

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ELLIOT HERSKOWITZ,)	
)	
Petitioner,)	
)	
v.)	Docket No. 21233-15 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER OF DISMISSAL

This case is set for trial on the Court’s September 12, 2016, New York, New York, trial session.

Background

On October 28, 2014, respondent issued to petitioner a Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320 (NFTL), with respect to petitioner’s tax years 2010 and 2011.¹ On October 30, 2014, respondent issued to petitioner another NFTL with respect to his tax year 2007.

In response to the NFTLs, petitioner filed a timely request for a collection due process (CDP) hearing with respect to tax years 2007, 2010, and 2011. Petitioner’s argument, as stated in his request, was that because he has a “history of making excessive estimated payments, the liability [for tax years 2007, 2010, and 2011] should be reversed, or, at a minimum, the interest and penalties should be reversed.” Petitioner and the settlement officer assigned to his case held a telephonic CDP hearing on March 13, 2015.

On July 17, 2015, respondent released the tax liens that were the subject of the NFTLs for petitioner’s 2007, 2010, and 2011 tax years. Then, on July 20,

¹All section references are to the Internal Revenue Code in effect at all relevant times.

2015, respondent offset an overpayment from petitioner's 2012 tax year against his income tax liabilities for 2007, 2010, and 2011 pursuant to section 6402(a). The offset fully satisfied all of petitioner's outstanding income tax liabilities for the years at issue.

On July 21, 2015, respondent issued a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, with respect to petitioner's taxable years 2007, 2010, and 2011, sustaining the NFTLs. This notice stated that if petitioner wished to dispute the determination he could file a petition in this Court. Petitioner timely filed his petition on August 21, 2015. The sole assignment of error in the petition was: "Due to exigent circumstances the penalties and interest should be waived."

On July 18, 2016, respondent filed a motion to dismiss for lack of jurisdiction on grounds that (1) this case is moot because there remains no unpaid Federal income tax liabilities for the years at issue and the liens underlying the NFTLs have been released; and (2) the Court lacks jurisdiction to determine an overpayment or to order a refund or credit of taxes. On August 30, 2016, petitioner filed a response to respondent's motion in which he (1) argued that the respondent's motion should not be granted because respondent had consented to jurisdiction in this Court by sending the notice of determination; and (2) asked that the Court review the offset and the underlying tax liabilities for the years at issue.

Discussion

Petitioner argues that because the notice of determination advised him that he could file an appeal in this Court, respondent has consented to this Court's jurisdiction and should not be heard to contest this Court's jurisdiction. The Tax Court is a court of limited jurisdiction; we may exercise jurisdiction only to the extent expressly provided by statute, *see, e.g., Henry Randolph Consulting v. Commissioner*, 112 T.C. 1, 4 (1999), and the parties' consent does not confer on this Court's jurisdiction not otherwise so provided. *High Adventure Ministries, Inc. v. Commissioner*, 80 T.C. 292, 297 (1983).

In a CDP case such as this, the Court may have jurisdiction if the IRS has issued a valid notice of determination and the petitioner has timely petitioned the Court. Sec. 6330(d)(1); *Orum v. Commissioner*, 123 T.C. 1, 8 (2004), *aff'd*, 412 F.3d 819 (7th Cir. 2005). In this case, as petitioner notes, there is no dispute that respondent issued a valid notice and that petitioner filed a timely petition.

Nevertheless, even where a valid notice of determination was issued and the petitioner timely petitioned for review, the Court will dismiss a CDP case as moot if there is no unpaid liability for the years at issue and respondent is no longer pursuing the collection action. Greene-Thapedi v. Commissioner, 126 T.C. 1, 7 (2006).

Having offset all of petitioner's tax liabilities for the years at issue by overpayment from petitioner's 2012 tax year, respondent no longer seeks to collect any amounts for the years at issue in the notice of determination and has withdrawn the NFTLs for those years. Consequently, this case is moot as to the NFTLs that are the subject of the notice of determination and the petition. See id.

In asserting in his petition that the interest and penalties that respondent has collected (through the offset) for the years at issue should be waived, petitioner effectively asks this Court to determine an overpayment or to order a refund or credit with respect to those amounts. The Tax Court, however, lacks jurisdiction in this collection review proceeding to determine an overpayment or to order a refund or credit of taxes. See Greene-Thapedi, 126 T.C. at 7-8. Whatever other advice or instructions respondent might have given petitioner does not make it otherwise. If petitioner seeks a refund or overpayment credit, then any legal remedy would lie in the United States District Court or the United States Court of Federal Claims rather than in this Court.

Insofar as petitioner seeks to challenge respondent's offset of his 2012 overpayment credit against his income tax liabilities for the years at issue, such a challenge is also not subject to review in this CDP proceeding, since an offset under section 6402 does not constitute a collection action under section 6330 that is subject to review by this Court. See Boyd v. Commissioner, 124 T.C. 296, 300 (2005).

For the reasons discussed above, it is

ORDERED: That respondent's motion to dismiss for lack of jurisdiction, filed July 18, 2016, is granted, and this case is dismissed for lack of jurisdiction.

**(Signed) Michael B. Thornton
Judge**

ENTERED: **SEP 06 2016**