

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JONATHAN SMITH A.K.A. LIL JON,)
)
Petitioner(s),) CZ
)
v.) Docket No. 23204-14 L.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

Respondent has moved for summary judgment sustaining the notice of determination (notice) in this collection due process (CDP) case. Petitioner objects.¹ Petitioner has moved for a continuance. Respondent objects.

Summary adjudication is appropriate "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, 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(b). The party adverse to the motion, "by affidavits or declarations or as otherwise provided in * * * [Rule 121], must set forth specific facts showing that there is a genuine dispute for trial." Rule 121(d).

This case arises out of a petition pursuant to section 6330(d) challenging respondent's determination to proceed with collection by levy of petitioner's unpaid 2007 and 2008 Federal income tax. Respondent moves for summary judgment on the grounds that the settlement officer conducting petitioner's CDP hearing (settlement officer) did not abuse her discretion in rejecting the collection alternatives raised by petitioner in his request for a CDP hearing because petitioner never submitted an offer in compromise or any of the financial information necessary to review his eligibility for a collection alternative. Respondent adds

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

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that the settlement officer did not abuse her discretion by not granting petitioner additional time to submit documents. We believe that the following facts are not in dispute.

Petitioner made his request for a CDP hearing on May 13, 2014. By letter dated June 17, 2014, Appeals Team Manager, Cindy R. Kasminoff, informed petitioner, with a copy of the letter to his counsel, Joseph P. Wilson, that petitioner's request had been received for consideration at respondent's Brookhaven, N.Y., Campus Appeals Office. The letter further informed petitioner of the basics of the CDP review process, that if he wanted a face-to-face review at a location close to his residence he should request it, and that, if petitioner had questions about the appeals process or how to prepare for his hearing, he should contact Florence Barba, a settlement officer in the Appeals office. Ms. Kasminoff did not request any documents or information from petitioner. By letter to Ms. Barba dated July 24, 2014 (but apparently written on or about June 24, 2014, since it was received by Appeals on June 27, 2014), Mr. Wilson, requested transfer of the case to California and a face-to-face hearing there. By letter dated June 30, 2014, (but apparently prepared by her on June 24, 2014, before she received Mr. Wilson's letter) Ms. Barba wrote to petitioner with a copy to Mr. Wilson listing the material petitioner would have to submit for her to consider a collection alternative. The letter references a time for a hearing--"If this time is not convenient for you"--but specifies no date or time. By declaration, Mr. Wilson states that he did not receive the June 30 letter until July 30, 2014. On July 3 and 7, 2014, Ms. Barba telephoned Mr. Wilson, who did not answer, and she left messages describing what she needed from petitioner before she could consider a transfer of the case; i.e., delinquent returns, any unpaid estimated tax payments, and information in support of collection alternatives. By declaration, Mr. Wilson states that, in those telephone messages Ms. Barba did not advise him of an upcoming telephonic hearing date but only listed the requested information and documents that were necessary for a transfer of the case. Specifically, he declares: "Ms. Barba did not state that these documents were required for the hearing date or that failure to provide these documents by a certain telephonic hearing date would result in an adverse determination." Mr. Wilson represents that he can provide copies of those voice messages to the Court. Ms. Barba telephoned Mr. Wilson on July 28, 2014, apparently intending that call to serve as petitioner's hearing with respect to his request for a collection alternative. Mr. Wilson declares that he was surprised by the call since he had no prior knowledge that it would occur. Ms. Barba's notes confirm his statement of surprise. They also confirm that, during the call, he asked for a transfer and a face-to-face hearing and that she replied that she would reschedule the hearing but that, by August 18, 2014, he had to provide her

with (1) confirmation that petitioner had filed delinquent returns and (2) the requested collection information. Her notes further state that she would then request a transfer and that, without the requested confirmation and collection information, she could not transfer the case or consider collection alternatives and that she would be required to issue the notice. Mr. Wilson declares: "She did not state, nor did she imply, that if she did not have these documents before the 15 [business] day hearing date [August 18, 2014] that she would sustain the IRS's determination without an extension of time to provide the complex financial documents and submit OIC documents or an installment agreement request." Mr. Wilson and Ms. Barba had a further telephone discussion on August 18 in which, her notes record, Mr. Wilson stated that the requested information was being prepared and should be completed within the week. Her notes further record that she replied that she would issue an (adverse) determination. Her notes for August 19, 2014, state that the notice of levy is sustained because petitioner was not in compliance with filing requirements and did not submit the requested documents; they further state that she prepared the required closing documents. The notice, sustaining respondent's determination to proceed with collection by levy, is dated August 26, 2014.

We review a settlement officer's determination regarding nonliability issues for an abuse of discretion.² Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). The gist of respondent's argument is that Ms. Barba did not abuse her discretion in determining to proceed with collection because petitioner had ample time to provide the information that she had requested:

The settlement officer made her determination 70 days after sending her initial contact letter. She extended the time to submit the missing tax returns, the required forms, and the financial information from the original 14 days to August 18, 2014, giving petitioner a month of additional time. * * * The Tax Court has considered this issue before and while analysis is situation specific, the Tax Court has upheld

²In the petition, petitioner concedes that he cannot dispute the underlying tax liability, but states that he would like to submit an "Offer in Compromise based on doubt as to liability". Respondent's motion does not address the latter statement, but we note in passing that petitioner would not be able to contest the liability through an offer in compromise. See Baltic v. Commissioner, 129 T.C. 178, 183 (2007).

determinations made 33 and 45 days after the letter scheduling the CDP hearing. See Clawson v. Commissioner, T.C. Memo 2004-106; Morlino v. Commissioner, T.C. Memo 2005-203; but see Industrial Investor v. Commissioner, T.C. Memo 2007-93 (noting that 18 business days may be too short a time).

Respondent's argument is inaccurate in one or more respects. Ms. Barba sent her initial letter to petitioner and his counsel on June 30, 2014. In calculating his 70-day period, respondent apparently is beginning with Ms. Kasminoff's June 17, 2014, letter, which did not demand missing tax returns or financial information, and ending with the determination letter on August 26, 2014, which is after Ms. Barba prepared the closing documents. Contrary to respondent's insinuation, there appears to be no letter scheduling petitioner's CDP hearing. If, when referring to "the original 14 day" period for petitioner to submit the requested items, respondent is beginning with the July 3 and 7 telephone messages, there is a dispute as to the content of those conversations and whether a deadline or a July 28 hearing was mentioned. We know only that on July 28, an August 18 call was scheduled. Petitioner appears to aver that the August 18 call was only for the purpose of determining whether he would receive a face-to-face hearing. As respondent's references to case law indicate, whether Ms. Barba abused her discretion may depend on how reasonable a period she allowed petitioner to respond to her requests when scheduling the hearing. There is a genuine dispute as to material issues of fact, and, on that ground, we shall deny the motion for summary judgment. Perhaps on further consultation before trial, the parties will conclude that the record is inadequate to support the notice and that remand to Appeals is appropriate.

A principal ground for petitioner's motion for a continuance is the pendency of the motion for summary judgment. Since we shall deny that motion, that ground no longer suffices. We shall deny the motion for a continuance.

On the premises stated, it is

ORDERED that respondent's motion for summary judgment is denied. It is further

ORDERED that petitioner's motion for continuance is denied.

**(Signed) James S. Halpern
Judge**

Dated: Washington, D.C.
November 24, 2015