

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

HEATHER HOPE JUPENA-ELMER,)	
)	
Petitioner,)	
)	
v.)	Docket No. 18172-14SL.
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COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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ORDER

Pending in this collection review case is respondent’s Motion For Summary Judgment, filed July 30, 2015. In his motion, respondent seeks to uphold a Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated July 1, 2014, that sustained a proposed levy to collect petitioner’s outstanding income tax liability for the taxable (calendar) year 2010.¹ Despite being ordered by the Court to file a reply to respondent’s motion by August 24, 2015, petitioner has failed to file any response.

Petitioner resided in the State of California at the time the petition was filed with the Court.

I. Background

Petitioner timely filed her 2010 income tax return. On it, she claimed a deduction for qualified residence interest. See sec. 163(a), (h)(2)(D), (h)(3)(A)(i). Respondent subsequently examined petitioner’s 2010 return and on February 11, 2013, sent her a notice of deficiency disallowing the mortgage interest deduction, resulting in a deficiency in income tax of \$3,232. See sec. 6212(a). Shortly thereafter, on or around April 5, 2013, petitioner filed her 2012 Federal income tax return, wherein she listed a different address from that appearing on the notice of deficiency.

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended. All Rule references are to the Tax Court Rules of Practice and Procedure.

Petitioner states that she did not receive the February 11, 2013 notice of deficiency and, consequently, did not appeal to this Court by filing a petition for redetermination. See sec. 6213(a). Subsequently, respondent assessed the deficiency, see sec. 6213(c), together with statutory interest.

On December 2, 2013, respondent sent petitioner a Final Notice/Notice Of Intent To Levy And Notice Of Your Right To A Hearing in respect of her outstanding tax liability for 2010. In response, petitioner timely filed a Form 12153, Request For A Collection Due Process Or Equivalent Hearing, in which she requested a collection alternative in the form of currently not collectible (CNC) status, indicating she was unable to pay the balance. In addition, petitioner disputed the underlying liability, stating, "I do not believe I should be responsible. Attempting to get documentation from ex-spouse and ex-CPA."

On January 3, 2014, the IRS Appeals Office received a letter from petitioner which included an incomplete Form 433-F, Collection Information Statement and a copy of a Form 1098, Mortgage Interest Statement, for 2010, reflecting that \$22,326.85 of interest was paid in respect of the residence giving rise to the deduction in issue. Only petitioner's former spouse's name appeared on the Form 1098. Even though petitioner's name did not appear on the Form 1098, in her letter she stated the residence was her "joint home" and she is "the second person on the loan, although [her] name does not show."

On April 22, 2014, petitioner participated in an administrative hearing with respondent's Appeals Office. Therein, the Appeals officer asked petitioner her address on February 11, 2013, i.e., the date the notice of deficiency was issued, and petitioner could not recall if she was using a Post Office Box or lived at the same address at which she resided as of the date of the hearing, but petitioner did state that she did not receive the notice of deficiency and that as of the date of the administrative hearing had not lived at the old address "for over a year plus". Petitioner continued to dispute the underlying liability. The Appeals officer determined that the underlying liability was not properly in issue because of the previous notice of deficiency and failure to challenge the liability at that time.

On July 1, 2014, respondent's Appeals Office sent petitioner a Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (notice of determination). The notice of determination sustained the proposed levy to collect petitioner's outstanding tax liability for 2010. Petitioner timely appealed to this Court. See sec. 6330(d)(1); Rules 330-334. In her petition, petitioner continued to dispute the underlying liability. She attached to her petition a copy of her Marital Termination Agreement. As stated above, respondent filed this Motion for Summary Judgment, as well as an accompanying declaration in support thereof, on July 30, 2015.

II. Discussion

A. Summary Judgment

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted with respect to all or any part of the legal issues in controversy “if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits, if any, 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(a) and (b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff’d, 17 F.3d 965 (7th Cir. 1994); Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

B. Hearings Under Section 6630

In rendering an administrative determination in a collection review proceeding under section 6330, the IRS Office of Appeals’ Appeals Officer must verify that the requirements of all applicable laws and administrative procedures were met in processing the taxpayer’s case. Sec. 6330(c)(1). The Appeals Officer also must consider legitimate issues raised by the taxpayer, including offers of collection alternatives, appropriate spousal defenses, and challenges to the appropriateness of the collection action. Sec. 6330(c)(2)(A). A taxpayer may challenge the existence or amount of the underlying tax liability if the taxpayer did not receive a notice of deficiency or did not otherwise have an opportunity to dispute such tax liability. Sec. 6330(c)(2)(B); Montgomery v. Commissioner 122 T.C. 1 (2004). Finally, the Appeals Officer must consider whether the collection action balances the need for efficient collection against the taxpayer’s concern that the collection be no more intrusive than necessary. Sec. 6330(c)(3)(C).

If the taxpayer’s underlying liability is properly in issue, the Court reviews the matter de novo. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Otherwise, the Court reviews the determination for abuse of discretion. Id. An abuse of discretion occurs if the Appeals Officer exercises his or her discretion “arbitrarily, capriciously, or without sound basis in fact or law.” Woodral v. Commissioner, 112 T.C. 19, 23 (1999).

C. Prior Opportunity to Dispute the Underlying Liability

Respondent argues that petitioner had a prior opportunity to dispute the underlying liability because a notice of deficiency for 2010 was sent to her last known address on February 11, 2013. Petitioner states that she did not reside at that address on the date the notice of deficiency was issued and that she did not receive the notice of deficiency. Therefore, she effectively argues that she did not have a prior opportunity to dispute the underlying liability pursuant to section 6330(c)(2)(B). There is nothing in the record establishing petitioner’s last known address as of the date that the notice of deficiency was issued on February 11, 2013. Further, there is nothing in the record to contradict petitioner’s assertion that she did not receive the notice of deficiency. Finally in this regard, there is nothing in the record to demonstrate that petitioner may have refused to accept delivery of, or neglected to claim, the notice of deficiency.

Respondent argues that even if petitioner is entitled to dispute the underlying liability, she failed to do so. To dispute a liability, a taxpayer must properly raise the merits of the liability during the administrative hearing. Giamelli v. Commissioner, 117 T.C. 107 (2007); sec. 301.6330-1(f)(2), *Proced. & Admin. Regs.* If the taxpayer raises the underlying liability but does not provide the Appeals officer with any evidence after being given an opportunity to do so, the underlying liability is not “properly raised.” Gonzalez v. Commissioner, T.C. Memo. 2012-151; sec. 301.6330-1(f)(2), *Proced. & Admin. Regs.* Respondent argues that petitioner did not provide sufficient evidence to properly raise the underlying liability.

Petitioner raised the underlying liability in her Form 12153. Later, petitioner provided the Appeals officer with a copy of a Form 1098 for 2010, which form reflected that mortgage interest had in fact been paid on the residence giving rise to the deduction for the year in issue. Concurrently with the Form 1098, petitioner stated that she was a joint owner of the home and she was listed on the loan. Throughout the administrative hearing process, petitioner continued to argue her entitlement to the mortgage interest deduction.

III. Conclusion

Drawing all factual inferences against respondent, the Court concludes that there are genuine disputes of material fact in this case regarding (1) petitioner’s last known address on the date the notice of deficiency was issued, i.e., February 11, 2013, and (2) whether petitioner had a prior opportunity to dispute the underlying liability for the year in issue, i.e., whether she received the notice of deficiency or whether she refused to accept delivery of, or neglected to claim, it.

Premises considered, it is hereby,

ORDERED that respondent’s Motion For Summary Judgment, filed July 30, 2015, is denied.

(Signed) Robert N. Armen, Jr.
Special Trial Judge

Dated: Washington, D.C.
September 18, 2015