

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DRC

ASG SERVICES, LLC,)
)
 Petitioner,)
)
 v.) Docket No. 14945-16 L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER

Respondent (the IRS) has moved to dismiss this “collection due process” (“CDP”) case filed under section 6330(d)(1), on grounds of mootness. The motion shows that, after the filing of the petition in this case, petitioner ASG Services, LLC (“ASG”), fully paid the liabilities at issue in August 2016, making further collection activity unnecessary. ASG opposed the IRS’s motion, maintaining that its liability challenge is not moot; and, in compliance with the Court’s order, the IRS filed a reply addressing and distinguishing this Court’s recent opinion in First Rock Baptist v. Commissioner, 148 T.C. No. 17 (May 18, 2017). Since then, the Court issued its opinion in Vigon v. Commissioner, 149 T.C. No. 4 (July 24, 2017). The Court will order the parties to make additional filings.

Petitioner should respond to the following three propositions, which are not holdings but are hypotheses:

1. ASG’s circumstance seems to be not like that of the petitioner in Vigon, in which the assertion of mootness was based on a showing that the liability had been abated, but in which the motion to dismiss for mootness was denied because the IRS reserved the right to reassess that liability. ASG’s case seems to be more like Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006), which “involved a liability that had been satisfied (not merely abated, as [in Vigon]), and the Commissioner had represented that there would be no further collection action

(rather than reserving the possibility of future collection, as [in Vigon]), leaving only the question (not present [in Vigon], and not present in Greene-Thapedi [or in ASG's case] when the petition was first filed) whether the taxpayer should get a refund--a question, already then pending in District Court, as to which we held the Tax Court lacked jurisdiction." Vigon, slip op. at 14, n.4. (We know of no refund suit filed by ASG.)

2. Without the existence of any possible prospect of future collection activity as to the liabilities at issue, this case would seem to become a mere suit for refund of the taxes alleged to have been overpaid. In further entertaining the case, we would be determining liability not incident to proposed or possible collection, as section 6330(c)(2)(B) contemplates, but solely for deciding whether ASG is entitled to a refund. Pursuant to section 6512(b), such a refund claim might be pursued in a deficiency case even after the IRS had conceded the deficiency that was the jurisdictional foundation of the case; but in the CDP context, no equivalent statute exists to permit the Tax Court to entertain a refund claim even where all collection issues have been conceded or have become moot. See Greene-Thapedi, 126 T.C. at 9-11.

3. If a CDP case has, in this manner, been reduced to a mere refund claim, but supposing that it could proceed as a refund case, it would seem that the petitioner would have to show that it had satisfied the threshold requirements for maintaining a refund suit. See Brady v. Commissioner, 136 T.C. 422, 427-431 (2011). Section 7422(a) would seem to require the filing of a timely administrative claim for refund, and section 6532(a)(1) would seem to require the petitioner to await the IRS's issuance of a notice of disallowance (or the passage of 6 months)--but ASG has not alleged compliance with either of these jurisdictional prerequisites. (And once ASG had met those prerequisites, it could presumably file a conventional refund suit in U.S. District court, pursuant to 28 U.S.C. sec. 1346(a)(1), or in the U.S. Court of Federal Claims, pursuant to 28 U.S.C. sec. 1491.)

If these hypotheses are correct, then it would seem we should grant the motion to dismiss and leave ASG to pursue its refund claim options. (The papers filed in this case indicate that the liabilities were paid in August 2016. ASG's attention is directed to section 6511, which give the deadlines for filing an administrative claim for refund.)

However, we note that ASG's opposition to the IRS's motion states that "Petitioner paid the amounts to stop the running of interest * * *." If this is

intended to assert that the August 2016 remittances were not payments (as reflected on the Forms 4340 attached to the IRS's motion) but instead were "deposits", see Rosenman v. United States, 323 U.S. 658 (1945), then ASG should document that assertion and explain how it would affect the mootness of this case.

It is

ORDERED that, no later than August 18, 2017, ASG shall file a supplemental response to the IRS's motion, in which ASG shall state whether it persists in opposing the IRS's motion to dismiss on grounds of mootness and, if it does so persist, shall (1) respond to the hypotheses stated above, (2) explain whether it contends the August 2016 remittances were "deposits" (and, if so, shall explain the effect on mootness), and (3) make any other response it wishes to make. It is further

ORDERED that, no later than September 1, 2017, the IRS shall file a supplemental reply to ASG's supplemental response or, if ASG fails to make any filing, shall file a status report.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
July 25, 2017