

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

DRC

RUSSELL T. BURKHALTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 14345-16 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	
	)	

**ORDER**

This is a collection review case involving a proposed levy. Presently pending before the Court is respondent’s Motion For Partial Summary Judgment, filed January 12, 2017. By Order dated January 17, 2017, petitioner was directed to file a response, if any, to respondent’s motion on or before February 7, 2017. In that Order petitioner was also expressly advised by the Court that failure to comply might result in the granting of respondent’s motion. In order to assist petitioner in the preparation of a response, the Court enclosed with its Order a copy of Q&A’s that the Court had prepared on the subject “What is a motion for summary judgment?” Despite the passage of many months the Court has not received any response from petitioner.

Most recently respondent’s aforementioned motion was assigned to the undersigned for disposition by Order of the Chief Judge dated July 3, 2017.

After review of the record in this case, the Court concludes that there is no genuine issue or dispute of material fact regarding whether petitioner’s underlying tax liabilities are not properly at issue. Accordingly, and for reasons to be discussed, the Court holds that respondent is entitled to judgment as a matter of law that petitioner is barred from challenging the existence or amount of his underlying tax liabilities in the present case.

## A. Background

The record establishes the following:

Petitioner resided in the State of Georgia at the time that the petition was filed with the Court.

The taxable (calendar) years that are at issue in this case are 2010, 2011, and 2013.

Respondent's official records<sup>1</sup> reflect that after examination of petitioner's income tax returns for 2010 and 2011, respondent assessed deficiencies, penalties and/or additions to tax, and statutory interest following default of notices of deficiencies. See sec. 6213(c).<sup>2</sup> In addition, those records reflect that for 2013 petitioner did not pay the tax reported on his late-filed return and that respondent assessed (in addition to the tax reported on the return) applicable additions to tax and statutory interest. See secs. 6201(a), 6601, 6665.

On May 26, 2015, respondent filed a notice of Federal tax lien with the Clerk of Superior Court of Gwinnett County in Lawrenceville, GA. The notice of Federal tax lien included petitioner's tax liabilities for 2010, 2011, and 2013. On May 28, 2015, respondent sent petitioner a Notice Of Federal Tax Lien Filing And Your Right To A Hearing Under IRC 6320 (the notice of lien). The notice of lien included petitioner's tax liabilities for the same three years as the notice of Federal tax lien.

The notice of lien was sent to petitioner by certified mail and was addressed to him at the same street address listed by him on the petition that he filed to commence the present case. USPS Tracking shows that the lien notice was delivered on June 2, 2015. Petitioner did not timely file with respondent a Request For A Collection Due Process Or Equivalent Hearing (Form 12153) in respect of the lien notice. See sec. 6320.

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<sup>1</sup> Forms 4340, Certificates Of Assessments, Payments, And Other Specified Matters.

<sup>2</sup> Except as otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended. All Rule references are to the Tax Court Rules of Practice and Procedure.

On October 8, 2015, respondent sent petitioner a Final Notice/Notice Of Intent to Levy And Notice Of Your Right To A Hearing (final notice). See sec. 6330. The final notice included petitioner's tax liabilities for 2010, 2011, and 2013. Respondent sent the final notice to petitioner by certified mail addressed to him at the same street address listed by him on his petition. In response, and using Form 12153, petitioner filed with respondent a Request For A Collection Due Process Or Equivalent Hearing (CDP request). Petitioner's CDP request was timely filed as to the final notice but not as to the lien notice. See sec. 6330(a)(3)(B); cf. sec.6320(a)(3)(B). In that regard, petitioner checked the box on line 7 of Form 12153 indicating that "I would like an Equivalent Hearing – I would like a hearing equivalent to a CDP Hearing if my request for a CDP hearing does not meet the requirements for a timely CDP Hearing." Also, on line 8 of Form 12153, petitioner requested a collection alternative, checking the box "I cannot pay balance". Petitioner raised no other issue on Form 12153; specifically, petitioner did not dispute either the existence or amount of his underlying liabilities on Form 12153.

The administrative process culminated on May 31, 2016, with respondent's Appeals Office in Atlanta, Georgia sending petitioner both a Notice Of Determination Concerning Collection Action(s) (notice of determination) and a Decision Letter On Equivalent Hearing (decision letter). Both the notice of determination and the decision letter referenced the three taxable years 2010, 2011, and 2013; however, the notice of determination addressed only, and sustained, the proposed levy, whereas the decision letter addressed only, and sustained, the filing of the notice of Federal tax lien. The Attachment to the notice of determination, which was prepared by the settlement officer, states that "The taxpayer did not dispute the [underlying tax] liability."<sup>3</sup>

In response to the notice of determination petitioner timely filed a petition with this Court. See sec. 6330(d)(1); Rules 330-334. In the petition petitioner seeks to challenge the existence or amount of his underlying tax liabilities.

After this case was at issue, see Rule 38, respondent filed his Motion For Partial Summary Judgment on January 12, 2017. See Rule 121(a). In his motion respondent moves "for a partial summary judgment and holding that petitioner's underlying tax liability is not properly at issue in this case \* \* \* because petitioner has had a prior opportunity to dispute that tax liability."

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<sup>3</sup> The Attachment to the decision letter includes the exact same statement.

## B. Discussion

### 1. Summary Judgment

Summary judgment serves to “expedite litigation and avoid unnecessary and expensive trials.” Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Either party may move for summary judgment upon all or any part of the legal issues in controversy. Rule 121(a). The Court may grant summary judgment only if there are no genuine disputes or issues of material fact. Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

Under Rule 121(d), if the adverse party does not respond to a motion for summary judgment, then this Court may enter a decision where appropriate against that party.<sup>4</sup> See King v. Commissioner, 87 T.C. 1213, 1217 (1986); Shepherd v. Commissioner, T.C. Memo. 1997-555. Petitioner has not responded to the motion for partial summary judgment. The Court could therefore grant respondent’s motion on that ground alone. However, even if the Court did not rely on that basis, the record in this matter shows that respondent is entitled to summary judgment on the issue whether petitioner’s underlying tax liabilities are not properly at issue.

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<sup>4</sup> Tax Court Rule 121(d) provides in relevant part as follows:

When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of such party’s pleading, but such party’s response, by affidavits or declarations or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine dispute for trial. If the adverse party does not so respond, then a decision, if appropriate, may be entered against such party. [Emphasis added.]

## 2. Underlying Tax Liability<sup>5</sup>

In the seminal case of Goza v. Commissioner, 114 T.C. 176, 182-183 (2000), the Court held that if a taxpayer was barred from challenging the existence or amount of the taxpayer's underlying tax liability before the Commissioner's Appeals Office, then the taxpayer would be barred from doing so in a subsequent collection review proceeding in this Court. There the Court focused on section 6330(c)(2)(B), concluding that because the taxpayer "was precluded from contesting his liability for the underlying taxes before the Appeals Office" based on that section, he was barred from doing so before this Court. Id.

Pursuant to section 6330(c)(2)(B) a taxpayer may challenge the existence or amount of the taxpayer's underlying tax liability at an administrative collection hearing before the Commissioner's Appeals Office if the taxpayer did not receive a notice of deficiency or did not otherwise have any opportunity to dispute such tax liability. See sec. 301.6320-(e)(1), Proced. & Admin. Regs. In the present case respondent's records indicate that deficiencies (together with penalties and/or additions to tax and statutory interest) were assessed for 2010 and 2011 upon default of notices of deficiency. However, the record does not establish that petitioner actually received the notices of deficiency. On the other hand, the record does establish that petitioner had an opportunity to dispute his underlying tax liabilities for 2010, 2011, and 2013 upon the issuance of the May 28, 2015 lien notice, which the record shows was delivered. The law is clear that petitioner's failure to do so in a timely manner bars him from seeking to challenge the existence or amount of his underlying tax liabilities for the three years in issue in the present case. Daniel v. Commissioner, T.C. Memo. 2009-28; sec. 301.6330-1(e)(3), Q&A-E7, Proced. & Admin. Regs.<sup>6</sup>

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<sup>5</sup> The term "underlying tax liability" in section 6330(d)(1) includes "any amounts owed by a taxpayer pursuant to the tax laws." Katz v. Commissioner, 115 T.C. 329, 339 (2000).

<sup>6</sup> The regulation states as follows:

Q-E7. What issues may a taxpayer raise in a CDP hearing under section 6330 [relating to levies] if the taxpayer previously received a notice under section 6320 [relating to liens] with respect to the same tax and tax period and did not request a CDP hearing with respect to that notice?

[continued on next page]

C. Conclusion

Drawing all factual inferences against respondent, the Court concludes that there are no genuine issues or disputes of material fact in this case regarding whether petitioner is barred from challenging the existence or amount of his underlying liabilities and that respondent is entitled to judgment as a matter of law on that matter.

Premises considered, it is

ORDERED that respondent's Motion For Partial Summary Judgment, filed January 12, 2017, is granted. It is further

ORDERED that petitioner is barred in the present case from challenging the existence or amount of his underlying liabilities for the taxable (calendar) years 2010, 2011, and 2013 because he had a prior opportunity to do so.

**(Signed) Robert N. Armen**  
**Special Trial Judge**

Dated: Washington, D.C.  
July 12, 2017

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A-E7. The taxpayer may raise appropriate spousal defenses, challenges to the appropriateness of the proposed collection action, and offers of collection alternatives. The existence or amount of the tax liability for the tax for the tax period specified in the CDP Notice may be challenged only if the taxpayer did not already have an opportunity to dispute that tax liability. Where the taxpayer previously received a CDP Notice under section 6320 with respect to the same tax and tax period and did not request a CDP hearing with respect to that earlier CDP Notice, the taxpayer already had an opportunity to dispute the existence or amount of the underlying tax liability. [Emphasis added.]