UNITED STATES TAX COURT
WASHINGTON, DC 20217

JAMES D. HURLEY & RUTH N. HURLEY,	)	**CMS**
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 30681-13 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
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O R D E R

This case is on the Court's February 23, 2015 Los Angeles, California trial calendar. It is an appeal from a decision by the Commissioner to collect the Hurleys' 2007 tax debt with a levy. The Commissioner moved for summary judgment last October, which the Hurleys opposed, even though they did not file a response to the Commissioner's motion when we invited them to do so. What makes it unusual is that the case features taxpayers, IRS counsel, and an IRS settlement officer who each seem to be reading scripts from different plays: The Hurleys complain that the collection-due-process (CDP) hearing that they themselves asked for to challenge a penalty that they thought was unjust should have been delayed because of an earlier CDP-hearing request that they filed prematurely. The settlement officer determined that the Hurleys' CDP challenge should be denied because they didn't supply her with the financial information that she needed to evaluate an alternative to enforced collection that they didn't ask for. And IRS counsel in his motion says that he has decided to abate the penalty that the Hurleys objected to in the first place, but that we should uphold the settlement officer's determination anyway because the Hurleys are wrong in thinking that their first CDP-hearing request should have stayed collection.

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The Court doesn't think any of the parties are right,[1] and will deny the motion.

Background

The Hurleys filed their 2007 returns a bit late after asking for an extension. Or maybe not -- their deadline was October 15, 2008 and that's the day that their return is dated. But the envelope that the return was in is postmarked October 17, which would mean that their return was late. *See* IRC § 7502. Except that they included a letter and several emails in their envelope that showed that they tried to file electronically on October 15 and 16 but that both attempts failed.

That might be an interesting moot-court question, but the actual facts of this case led everyone in a different direction. The Hurleys' return was received by the Commissioner and he assessed the tax shown, plus a penalty for late filing. The Hurleys didn't pay after the Commissioner sent them the usual notices, and then he began to threaten them with collection by levy. He sent one of these threats to them in April 2013. It wasn't a *final* notice of levy, but the Hurleys filled out and sent in the IRS form requesting a CDP hearing in early May 2013.

The Commissioner ignored this request. But later that month, he did send out his form letter titled "Final Notice of Intent to Levy and Notice of Your Right to a Hearing." When the Hurleys got this letter they filled out and sent in a second request for a CDP hearing. They made a couple points:

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[1] *Cf. Fiddler on the Roof* (United Artists 1971) (Tevye: "He's right." Avram: "He's right, and he's right. They can't both be right." Tevye: "You know, you are also right.").

> that the Final Notice was precluded by section 6330(e)(1), which suspends all collection activity while a CDP request is pending; and
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> that the penalty (and in this context that means the late-filing penalty under section 6651(a)(1)**)** was inaccurate and improper.[2]

They specifically did *not* check the box on the CDP request form that asked if they wanted the Commissioner to consider any collection alternatives. The case-activity reports in the administrative record show without any doubt that the Hurleys knew where they were asking the Commissioner to focus his attention: An entry for September 25, 2013 says that the settlement officer "was advised by the taxpayer that he agrees with the underlying liabilities but not with the interest and penalty assessment." It also says "that he will not be requesting a collection alternative."

A couple months later, in November 2013, the settlement officer sent the Hurleys a notice of determination. Here is its summary section:

> The Office of Appeals has determined not to grant you relief under Internal Revenue Code (IRC) 6330 Notice of Intent to Levy for Form 1040 tax period ending December 31, 2007. You did not provide any of the requested financial documentation and you are not in compliance with your filing and estimated tax payments requirements; *therefore, you are not eligible for consideration of collection alternatives.* (Emphasis added).

This determination did not even mention, much less analyze, the effect of the Hurleys' first request for a CDP hearing. And, though the determination did refer to the Hurleys' disagreement with the penalty, the settlement officer denied any abatement because the Hurleys hadn't filed an abatement request (we think, but are not sure on this record, that the settlement officer had in mind an interest-abatement request under section 6404).

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[2] The Hurleys also asked for innocent-spouse relief for Mrs. Hurley, but they've since dropped this request.

The Hurleys filed a petition with our Court to challenge this determination.

The Commissioner then moved for summary judgment in June 2014. He supplemented his motion a month later to state that he was reexamining the initial problem that the Hurleys had raised -- why should they be penalized for late filing when (at least arguably) it was the IRS's website that blocked their attempt to do so. Later that month, the Commissioner filed a second supplement to his motion, in which he stated that he was going to abate the late-filing penalty and associated interest.

The Court then denied the motion, and one might have thought the Hurleys had won on the main issue that bothered them. There was still some unpaid tax liability, but remember that the Hurleys weren't challenging that. Yet there was still the question of whether to sustain the determination by the settlement officer to proceed with collection of this liability by levy -- a determination that was based on the Hurleys' failure to give her the financial information that she needed to evaluate a collection alternative that they hadn't asked for.

So the entire case was not now moot.

In October 2014 the Commissioner again moved for summary judgment. In the motion he does not argue that the settlement officer's analysis was correct. He instead raises the argument that the Hurleys' main contention at the CDP hearing -- which, remember, was that their first CDP-hearing request should have suspended all collection activity, including action on their second CDP-hearing request -- was wrong as a matter of law. Anything else the Hurleys could have raised at the CDP hearing was either moot now that he had conceded the penalty issue or can safely be disregarded under our rule that a taxpayer generally can't raise an issue in Tax Court that he hasn't first raised in the CDP hearing.

Analysis

We begin by noting that the settlement officer's reasoning has nothing to do with the arguments that the Hurleys actually made. We have often held that the IRS can refuse to consider collection alternatives if a taxpayer doesn't show that he is current in his tax reporting or doesn't submit financial information. *Huntress v. Commissioner*, 98 T.C.M. (CCH) 8, 10-11 (2009). But we've never held -- and the Commissioner doesn't argue -- that taxpayers have to prove both these things just

to get the arguments that they *do* raise heard and decided by the settlement officer who is running their CDP hearing.

What the Commissioner *does* argue is that the Hurleys are wrong in thinking that their first request for a CDP hearing should have stopped the IRS from sending the Final Notice of Intent to levy. We have to side with the Commissioner on this one. We held in *Andre v. Commissioner,* 127 T.C. 68 (2006), that a premature request for a CDP hearing would prejudice the Commissioner and therefore was not effective. In *Andre*, the taxpayers received a Notice of Federal Tax Lien (NFTL) for the years 1996-2000, and they responded by requesting a CDP hearing for years 1990-2000. *Id.* at 69. Two months later, the Commissioner sent the taxpayers a second NFTL for the years 1990-1995. *Id.* We held that the taxpayers' request for a CDP hearing was not valid for years 1990-1995 because it was sent prematurely, before the Commissioner issued them a NFTL for those years. *Id.* at 74. Under the same principles then, the Hurleys' premature CDP request before the Commissioner's Final Notice of Federal Tax Lien would not be effective. And if we could limit our focus to this, we'd conclude that the Commissioner has to win.

But there is a problem. And, it is a problem that should be increasingly familiar: The Commissioner is making an argument in our Court that is not what the settlement officer made in the notice of determination after the CDP hearing. *See SEC v. Chenery Corp.,* 332 U.S. 194 (1947) (*Chenery II*); *SEC v. Chenery Corp.,* 318 U.S. 80 (1943) (*Chenery I*). *Chenery* summarizes the administrative-law principle that says "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Chenery II*, 332 U.S. at 196 (describing its holding in *Chenery I*). The Supreme Court not too long ago announced that "we are not inclined to carve out an approach to administrative review good for tax law only" and noted "the importance of maintaining a uniform approach to judicial review of administrative action." *Mayo Found. for Med. Educ. & Research v. United States,* 562 U.S. 44,___, 131 S. Ct. 704, 713 (2011) (citation and internal quotation marks omitted). This dictates that we follow the *Chenery* doctrine in CDP cases. *See Jones v. Commissioner,* 104 T.C.M. (CCH) 364, 369 (2012); *Salahuddin v. Commissioner,* 103 T.C.M. (CCH) 1764, 1768 (2012). And it means that we cannot sustain a notice of determination on grounds other than those upon which the settlement officer relied, at least when a taxpayer says that he wants to rely on *Chenery*.

There is a practical problem here: The Hurleys haven't said that they want to rely on *Chenery*. And even though our Court hasn't ruled on the issue, *Chenery*

might be waived if it's not raised, *Catholic Health Initiatives Iowa Corp. v. Sebelius,* 718 F.3d 914, 922 n. 6 (D.C. Cir. 2013), as one can predict it won't be by all but a tiny fraction of litigants who, like the Hurleys, are *pro se.* It may turn out that *"Chenery"*, like an incantation, must be uttered by taxpayers to be effective. Or maybe not: In *Hoyle v. Commissioner*, 131 T.C. 197 (2008), *supplemented by* 136 T.C. 463 (2011), we held that the Commissioner is obliged by section 6330(c)(1) to verify "that the requirements of any applicable law or administrative procedure have been met." Perhaps this background principle of administrative law is one of those "applicable requirements." *See* Tax Court Rule 121. But until this small puzzle is solved, we cannot conclude that the Commissioner is entitled to judgment "as a matter of law."

This means that it must be

ORDERED that the Commissioner's October 21, 2014 summary-judgment motion is denied.

The Court expects to discuss further motions, including one to remand, with the parties at calendar call if they do not settle the case before then.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
February 4, 2015