UNITED STATES TAX COURT
WASHINGTON, DC 20217

PHILIP BAUMGARTEN & ESTHER GOMEZ BAUMGARTEN,	)	**CLC**
Petitioners,	)	
v.	)	Docket No. 17205-14 L.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This is a "collection due process" ("CDP") case, brought under I.R.C. section 6330. Petitioners Philip Baumgarten and Esther Gomez Baumgarten, invoking our jurisdiction under section 6330(d)(1), have appealed a determination by the IRS's Office of Appeals that sustains the filing of a notice of federal tax lien to collect their unpaid income tax for 2009, 2010, 2011, 2012. By order of July 1, 2015, we dismissed the year 2009 as moot. The IRS filed a motion for summary judgment on July 28, 2015, and the Baumgartens opposed.

The IRS's motion for summary judgment included factual assertions in paragraphs 7 through 34 that the Baumgartens' opposition did not dispute; and in general those facts "shall be deemed established" under Rule 121(c). However, Exhibit 1-R is apparently missing one or more pages that cause respondent's paragraph 23 to be unsupported, and Exhibit 17-R is likewise missing one or more pages that cause respondent's paragraphs 27 (sentence 1) and 28 to be unsupported.

We will deny the IRS's motion but will deem certain facts to have been established.

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Background

For each of the years still at issue (2010, 2011, and 2012), the Baumgartens filed Federal income tax returns reporting liabilities, but they did not fully pay the liabilities. The IRS assessed the tax reported and also assessed two additions to tax (which the parties call "penalties") under section 6651(a)(2) for failure to pay the tax shown on the return and under section 6654 for failure to pay estimated tax. For each of the years, the Baumgartens entered into an installment agreement with the IRS (in April 2012 for 2010, in November 2012 for 2011, and in December 2013 for 2012) to pay off those liabilities over time.

It appears that in February 2014 the Baumgartens requested and the IRS agreed to a revision of these agreements, pursuant to which the three agreements were combined and a single monthly payment was thereafter due. This revised installment agreement is evidently embodied in a letter from the IRS (Ex. 2-R) dated February 20, 2014, in which the IRS stated (emphasis added):

> You must meet all conditions of your installment agreement. If you don't, we can cancel it and take enforcement action to collect the full amount of your tax liability. Enforcement action could include filing a Notice of Federal Tax Lien lien [sic] (which notifies your creditors of our lien against your property) or placing a levy on your wages or bank accounts.

Seven days later, on February 27, 2014, the IRS issued a "Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320" (Ex. 3-R, hereinafter "NFTL"). The IRS does not allege that this issuance of the NFTL was preceded by any failure of the Baumgartens to meet the conditions of their installment agreement.

In response to the NFTL, the Baumgartens filed with the IRS a timely request for a CDP hearing. On their request (a Form 12153, Ex. 4-R), they checked boxes indicating that they requested "subordination" or "withdrawal" of the lien, and they explained as follows:

> We have a one year adjustable mortgage that needs to be refinanced. A lien would prevent us from doing so at prohibitive cost. Also we have reinstated our installment agreement.

> There is no reason to file a lien so long as the installment agreement is in effect as the Government's interest is not being compromised.

On the Form 12153 the Baumgartens did not check the box indicating a request for consideration of "innocent spouse" relief under section 6015. (The form states, "(Please attach Form 8857, *Request for Innocent Spouse Relief*, to your request.)") On the Form 12153 the Baumgartens also did not mention the penalty liabilities that are included in the amounts at issue.

On April 9, 2014, the IRS sent the Baumgartens a letter (Ex. 17-R) that set a schedule for the CDP hearing and gave some description of the issues to be covered. The IRS's motion alleges (at 6, para. 28) that the letter advised the Baumgartens that they would be given the opportunity to make "challenges to the appropriateness of collection action, or spousal defenses when applicable", but the evidently incomplete copy of the letter in our record does not include this information, nor does it show whether the IRS's letter requested any information. We are therefore unable to say, for purposes of the IRS's motion, just what the IRS said in this letter.

The telephonic CDP hearing took place on May 28, 2015, starting at 2:00 p.m. (Ex. 18-R). The incomplete copy of the "Case Activity Records" (Ex. 1-R) in our record omits the first part of the entry for this date, begins in mid-sentence, and reads as follows (emphasis added):

> wife's name. I told the tp [taxpayer] that the lien attaches to any property (not just a house) that he/they have or acquire in the future.
>
> The tp said that he has other issues he wants to raise:
>
> 1. Innocent Spouse (IS). The tp said that his wife received income from the UN and as a condition of employment; she had to file a joint return. I told him that I do not investigate IS cases; however, if it was a condition of her employment and she knowing filed/signed what did he want the IRS to do? He said that she didn't want to file joint, but she had to. <u>I told the tp if he wants to raise this issue to fill out the Form 8857 and send it to me today</u>.
>
> 2. Penalty abatement. I explained that he must have reasonable cause. The tp said that he lost his job in 2008 and got behind. He said that they borrowed money from various sources (IRA, stock, etc) and paid off their credit cards in 2011/2012. I said, you paid off credit cards when you had a

balance with the IRS? He said yes, the IRS wasn't my only creditor. I informed him that is not reasonable cause. The tp also said that he was hospitalized with health issues. I explained that if he only had one year and he could prove he was hospitalized (coincided with return due date) then maybe I would consider abating the penalty; however, his compliance history ways [sic] against abatement as does his reasons for not paying on time. I told the taxpayer that he doesn't meet reasonable cause penalty abatement.

Again, I told the tp if he wants to file for Innocent Spouse, then he must fax me the form today. I also told him that the lien will stay in place (unless IS decision is granted for spouse). I explained that I will issue the determination letter which gives him the right to petition the Court. He asked about the timeframe for petitioning the Court and I told him 30 days from the date of the determination letter. He understood. The tp said he may petition the Court. I told him that is his right.

The Baumgartens did not fax to the IRS a Form 8857 that day (nor thereafter).

On June 23, 2014, the IRS issued its "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330". (The copy of the notice of determination submitted as Exhibit 20-R to respondent's motion for summary judgment lacks the signature page and one page of the explanatory attachment; but we find a complete copy of the notice attached to the petition.) The notice of determination sustained the NFTL and stated in pertinent part as follows:

- You did not return the Form 14134, Application for Certificate of Subordination of Federal Tax Lien, to consider subordinating the NFTL.

- You did not present any information that would qualify you for withdrawal of the NFTL.

- The SO asked you to download the Form 8857, Request for Innocent Spouse Relief, and return it by fax on May 29 [sic], 2014; however, the form was never received.

Challenges to the Existence of Amount of Liability
You did not dispute your liability.

You raised no other issues.

Balancing of need for efficient collection with taxpayer concern that the collection action be no more intrusive than necessary.

The NFTL is sustained. You did not present any relevant challenge to the appropriateness of the NFTL. In order to be protected against third parties the government must file a NFTL under IRC § 6323(a) and (f). The filling [sic] of the lien balances the need for efficient collection of taxes with the intrusiveness of the action.

The notice of determination did not mention the penalties as to which the Baumgartens had requested abatement.

On July 23, 2014, the Baumgartens filed their petition in this Court. The petition contends that IRS Appeals abused its discretion in sustaining the NFTL, in not granting abatement of the penalties, and in not allowing sufficient time for submission of a Form 8857 requesting "innocent spouse" relief. Respondent moved for summary judgment on July 28, 2015, and the Baumgartens opposed.

Discussion

I. Sustaining the NFTL

For the reasons stated in his motion and reply, respondent is generally correct that the filing of the notice of lien is not at all inconsistent with an installment agreement. The lien protects the Government's right to collect the unpaid tax from the taxpayer's assets, and the ability to file the lien thereby allows the Government to forebear in its collection by permitting installment payments rather than demanding immediate payment in full. Without the protection of the lien filing, the Government might practically need to be more aggressive in collection. For these same reasons, the balancing of the Government's interests and the taxpayer's interests that is described in the notice of determination is entirely reasonable and cannot be called an abuse of discretion.

However, on the incomplete record before us, and construing the facts in favor of the non-movant petitioners (as Rule 121 requires), we cannot rule out the possibility that the letter of February 20, 2014 (Ex. 2-R), constitutes a contract by which the IRS agreed that, "If you [Baumgartens] don't ... meet all conditions of your installment agreement", then the IRS "could ... fil[e] a Notice of Federal Tax

Lien"--but that if the Baumgartens did meet their conditions, then the IRS would not file an NFTL. We do not hold that there was such an agreement, but we cannot rule it out entirely on this record. (If there was no such agreement, then the letter is poorly drafted and may be misleading to taxpayers with an installment agreement.)

Given the existence of this genuine dispute of material fact, we must deny respondent's motion as to the sustaining of the NFTL.

II. Innocent spouse

A taxpayer who, like the Baumgartens, does not check the "innocent spouse" box on Form 12153, is nonetheless entitled to raise that issue at the CDP hearing (and respondent does not contend otherwise). The Baumgartens did raise this issue at their CDP hearing and were told, in a telephone conference that began at 2:00 p.m., that they must download Form 8857 from the Internet, fill it out, and submit it "today". It therefore seems that they were given three hours to make this submission. (Other than the mention on Form 12153, our record does not show any prior reference to Form 8857 nor any request for it; and contrary to respondent's motion at 6, para. 28, our record does not show any prior mention by Appeals of "spousal defenses".)

We have previously held that imposing a 2-week deadline may be a reasonable exercise of discretion by Appeals, see Shanley v. Commissioner, T.C. Memo. 2009-17; but a 3-hour deadline is very surprising. Perhaps anticipating this reaction, respondent argues (at 24, para. 84, 86):

> Further, Petitioner Philip Baumgarten is a C.P.A. and tax attorney, specializing in tax for over 30 years. He is a sophisticated taxpayer who could have asked for more time to complete the necessary paperwork.... Petitioners did not request more time ....

Perhaps respondent is arguing that, if in a CDP hearing Appeals imposes an unreasonable 3-hour deadline, then the unreasonableness is cured (at least in the case of a sophisticated taxpayer) by Appeals's supposed willingness to entertain the taxpayer's request for more time. But respondent does not suggest that Appeals invited such a request; and on this record, we have to assume the apparent fact that, by imposing a 3-hour deadline, Appeals communicated to the taxpayer that the deadline was firm. We think an imminent deadline of this sort is normally used to communicate utter seriousness and to put fear in the heart of the hearer. One cannot make such a dramatic demand and then expect the hearer to suppose

that the same stern authority who imposed that deadline will become a benign and flexible person. One settlement officer cannot serve both as Appeals's bad cop and as its good cop.

Respondent also argues that "Petitioners gave no indication that they intended to proceed with the innocent spouse claim." However, given the settlement officer's treatment of the issue, one cannot read much into the fact that the Baumgartens did not then repeat "that they intended to proceed with the innocent spouse claim". That claim had been batted down pretty flatly. The SO's case record states, "I explained that I will issue the determination letter which gives him the right to petition the Court." On this record, we have to assume that the Baumgartens took the SO at her word and concluded that their only recourse was to bring this up with the Court (as they have done).

For purposes of Rule 121, construing the facts in the Baumgartens' favor, we hold that a genuine dispute of material fact exists on the question whether imposing a 3-hour deadline constituted an abuse of discretion. We do not hold that it necessarily was, but it seems highly possible that it was.

We also do not make any holding as to the probable merits of Mrs. Baumgarten's "innocent spouse" claim. The IRS's description of that claim makes it seem not at all promising, but its merits are not yet before us. We assume that at trial this issue will be presented to us de novo, as it would be if it were brought as a stand-alone claim, see Porter v. Commissioner, 132 T.C. 203, 210 (2009); Sego v. Commissioner, 114 T.C. 604, 610 (2000), and that Mrs. Baumgarten, as petitioner and putative "innocent spouse", will have the burden of proof by the preponderance of the evidence. If either party disagrees with this standard and scope of review, he should be prepared to argue otherwise before trial.

III. Penalties

The Baumgartens raised at the CDP hearing their contention that additions to tax ought to be abated because they had "reasonable cause" for their failure to pay. ("Reasonable cause" is a ground for non-liability for the failure-to-pay-tax addition under section 6651(a)(2). The equivalent contention as to the addition for failure to pay estimated tax would perhaps be grounded on section 6654(e)(3).) At the CDP hearing the settlement officer explained to the Baumgartens why she believed they failed to show "reasonable cause" (in the language from the case record (Ex. 1-R) quoted above).

However, the operative document--the notice of determination (attachment to petition; Ex. 20-R)--is silent on this issue. The settlement officer evidently did not have authority to close the case; rather, the Appeals Team Manager did (see Ex. 19-R), and it was the ATM (not the SO) who had authority to sign and did sign the notice of determination. Consequently, Appeals failed to address the issue before sustaining the NFTL, and such a failure constitutes an abuse of discretion.

When this issue comes to trial, respondent bears the burden of production to show that the penalty is due. Sec. 7491(c). If respondent meets that burden, then the Baumgartens will thereafter have the burden of proof.

IV. Rule 121(c)

Rule 121(c) provides as follows:

> If, on motion under this Rule, decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Court may ascertain, by examining the pleadings and the evidence before it and by interrogating counsel, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It may thereupon make an order specifying the facts that appear to be without substantial controversy, including the extent to which the relief sought is not in controversy, and directing such further proceedings in the case as are just. Upon the trial of the case, the facts so specified shall be deemed established, and the trial shall be concluded accordingly.

Although we deny respondent's motion, it is clear that most of the proposed findings in the motion are well grounded and are undisputed. To that extent, we will deem them established.

To give effect to the foregoing, it is

ORDERED that, to the extent petitioners' opposition filed August 20, 2015, was intended as a motion for summary judgment, it is denied as untimely. In the alternative, we would have denied such a motion for the reasons stated in part II of respondent's motion and part I of respondent's reply. It is further

ORDERED that respondent's motion for summary judgment is denied for the reasons stated above. However, it is further

ORDERED, pursuant to Rule 121(c), that the facts stated at paragraphs 7-22, 24-26, 27 (sentences 2-3), and 29-34 of respondent's motion for summary judgment filed July 28, 2015, exist without substantial controversy and are deemed established. It is further

ORDERED that, consistent with the notice given April 28, 2015, this case will proceed to trial at the Court's trial session in New York City beginning September 28, 2015. If either party believes that the case should instead be remanded to the IRS Office of Appeals, then they should so move when the case is called from the calendar. The Court would entertain a joint motion to remand filed before that date.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
September 17, 2015