter 1153. Accordingly, because petitioner disputed the assessment, and a challenge to the assessment constitutes a challenge to the underlying liability, the Court will review the case de novo. See Sego v. Commissioner, 114 T.C. at 610.

III. Preliminary Notice

The Commissioner often uses Letter 1153 to offer a taxpayer a pre-assessment opportunity to contest the TFRP. The Commissioner must either deliver in writing by mail Letter 1153 to a taxpayer or deliver the notice in person before demanding payment of the TFRP. See sec. 6672(b)(1) and (2). The Commissioner does not, however, need to show that a taxpayer received the properly mailed Letter 1153 to satisfy section 6672. See Mason v. Commissioner, 132 T.C. 301, 321-323 (2009).

The Commissioner also may use Letter 1153 to show that a taxpayer had an opportunity to dispute the underlying liability according to section 6330(c)(2)(B). To show that a taxpayer had an opportunity to challenge the underlying liability under section 6330, a taxpayer must actually receive Letter 1153. The parties agree that decedent never received Letter 1153 and thus, petitioner is allowed to challenge the underlying liability under section 6330 as discussed above.

The parties do not agree whether the envelope sent on October 6, satisfies section 6672(b). Respondent asserts that the assessment is valid because there is no statutory requirement that respondent ensure that decedent or petitioner actually received Letter 1153. Petitioner counters that the assessment is invalid because there is no evidence showing that respondent correctly sent Letter 1153 to decedent.

Preliminary notice under section 6672(b)(1) is often accomplished by sending a Letter 1153 to a taxpayer's last known address as provided by section 6212(b). Accordingly, as a general rule, the Commissioner cannot assess a section 6672 penalty unless the Commissioner has properly mailed a preliminary written notice or delivered the written notice in person according to section 6672(b)(1). Respondent has accepted the burden of proof for this summary judgment motion to "establish that it properly mailed a Letter 1153, the notice of proposed trust fund recovery penalty assessment, by certified mail, to decedent's last known address."

Respondent's primary contention is that the assessment against decedent was valid despite the mailed envelope being returned to respondent as "not deliverable and unable to forward" after only two days. Legally, respondent relies on Mason v. Commissioner, 132 T.C. 301, for the proposition that an assessment is valid when respondent sends a taxpayer a Letter 1153 but the taxpayer does not receive the letter. Respondent asserts that the facts in petitioner's case are analogous to Mason and that judgment should be entered as a matter of law despite the returned Letter 1153. The Court disagrees.

Respondent's assertion is incorrect because respondent fails to recognize the distinction between a taxpayer not receiving Letter 1153 and the Commissioner not sending Letter 1153. Respondent uses Keado v. United States, 853 F.2d 1209 (5th Cir. 1988), and Mason v. Commissioner, 132 T.C. 301 (2009), to support the position that the envelope deposited on October 6, 2009, satisfies section 6672. Indeed respondent correctly points out that neither Keado nor Mason held that section 6672(b)(1) included a receipt requirement, but the cases do not support respondent's position taken in the motion for summary judgment.

The relevant issue in Keado involved a notice of deficiency that the Commissioner sent to a taxpayer in 1984. Keado, 853 F.2d at 1211. The court in Keado found the evidence was sufficient to show that the notice of deficiency was properly mailed to the taxpayer's last known address but the Postal Service failed to deliver the notice to the taxpayer. Id. at 1210, 1214. The court held that the notice of deficiency was mailed despite the Postal Service's error. Id. at 1214. The Commissioner produced several corroborating documents showing that the document was mailed but the notice was never delivered by the Postal Service. See id. The documents included two Postal Service forms--one of which was initialed by a postal worker--that confirmed the address of letters sent to the taxpayer. See id. The Keado court held that the notice of deficiency was valid because the envelope was properly addressed and deposited with the Postal Service. See id.

Respondent did not produce similar records to demonstrate a proper mailing. Unlike Keado, where the Commissioner produced documents confirming the letter was sent to the correct address, respondent provided only a self created return receipt. Respondent did not produce initialed Postal Service forms nor any other documents showing that the envelope sent on October 6, 2009, was properly mailed. In fact the only corroborating evidence created by the Postal Service is the date stamps on the returned envelope processed by the Postal Service within 48 hours from respondent's deposit as not deliverable as addressed and unable to forward. In addition, respondent's own date stamp acknowledging receipt of the returned envelope after an extremely short period of time reflects indicia of failure to properly mail the envelope. Matching tracking numbers between an envelope and a self created return receipt is not sufficient to prove Letter 1153 was properly mailed. SO Murphy focused on the fact the taxpayer in Keado did not receive the notice rather than recognizing the quality and quantity of evidence used in Keado to show proper mailing. Respondent, unlike the Commissioner in Keado, has not yet produced sufficient evidence to conclusively show that Letter 1153 was mailed to the intended recipient.

In Mason v. Commissioner, 132 T.C. 301, 308-309 (2009), the Commissioner properly mailed Letter 1153 to the last known address of a taxpayer responsible for a TFRP but the Letter 1153 was returned to the Commissioner 16 days later as "UNCLAIMED". The Court held that section 6672(b)(1) was

satisfied when the Commissioner properly mailed Letter 1153 to a taxpayer's last known address even though the taxpayer did not actually receive the letter. Id. at 323. The reason the taxpayer in Mason did not receive Letter 1153 was because she failed to claim the letter or the Postal Service failed to deliver it, not because the Commissioner failed to properly address or send the letter. In fact, in Mason, the address was clearly hand written on the Letter 1153 envelope that was entered into evidence. Id. at 309. Unlike Mason, respondent has not shown Letter 1153 was properly addressed or mailed. As noted above, matching tracking numbers between an envelope and return receipt is not sufficient to prove that Letter 1153 was properly mailed.

These cases are helpful when a taxpayer does not receive a letter because of reasons outside of the Commissioner's control, but the cases are not directly relevant for respondent's motion for summary judgment. The facts in Keado and Mason show that the Commissioner notified the respective taxpayers "in writing by mail" but the taxpayers did not receive the notifications for reasons beyond the Commissioner's control. Respondent has not produced similar evidence to satisfy the requirements of section 6672(b) showing that Letter 1153 was mailed. Accordingly, the question of whether respondent properly notified decedent "in writing by mail" of the section 6672 penalty remains unanswered.

Considering the foregoing, it is

ORDERED that respondent's motion for summary judgment filed March 21, 2013, is denied.

(Signed) Elizabeth Crewson Paris
Judge

Dated: Washington, D.C.
November 20, 2014