

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

JOHN MICHAEL GILLESPIE,)
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 Petitioner(s),)
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 v.) Docket No. 729-09 L.
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 COMMISSIONER OF INTERNAL REVENUE,)
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 Respondent)
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ORDER AND DECISION

This case was on the Court’s September 26, 2011 trial calendar for San Francisco but was stricken from the calendar and moved onto a summary-judgment track. The case arose from a notice sent by the IRS to Gillespie concerning its intent to place a lien on his property for unpaid taxes for 2004. Gillespie timely filed a request for a collection due process (CDP) hearing. He at first contested only the underlying liability. The Commissioner scheduled Gillespie’s CDP hearing but was unable to get in contact with him. Gillespie is a commercial fisherman who is at sea for months at a time. After failing to reach him, the Commissioner made a decision based on the information it had and issued Gillespie a notice of determination upholding the intent to place a lien on his property. Due to the understandable nature of his absence, the Commissioner ultimately agreed that this was unfair, and filed a motion to remand the case back to Appeals for reconsideration. We granted this request. The next time around, Gillespie made an offer in compromise and was put in touch with the IRS settlement officer. The settlement officer determined that the offer was too low and again sustained the lien determination. Gillespie appealed this determination and now argues the IRS has been unfair to him and that he should be allowed to apply an unused credit from his 1998 tax return to his current deficit. The Commissioner moved for summary judgment and Gillespie replied.

Background

Gillespie timely filed his 2004 tax return. He didn't pay the amount shown as due on his return and as a result received a notice of federal tax lien filing. He timely filed a request for a CDP hearing concerning this notice. He challenged the underlying liability for 2004 but didn't want to discuss collection alternatives. Gillespie's argument was that he should be allowed to use a credit from overpayment of taxes for 1998 to offset some of his 2004 liability. Gillespie didn't file his 1998 tax return until April 15, 2005, and he received a notice from the IRS informing him that it couldn't issue him a refund for that year because it would be barred by the statute of limitations.

The IRS couldn't reach Gillespie for the scheduled CDP hearing. After a number of failed attempts, the appeals officer closed the case and determined that enforced collection by lien was appropriate. Gillespie timely filed a petition with this court to contest that determination. Gillespie is a commercial fisherman who is gone for long stretches of time. The IRS realized that Gillespie's circumstances justified another shot at a CDP hearing and moved to remand the case to Appeals. We granted this request.

At the supplemental hearing, the settlement officer explained that Gillespie couldn't apply the refund to his 2004 tax liability because the statute had expired. Gillespie asked that penalties for 2004 be removed and the settlement officer said she would look into that. The settlement officer told Gillespie that he would have to submit a form 433-A and all of his tax returns through 2009 if he wanted to discuss a collection alternative. Gillespie submitted them. Gillespie also mentioned that he had an NOL to apply to 2004. The settlement officer sent Gillespie a Form 1045 to fill out concerning the NOL and said that he would need to talk to an appeals officer about that issue. Gillespie never filled out the form. His question was still referred to an appeals officer. The appeals officer called Gillespie and he said he no longer wanted to pursue the NOL issue but rather wanted to discuss collection alternatives. The appeals officer closed the case.

Gillespie then submitted a Form 656 as his offer in compromise. The form related to his tax liabilities for the years 2004-2009. The total liability was slightly more than \$30,000 and Gillespie offered to settle the entire amount for around \$8,000. He checked the box for "effective tax administration" as the justification for a less than full settlement. Gillespie eventually offered \$6,000 more, but continued to argue he shouldn't have to pay in full because he overpaid in 1998

and was suffering from numerous personal and family problems. The settlement officer reviewed his financial information and determined he had sufficient equity in his home and fishing boat to cover the entire \$30,000. She also determined it wouldn't be in the interests of effective tax administration to accept Gillespie's offer. She did agree to abate all of Gillespie's late filing penalties. Gillespie then appealed from this supplemental notice of determination.

Discussion

We may grant summary judgment when there is no genuine dispute of any material fact and a party is entitled to judgment as a matter of law. Rule 121(b); *Sundstrand Corp. and Consol. Subsidiaries v. Commissioner*, 98 T.C. 518, 520 (1992). The moving party bears the burden of proving there is no genuine dispute of material fact and we read factual inferences in a manner most favorable to the nonmoving party. *Dahlstrom v. Commissioner*, 85 T.C. 812, 821 (1985).

In making a determination, we start with Code sections 6320 and 6330. These sections allow us to review a determination made by the IRS Office of Appeals to sustain proposed liens and levies. I.R.C. § 6320(c); I.R.C. § 6330(d)(1). This case is appealable to the Ninth Circuit because Gillespie is a California resident. *See* I.R.C. § 7482(b). Our review is limited to the administrative record, and the parties have no dispute about the contents of that record nor do they attempt to supplement it. *Keller v. Commissioner*, 568 F.3d 710, 718 (9th Cir. 2009). Because Gillespie is claiming he should've been able to use a credit from 1998 to offset income for 2004, he's disputing the underlying liability. In such circumstances, our review is normally de novo. *Goza v. Commissioner*, 114 T.C. 176, 181-82 (2000). But, that's only the case if the underlying liability was properly before the CDP hearing and properly before us. To be properly before us, Gillespie had to make the argument during the CDP hearing. 26 C.F.R. § 301.6330-1(f)(2). He did. To be properly the subject of the CDP hearing, Gillespie must not have had a prior opportunity to argue his claim. I.R.C. § 6330(c)(2)(B).

Gillespie did have a prior opportunity to dispute the refund issue. The IRS issued him a letter on February 23, 2001, informing him that he had a credit of over \$7000 for 1998. The letter said the IRS couldn't locate his return for that year and that he should file a return. It didn't specifically say he would lose his right to a refund if he failed to file his 1998 return by April 15, 2001, but it did request he file it within 2 weeks. Gillespie didn't file his 1998 tax return until April 15, 2005. The return showed an overpayment and was effectively a request for refund. The

IRS issued Gillespie a letter on June 24, 2005, telling him it couldn't accept his refund claim because it was untimely. The letter said Gillespie could appeal the decision to the Appeals Office of the IRS, as well as file suit to recover tax in either a United States district court or the United States Claims Court. Gillespie didn't appeal the decision or file suit.

The only problem with his 2004 liability according to Gillespie is that he should've been allowed to take the unused credit from 1998. He also makes a number of arguments of inappropriate behavior by the IRS, but none of them have anything to do with his self-reported liability. Because this is the only issue, he was precluded from challenging the underlying liability in the CDP hearing. Gillespie was afforded a prior opportunity to contest the denial of his refund and he failed to take advantage of it. This was the type of opportunity contemplated by section 6330. See *Farley v. Commissioner*, T.C. Memo. 2004-168, 2004 WL 1598658, at *3; 26 C.F.R. § 301.6320-1(e)(3) ("An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability"). Whether Gillespie had an allowable excuse for failing to timely file his 1998 refund (such as being at sea for a long period of time) is something he needed to raise at this prior appeal opportunity. He couldn't raise it in the CDP hearing and he can't raise it now.

There's still the issue of the denial of the offer in compromise. Our standard of review for this question is abuse of discretion. See *Sego v. Commissioner*, 114 T.C. 604, 610 (2000). We look to see if the Commissioner's decision was based on an error of law or rested on a clearly erroneous finding of fact, or whether he ruled irrationally. See *Antioco v. Commissioner*, 105 T.C.M. (CCH) 1234, 1237 (2013). The issue here is a factual one -- whether the Commissioner acted arbitrarily and irrationally in rejecting Gillespie's collection alternative and sustaining the proposed lien.

Gillespie submitted many notes explaining a number of difficulties faced by him and his family over the years that he believes support his argument. He has our sympathies, but we can't find that the IRS abused its discretion at any point in the process. Gillespie explained why some of these difficulties contributed to the late tax filings, but the IRS abated all of his late return penalties. There's no unfairness there. He's now asking they give him his credit despite clear statutory language commanding them not to. Section 6511 sets clear deadlines for filing a refund claim. The deadline applicable to Gillespie is that he needed to file his 1998 return, indicating a refund was due, by three years from the deadline of a

timely filed return (i.e., April 15, 2001). I.R.C. § 6511(b)(1). It's undisputed that he didn't.

Gillespie submitted an offer in compromise for years 2004-2009 that was lower than the total amount his returns showed that he owed. He doesn't dispute that he can afford the full amount but rather that a compromise for less than full amount is justified by the circumstances. Essentially, Gillespie is arguing he fits within the offer in compromise exception that allows him to not pay the full amount despite being able to pay it. This exception states that,

The IRS may compromise to promote effective tax administration where compelling public policy or equity considerations identified by the taxpayer provide a sufficient basis for compromising the liability. Compromise will be justified only where, due to exceptional circumstances, collection of the full liability would undermine public confidence that the tax laws are being administered in a fair and equitable manner.

26 C.F.R. § 301.7122-1(b)(3)(ii).

Gillespie seems to focus his attention on the fairness aspect by repeatedly noting he overpaid his 1998 taxes. We can't deny an element of unfairness here -- both parties agree the United States Treasury received a little over \$7000 more than it was supposed to from Gillespie and he never got it back. But we don't find such a level of unfairness to find the IRS acted clearly erroneously. *See Wai v. Commissioner*, 92 T.C.M. (CCH) 181, 2006 WL 2482901, at *6 (upholding the IRS's refusal of the taxpayer's offer in compromise, despite acknowledging that the application of the AMT rules to this particular taxpayer may have produced an inequitable result); *Murphy v. Commissioner*, 469 F.3d 27, 32 (1st Cir. 2006) (noting that the court won't disturb the IRS's decision unless the rejection "represents a clear abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS"). Nevertheless, we needn't decide if this fact would "undermine public confidence that the tax laws are being administered in a fair and equitable manner." We don't because even if the IRS could've accepted an offer for less than full amount, Gillespie's offer was for far less than his liability less the lost credit. In other words, Gillespie's lost refund can't fully justify the difference between his offer and his true liability, especially when he doesn't disagree with the IRS's position that he has sufficient equity to pay it in full.

In making a determination, the settlement officer is required to take into consideration (1) the verification that the requirements of applicable law and

administrative procedures have been met, (2) issues raised by the taxpayer, and (3) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection be no more intrusive than necessary. I.R.C. § 6330(c)(3). The record reflects that she did just that. With this in mind, we conclude that the Commissioner didn't abuse his discretion in upholding the determination to file a lien.

It is therefore

ORDERED that respondent's motion for summary judgment is granted. It is also

ORDERED that petitioner's cross-motion for summary judgment is denied. It is also

DECIDED that respondent may proceed with the collection of petitioner's federal income tax liability for the tax year 2004, as described in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, dated February 1, 2011.

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

ENTERED: **DEC 30 2016**