

UNITED STATES TAX COURT
WASHINGTON, DC 20217

SAMUEL D. KELKER,)	
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Petitioner(s),)	
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v.)	Docket No. 15061-14 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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ORDER AND DECISION

This collection due process (CDP) case is on the Court's November 3, 2016 calendar for Lubbock, Texas. It arises from the Commissioner's attempt to levy petitioner Samuel Kelker's property to satisfy his 2010 income-tax liability. On July 29, 2016 the Commissioner moved for summary judgment and Kelker responded with a motion to strike the Commissioner's motion and dismiss his case for lack of jurisdiction.

We begin with Kelker's motions. Both are based on his assertion that we have no jurisdiction to entertain summary-judgment motions and require that parties file pleadings and follow all the other ordinary procedures of a trial court. He argues that in our CDP cases we act as an appellate court and so should follow the rules of the Fifth Circuit.

This is just wrong. Section 6330(d)(1) gives us jurisdiction to review the IRS's notices of determination that sustain its decisions to collect tax debts like Kelker's through levies. Section 7453 gives us the authority to conduct cases in accord with rules of our own devising, and we have chosen to do so with our Rules of Practice and Procedure.

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Kelker is a little bit right that our function in CDP cases is largely an appellate one. Our job is to review the record that the IRS compiled in reaching its decision to try to collect Kelker's taxes by levy. Sometimes a trial is necessary to figure out whether that record is complete or defective in some way, but in this case neither Kelker nor the IRS has identified any issue that needs to be tried. To get the record before us, the IRS usually (as it did here) attaches it to an affidavit of the IRS employee who conducted the CDP hearing. The IRS and the taxpayer can then move for summary judgment -- and much like arguing in briefs to a circuit court -- can argue in the form of motion papers that the IRS's conclusion was correct or incorrect on that record.

So we have jurisdiction over Kelker's case because the IRS issued a notice of determination and Kelker filed a timely petition. *Weber v. Commissioner*, 122 T.C. 258, 261 (2004).

Turning to the IRS's motion, we'll begin with some background. Kelker was a nonfiler for his 2010 tax year. The IRS prepared a substitute tax return, which section 6020(b) lets it do, and then sent him a notice of deficiency. This notice of deficiency is dated October 1, 2012 and that started a 90-day clock for Kelker to file a petition in Tax Court if he disagreed. He never did.

The IRS then assessed the tax liability shown on the notice of deficiency and began to try to collect. Kelker didn't pay voluntarily and the IRS decided to try to collect by levy -- seizing his property. The Code tells the IRS that it must first notify a taxpayer and give him a chance to ask for a hearing. Kelker did so and, where the form asked him what issues he wanted to discuss, he wrote that he didn't have any records that he owed any tax debt, didn't recall getting a notice of deficiency, and wanted an alternative to collection if he actually owed anything.

By May 2014, the IRS officer who conducted the hearing had finished combing through records and reading Kelker's CDP hearing statement. She determined that Kelker couldn't challenge his liability -- if that's what he meant by writing that he didn't have any records that showed he owed anything. She is right about this: The law says that once a taxpayer gets a notice of deficiency he has to file a case in Tax Court if he wants to challenge his underlying liability before paying it. IRC § 6330(c)(2)(B). Kelker admits he got the notice of deficiency.

Kelker had said in his request for a CDP hearing that he might want a collection alternative. But he later wrote to the IRS that he didn't intend to pursue any such alternatives.

The IRS then issued the notice of determination that sustained its decision to pursue collection by levy. Kelker timely appealed, but in his petition -- where a taxpayer has to tell us where he thinks the IRS got something wrong -- he complained mostly that the IRS had offered him a telephone hearing instead of one by correspondence. He does mention at the end of his petition that he didn't have a chance to contest "Tax Year 2010 and the civil penalties" and that the IRS didn't consider the points he made in his hearing statement.

We've looked at the explanation that the IRS officer gave to justify her determination to sustain the notice of levy. As we've already written, she was correct on the legal question of whether Kelker had the right to challenge his tax liability since he had received a notice of deficiency. And she was right that she didn't have to consider any collection alternatives once he wrote her to say he didn't want to pursue them. That she offered him a telephone call in addition to reading the materials that he sent her makes no difference to the determination. And now we have reviewed the same record that she did, and find no error at all in her conclusion that the IRS followed all legal and administrative procedures before deciding to collect the tax debt that Kelker owes for the 2010 tax year.

It is therefore

ORDERED that petitioner's September 2, 2016 motion to dismiss for lack of jurisdiction is denied. It is also

ORDERED that petitioner's September 2, 2016 motion to strike motion for summary judgment and declaration of Tina Galarza is denied. It is also

ORDERED that respondent's July 29, 2016 motion for summary judgment is granted. It is also

ORDERED and DECIDED that respondent may proceed with the collection of petitioner's federal income-tax liability for the tax year 2010, as described in

the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, dated May 27, 2014.

**(Signed) Mark V. Holmes
Judge**

ENTERED: OCT 24 2016