

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

CLC

JAMES L. MCCARTHY,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 21940-15 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This collection due process (CDP) case is calendared for trial at the Court's January 30, 2017, trial session, scheduled to begin at 10:00 a.m., in Room 206, Jacob K. Javits Federal Building, 26 Federal Plaza, New York, New York 10278.

Both parties have filed motions for partial summary judgment in regard to the same issue and each objects to the other's motion. For the reasons explained below, we will deny each motion.

Summary judgment 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).¹

This case arises out of a petition under section 6330(d) challenging respondent's determination to sustain the proposed collection by levy of petitioner's liability for taxes, penalties, and interest for his taxable years 2000, 2001, and 2003. Petitioner's liability includes assessments made by respondent of a criminal monetary penalty imposed on petitioner by a Federal District Court as a result of his conviction for offenses related to the filing of false corporate and individual

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

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income tax returns. The District Court's order requires petitioner to pay restitution of about \$1.2 million in monthly installments of \$1,000.

As part of his CDP hearing, petitioner proposed an offer-in-compromise (OIC) under which he would pay \$2,500 per month for 96 months in addition to the \$1,000 monthly payments he was already required to make in satisfaction of his restitution obligation. Respondent's Appeals office rejected petitioner's OIC on the ground that it did not provide for full payment of petitioner's court-ordered restitution within the 24-month period that respondent allows for periodic payment OICs. After the rejection of his OIC, petitioner proposed as a collection alternative an installment agreement under which he would make monthly payments of \$3,000. Respondent's Appeals office rejected that proposal as well, on the ground that it did not account for assets that, respondent alleges, are held by a trust as nominee for petitioner.

In his petition, petitioner alleges that respondent's Appeals office erred in rejecting first his proposed OIC and then his proposal of an installment agreement as a collection alternative. The parties' motions for partial summary judgment address only whether rejection of petitioner's OIC was an abuse of discretion.

We will reject both parties' motions for the following reasons: First, the issue of whether Appeals' rejection of petitioner's OIC was an abuse of discretion implicates a legal question that the parties' submissions have not adequately addressed. Second, the ultimate resolution of that issue may turn on the same contested fact question that underlies the separate issue regarding Appeals' rejection of petitioner's proposed installment agreement.

As we understand respondent's position, no OIC that petitioner could have made would have been acceptable under the Internal Revenue Manual guidelines on which respondent relies. Petitioner could not have fully satisfied his restitution obligation within 24 months without substantially modifying the terms of the District Court's restitution order. It thus seems that, under respondent's position, no taxpayer who is obligated to pay tax-related criminal restitution over a period of more than 24 months can submit an acceptable offer to comprise that taxpayer's non-restitution liability for the tax periods to which the restitution relates. We question how a policy allowing for the exercise of discretion that, as a practical matter, will never be exercised, regardless of the surrounding circumstances, can be other than arbitrary. Cf. Quality Software Sys., Inc. v. Commissioner, T.C. Memo. 2015-107 at *21 ("By having discretion to reinstate OIC agreements, but choosing never to exercise that discretion, without providing any sort of

justification, Appeals may be abusing its discretion."). Nonetheless, we are reluctant to decide at this juncture whether Appeals' rejection of petitioner's OIC on the stated grounds was an abuse of discretion because the submissions the parties have made in regard to their competing motions do not address the potential conundrum described above.

Even if petitioner's failure to fully satisfy his restitution obligation in 24 months did not provide an adequate basis for rejection of his OIC, Appeals might have had legitimate grounds to reject the OIC if it did not fairly reflect petitioner's ability to pay. Thus, resolution of the OIC issue may ultimately turn on the same contested factual question that underlies the installment agreement issue--that is, whether assets held by a trust should be taken into account in determining the financial resources available to satisfy the liabilities respondent seeks to collect because the trust holds its assets as a nominee for petitioner.

On the premises stated, it is

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

ORDERED that petitioner's motion for partial summary judgment is denied.

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

Dated: Washington, D.C.
January 18, 2017