UNITED STATES TAX COURT
WASHINGTON, DC 20217

MICHAEL TIMOTHY BUSHEY,	)	
	)	
Petitioner,	)	
	)	**CT**
v.	)	Docket No. 26557-15 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

ORDER AND DECISION

This matter is before the Court to decide on respondent's Motion for Summary Judgment, filed September 20, 2016, pursuant to Rule 121 of the Tax Court Rules of Practice and Procedure. Respondent contends that no genuine issue exists as to any material fact and that the subject determination approving a notice of intent to levy with respect petitioner's unpaid Federal income tax liability for the 2008 taxable year should be sustained.

By Order dated September 21, 2016, the Court ordered petitioner to file a response to respondent's Motion for Summary Judgment no later than October 21, 2016. The Court later extended the time for petitioner to respond to respondent's motion. On November 8, 2016, petitioner timely filed an Opposition to Motion for Summary Judgment.

This case was called from the calendar for the Trial Session of the Court at Boston, Massachusetts on November 28, 2016. Petitioner and counsel for respondent appeared and were heard regarding the status of this case, including respondent's motion for summary judgment. The Court took respondent's motion under advisement.

Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

SERVED Jul 12 2017

Background

In response to receiving a notice of intent to levy with respect to his unpaid Federal income tax liability for the 2008 taxable year, petitioner timely submitted to respondent a Form 12153, Request for a Collection Due Process or Equivalent Hearing (CDP hearing request). As the reason for his disagreement with the proposed levy action, petitioner checked the box on his CDP hearing request for "Offer in Compromise". Additionally, in further support of his disagreement with the proposed levy action and request for a collection due process (CDP) hearing, petitioner stated on his CDP hearing request, "I do not owe this money. It was a tax credit, not a tax owed. It was a first time home buyers credit and it was based on the first & only house I have ever purchased".

A representative from the Internal Revenue Service (IRS) Office of Appeals (Appeals) acknowledged receipt of petitioner's CDP hearing request, by letter dated May 21, 2015, and the request was assigned to Settlement Officer Inez R. Perales (SO Perales). On May 28, 2015, SO Perales sent petitioner a letter in which she scheduled a telephonic CDP hearing with petitioner on July 17, 2015. She also outlined the issues she had to consider during the hearing and informed petitioner that in order for her to consider a collection alternative (and specifically, an offer in compromise) he needed to submit a completed Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and a completed Form 656, Offer in Compromise. Finally, she informed petitioner that if he preferred to reschedule the hearing or have a face-to-face conference he should call or write her within 14 days.

Due to SO Perales being out of the office on account of illness, the telephonic CDP hearing did not take place on July 17, 2015. On July 20, 2015, SO Perales sent petitioner a letter rescheduling the CDP hearing (still as a telephonic hearing) to August 4, 2015. She also informed him that she had not received the requested information from him and advised him to provide her with any information he would like for her to consider within 14 days.

On August 4, 2015, SO Perales received a telephone message from petitioner stating that he would not be available for the telephonic CDP hearing that day but that he would be available starting the first or second week of September. In response to this message, on August 5, 2015, SO Perales sent petitioner a letter rescheduling the CDP hearing (again as a telephonic hearing) to September 2, 2015. She also informed petitioner that she still had not received the requested information from him; advised him that a determination in the CDP

hearing would be made by reviewing the IRS Office of Collections administrative file and whatever information he had already provided; and offered him another 14 days to submit any information he would like for her to consider.

On September 2, 2015, SO Perales attempted to contact petitioner to conduct the rescheduled telephonic CDP hearing, but she was unable to reach him. On the same day, she sent petitioner a follow-up letter, informing him that she still had not received the requested information from him but that he had one last chance to submit within 14 days any information he would like for her to consider. She also again advised him that a determination would be made by reviewing the IRS Office of Collections administrative file and whatever information he had already provided.

On September 3, 2015, Appeals received an undated letter from petitioner in which he acknowledged having received SO Perales' August 5, 2015, letter (which he attached thereto). He also asserted throughout the letter that he did not request a telephone conference and that "by law" he was entitled to a "due process hearing".

On September 22, 2015, Appeals sent petitioner a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code (Notice of Determination), sustaining the proposed levy action. A summary detailing the matters considered by Appeals was attached to the Notice of Determination and included the following explanations:

LEGAL AND ADMINISTRATIVE REVIEW

The Settlement Officer, Inez R Perales, verified the requirements of any applicable law or administrative procedure were met.

* * * * * * *

ISSUES YOU RAISED

* * * * * * *

Collection Alternatives Requested

We considered your request for an offer in compromise as a collection alternative. However, in our letter dated May 26 [sic], 2015, you were

advised to submit a completed financial statement along with the Form 656 offer in compromise.

In our letters to you dated July 20, 2015, August 5, 2015 and September 2, 2015 we provided you with additional opportunities to submit the requested information and you failed to do so. Since you did not provide the information we requested, we were unable to explore any collection alternative, other than full payment. As such the levy is fully sustained.

Challenges to the Liability

In your request for a hearing you indicated the underlying liability which is the basis for the proposed collection action under consideration in this hearing is not owed. IRC 6330(c)(2)(B) prohibits a taxpayer from raising the underlying liability in a Collection Due Process Hearing if the taxpayer has been afforded a prior opportunity to raise the issue before the Office of Appeals or within the Courts. You provided court documents which would constitute as a prior opportunity. As such the assessments at issue are valid.

You raised no other issues.

BALANCING ANALYSIS

Although you responded to the hearing you did not provide requested financial data necessary to make a determination concerning your proposed offer in compromise. Since no financial data provided, consideration of your proposed collection alternative of an offer in compromise or other less intrusive methods of collection is not possible. Therefore, the issuance of the Notice balances the efficient collection of the taxes with a concern that the collection action be no more intrusive than necessary.

(Emphasis in original.)

On October 20, 2015, petitioner, while residing in Maine, timely filed his petition with this Court. In his petition, he did not allege that SO Perales abused her discretion; instead, he stated that his reason for disagreeing with the Notice of Determination was the following:

The amount in dispute was not back taxes or unpaid taxes, but a tax credit (a.k.a. loan). The amount was discharged under bankruptcy chapter 7

> action. Then later while still attempting to collect the amount was mishandled and interest calculations were mishandled by the I.R.S. own admission. It was recommended by area counsel to file an "offer of compromise" which I did an [sic] has been rejected over and over.

In his opposition to respondent's motion for summary judgment, petitioner continued to dispute the amount of his underlying tax liability for 2008. He also contended that he disagreed with respondent's account of his case, to wit, respondent's attempts and timeline to contact him. Finally, he asserted that he had "received no 'due process'" and was "seek[ing] a fair settlement". However, when petitioner appeared when his case was called from the calendar for the November 28, 2016, Boston, Massachusetts Trial Session of the Court, he stated that he did not "dispute the outstanding balance" but wanted the "interest and penalties . . . to be waived". He also stated that he never received SO Perales' September 2, 2015, letter and that he had already submitted an offer in compromise to respondent, along with all of the requested financial information, but was willing to submit another offer in compromise.

The record indicates that in response to a notice of deficiency with respect to 2008, petitioner filed a petition with this Court disputing respondent's determinations for that year and that the Court subsequently entered a stipulated decision, pursuant to the agreement of the parties, in that case. The record further reflects that after the decision in that case became final and before respondent issued the notice of intent to levy upon which petitioner's CDP hearing request was based, petitioner submitted and respondent rejected an offer in compromise with respect to 2008.

Discussion

Summary judgment may be granted where the moving party shows, through the pleadings and other materials, that there is no genuine issue of material fact and a decision may be rendered as a matter of law. Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F. 3d 965 (7th Cir. 1994). In all cases, the factual inferences are viewed in a light most favorable to the nonmoving party. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985); Jacklin v. Commissioner, 79 T.C. 340, 344 (1982). The nonmoving party may not rest upon the mere allegations or denials of his pleading but must set forth specific facts showing that a genuine dispute of material fact exists. Rule 121(d); Sundstrand Corp. v. Commissioner, 98 T.C. at 520. The factual disputes petitioner seemingly raises in his opposition to respondent's motion for summary judgment and when

his case was called from the calendar for the November 28, 2016, Boston, Massachusetts Trial Session of the Court are vague and inconsequential, and as such, are not genuine disputes over material facts. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). Consequently, a decision may be rendered as a matter of law.

Petitioner challenged the amount of his underlying liability for 2008 in his CDP hearing request and his petition. However, petitioner could not have raised the issue of his underlying liability during the proceedings before Appeals and as a result, the issue is not one properly before the Court because he received a notice of deficiency with respect to that liability from which he filed a petition in this Court and the Court later entered a stipulated decision. See sec. 6330(c)(2)(B) and (c)(4)(A); Giamelli v. Commissioner, 129 T.C. 107 (2007). Thus, we will review Appeals' determination for abuse of discretion; that is, whether the determination was arbitrary, capricious, or without a sound basis in fact or law. See Murphy v. Commissioner, 125 T.C. 301, 308 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181-182 (2000).

In determining whether a proposed collection action may proceed, Appeals must take into consideration: (1) the verification that the requirements of applicable law and administrative procedure have been met; (2) issues raised by the taxpayer, including offers of collection alternatives, such as an offer in compromise; 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. Secs. 6320(c), 6330(c)(3); see also Lunsford v. Commissioner, 117 T.C. 183, 184 (2001). We note that SO Perales' case activity notes and Appeals' Notice of Determination show that SO Perales verified that the requirements of section 6330(c)(3) were met. Petitioner has not presented any evidence to even suggest that these requirements were not satisfied and that thus the approval of the levy notice was arbitrary, capricious, or without a sound basis in fact or law.

Besides, it is not an abuse of discretion for a Settlement Officer to sustain a proposed collection action and not consider collection alternatives when the taxpayer has proposed none. Kendricks v. Commissioner, 124 T.C. 69, 79 (2005); O'Neil v. Commissioner, T.C. Memo. 2009-183 (taxpayer discussed an offer in compromise with Settlement Officer on multiple occasions but failed to submit one

in writing); see also Treas. Reg. § 301.7122-1(d)(1) (offer must be made in writing and must contain all the information requested by the IRS). Similarly, this Court has held on numerous occasions that it is not an abuse of discretion for Appeals to reject collection alternatives and sustain the proposed collection action on the basis of the taxpayer's failure to submit requested financial information. See, e.g., Wright v. Commissioner, T.C. Memo. 2012-24; Ranuio v. Commissioner, T.C. Memo. 2010-178; Dinino v. Commissioner, T.C. Memo. 2009-284; Huntress v. Commissioner, T.C. Memo. 2009-161; Prater v. Commissioner, T.C. Memo. 2007-241; Chandler v. Commissioner, T.C. Memo. 2005-99; Roman v. Commissioner, T.C. Memo. 2004-20.

On his CDP hearing request, petitioner checked the box indicating he desired an offer in compromise. Petitioner, however, did not make a written offer or provide any of the financial information SO Perales requested on several occasions that he submit to her. When his case was called from the calendar for the November 28, 2016, Boston, Massachusetts Trial Session of the Court, petitioner expressed that he had already submitted an offer in compromise, together with the necessary financial information. Although petitioner was correct that he had submitted an offer in compromise to respondent, he did so prior to respondent's issuing the subject levy notice and respondent had rejected that offer also prior to respondent's issuing the levy notice. Petitioner needed to submit an offer in compromise with the required financial information during the proceedings before Appeals, which he failed to do. As a result and taking into account the information in the administrative file, SO Perales determined that the proposed levy action should be sustained.

The Court finds that SO Perales properly based her determination on the required factors. The administrative record shows that she (1) verified that all legal and procedural requirements had been met, (2) considered the issues petitioner raised, and (3) determined that the proposed collection action appropriately balanced the need for the efficient collection of taxes with the legitimate concern of petitioner that the collection action be no more intrusive than necessary. It cannot be said that an abuse of discretion was committed with regard to that determination.

Petitioner has also suggested that he did not receive "due process" because he did not have a face-to-face CDP hearing pursuant to a written request he made in an undated letter respondent received on September 3, 2015, one day after the rescheduled telephonic CDP hearing was to take place. A face-to-face hearing is not required under section 6330. See Katz v. Commissioner, 115 T.C. 329 (2000);

LaForge v. Commissioner, T.C. Memo. 2013-183; Roman v. Commissioner, T.C. Memo. 2004-20; Dorra v. Commissioner, T.C. Memo. 2004-16. In addition, we have held that it is not an abuse of discretion to deny a request for a face-to-face hearing when the taxpayer refuses to provide the requested financial information. See LaForge v. Commissioner, at *11-*12 (and cases cited thereat). The record indicates that SO Perales gave petitioner a reasonable opportunity--two opportunities in fact--to be heard prior to the issuance of the Notice of Determination. Accordingly, the Court finds that SO Perales' consideration of petitioner's case did not fail to comply with the terms of a fair hearing set forth in section 6330.

As the Court explained to petitioner when he appeared when his case was called from the November 28, 2016, Boston, Massachusetts Trial Session of the Court, he still has the right to submit to respondent an offer in compromise with the required financial information. Petitioner acknowledged as much that he was willing to do so, and we encouraged petitioner to do so, with the assistance of Pine Tree Legal Assistance, Inc. The Court also hopes that respondent will hold off on proceeding with the proposed collection action to give petitioner an opportunity, with perhaps the aforementioned low income taxpayer clinic's assistance, to submit an offer in compromise.

Nevertheless, petitioner has not given a sufficient basis to deny summary adjudication of this case in respondent's favor pursuant to Rule 121. Respondent having shown that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law, it is hereby

ORDERED that respondent's Motion for Summary Judgment, filed September 20, 2016, is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action with respect to petitioner's unpaid income tax liability for the 2008 taxable year, as described in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated September 22, 2015, upon which this case is based.

(Signed) Tamara W. Ashford
Judge

ENTERED: **JUL 12 2017**