

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 is a collection due process case in which petitioner assigned error to respondent's Appeals Office's (Appeals') determinations rejecting petitioner's collection alternatives of an offer in compromise (OIC) or, alternatively, a partial payment installment agreement. The parties both moved for summary judgment, and by order dated January 18, 2017 (January 18 order), we denied both motions. We did so for two reasons. First, an issue before us concerning whether Appeals' rejection of petitioner's OIC implicates a legal question that the parties' submissions had not adequately addressed; viz: Whether respondent's Internal Revenue Manual (IRM) instructions had foreclosed Appeals' exercise of discretion by insisting that petitioner's OIC provide for full payment of petitioner's Federal District Court ordered restitution within the 24 month period that respondent allows for periodic payment of OICs. The District Court's order required periodic payments over 96 months. Second, the ultimate resolution of the first issue may turn on the same contested fact question that underlies the separate issue regarding Appeals' rejection of petitioner's installment agreement; i.e., petitioner's alleged control of the assets of a trust.

The case was called from the calendar of the Court's Trial Session at New York, New York, on January 31, 2017, and a trial was held. After all witnesses had been called, the Court suggested that a remand of the case to Appeals for further consideration might be appropriate to address the legal

question set forth in the January 18 order and to consider the testimony received at the trial regarding petitioner's alleged control of the trust's assets. By order dated January 31, 2017, we ordered that briefing in the case be delayed and that respondent respond to the Court's suggestion to remand the case to Appeals. Respondent responded with his motion to remand (motion), filed March 13, 2017, which, among other things, sets forth the issues he believes that Appeals should address on remand. Petitioner responded with his notice of objection to the motion, filed March 16, 2017, in which he did not object to a remand but suggested somewhat different issues that Appeals should address. On March 28, 2017, we held a conference call with the parties in which they agreed that Appeals should address the following issues, which to some extent (they recognize) involve questions of fact, questions of law, and mixed questions of fact and law.<sup>1</sup>

Does the IRM foreclose Appeals from accepting an OIC from petitioner that leaves in place the terms of the District Court's restitution order requiring periodic restitution payments over a term in excess of 24 months?

If so, how can a policy allowing for the exercise of discretion that, as a practical matter, will never be exercised, regardless of the surrounding circumstances, 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.").

If Appeals does have discretion to accept an OIC that leaves in place the terms of the District Court's restitution order, did (or does) Appeals have any valid grounds on which to reject petitioner's OIC other than those described in the attachment to Appeals' Notice of Determination (i.e. "Attachment to Letter 3193").

If Appeals does have that discretion, and considering the evidence that petitioner previously presented to Appeals, the evidence received at trial, and any other evidence petitioner presents to Appeals on remand, does Appeals accept an OIC presented by petitioner or a partial payment installment agreement?

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<sup>1</sup>The parties did not agree whether the issues to be addressed by Appeals on remand should include one issue described by petitioner in his notice of objection; viz, whether respondent properly notified petitioner of his right to an administrative hearing regarding 2002. That issue is not included in the issues to be addressed by Appeals on remand.

If not, why not?

On the premises stated, it is

ORDERED that respondent's motion to remand is granted, and this case is remanded to respondent's Office of Appeals, at respondent's Appeals Office located closest to petitioner's residence (or at such other place as may be mutually agreed upon) at a reasonable and mutually agreed upon date and time, but no later than July 1, 2017, for the purpose of a supplemental determination. It is further

ORDERED that the parties shall, on or before August 1, 2017, submit to the Court joint or separate reports regarding the then present status of this case.

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

Dated: Washington, D.C.  
March 29, 2017