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UNITED STATES TAX COURT
WASHINGTON, DC 20217

MICHAEL HORWITZ & JUDITH A. HORWITZ,	)	
Petitioners,	)	
v.	)	Docket No. 13479-15L.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER AND DECISION

The amended petition[1] in this case was filed in response to a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code, sustaining a proposed levy action to collect petitioners' unpaid Federal income tax liabilities for 2010, 2011, and 2012. Pending before the Court is respondent's motion for summary judgment under Rule 121, filed on June 21, 2017 (motion).[2] In an Order dated June 22, 2017, the Court directed petitioners to file a response to respondent's motion, and they did so on July 19, 2017 (response).

Summary judgment "is intended to expedite litigation and avoid unnecessary and expensive trials." Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted where there is no genuine issue of material

[1]The original document filed as petitioners' petition did not comply with the Tax Court Rules of Practice and Procedure concerning form and content. Petitioners thereafter filed an amended petition. Petitioners resided in New Jersey at the time of the filing of both documents.

[2]Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code of 1986, as amended.

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fact and a decision may be rendered as a matter of law. Rule 121(a) and (b). The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences are viewed in a light most favorable to the nonmoving party. Craig v. Commissioner, 119 T.C. 252, 260 (2002); Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985). The party opposing summary judgment must set forth specific facts showing that a genuine question of material fact exists and may not rely merely on allegations or denials in the pleadings. Rule 121(d); Grant Creek Water Works, Ltd. v. Commissioner, 91 T.C. 322, 325 (1988).

Section 6330 provides that no levy may be made on any property or right to property of a taxpayer unless the Commissioner first notifies the taxpayer of the right to a hearing before the Internal Revenue Service (IRS) Office of Appeals (Appeals). Sec. 6330(a) and (b). At the hearing the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed levy, including appropriate spousal defenses, challenges to the appropriateness of collection actions, and offers of collection alternatives. Sec. 6330(c)(2)(A); Sego v. Commissioner, 114 T.C. 604, 608-609 (2000); Goza v. Commissioner, 114 T.C. 176, 180 (2000). A taxpayer may contest the existence or amount of the underlying tax liability if the taxpayer did not receive a statutory notice of deficiency for the liability or did not otherwise have an earlier opportunity to dispute it. Sec. 6330(c)(2)(B); see also Sego v. Commissioner, 114 T.C. at 609. Following the hearing Appeals must make a determination whether the Commissioner may proceed with the proposed collection action. We have jurisdiction to review Appeals' determination. Sec. 6330(d)(1).

Petitioners do not dispute the underlying tax liabilities for the years at issue and did not raise the issue in their section 6330 collection due process hearing (CDP hearing).[3] Where the validity of the underlying tax liability is not properly at issue, we review the Commissioner's administrative determination for abuse of discretion. Sego v. Commissioner, 114 T.C. at 610; Goza v. Commissioner, 114 T.C. at 182. An abuse of discretion occurs if the determination by Appeals is arbitrary, capricious, or without sound basis in fact or law. See Murphy v. Commissioner, 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Freije v. Commissioner, 125 T.C. 14, 23 (2005).

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[3]In his motion respondent specifically alleges that petitioner Judith A. Horwitz advised the settlement officer conducting the CDP hearing that petitioners were not disputing the underlying tax liabilities. Petitioners did not dispute that allegation in their response.

On January 12, 2015, respondent sent petitioners a Notice of Intent to Levy and Notice of Your Right to a Hearing concerning the collection of petitioners' unpaid Federal income tax liabilities for the 2010, 2011, and 2012 taxable years.[4] In response, petitioners filed Form 12153, Request for a Collection Due Process or Equivalent Hearing, which was received by respondent on February 3, 2015. Petitioners therein requested an installment agreement. Petitioners sent a cover letter with Form 12153, reiterating their request for an installment agreement and acknowledging that they "still have to complete additional 1040's." Petitioners added: "We have not yet completed returns requested in enclosed letter dated 12/14/14. Missing information is still being compiled by our accountant." Petitioners' Form 12153 did not raise any other issues.

On February 20, 2015, respondent sent petitioners a letter acknowledging receipt of their Form 12153 and informing them that "[a] collection alternative cannot be considered until all returns are filed." The letter informed petitioners that the IRS had no record of receiving returns for 2005, 2006, 2007, 2008, 2009, and 2013. The letter instructed: "To expedite your request, please file these returns by March 17, 2015."

On March 18, 2015, the settlement officer conducting petitioners' CDP hearing (settlement officer) sent petitioners a letter acknowledging that petitioners' case had been received for consideration by Appeals. On March 20, 2015, the settlement officer sent petitioners a letter scheduling a telephone conference for April 17, 2015. The letter stated that in order for an installment agreement to be considered, petitioners would need to complete a Form 433-A, Collection Information Statement (a copy of which was enclosed with the letter), and provide signed returns for 2008, 2009, 2013, and 2014. The letter requested that petitioners send the completed Form 433-A within 14 days and the signed returns within 21 days. The letter stated: "I can't consider collection alternatives without the information requested." The letter also included contact information for the settlement officer and asked that petitioners contact her with any questions or concerns.

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[4]This and the fact findings that follow, which are made solely for the purpose of deciding respondent's motion, are confined to the administrative record and the filings in this case, and are either stipulated, undisputed, or result from factual inferences resolved in favor of petitioners.

On March 31, 2015, petitioners sent Appeals a letter stating that April 17, 2015, was "not convenient" and requesting that the telephone conference be rescheduled to a date after April 18, 2015. On April 16, 2015, the settlement officer called petitioners and rescheduled the telephone conference for April 20, 2015.

On April 20, 2015, the settlement officer held a telephone conference with petitioner Judith A. Horwitz. During the hearing Mrs. Horwitz informed the settlement officer that petitioners were requesting an installment agreement. The settlement officer advised Mrs. Horwitz that she was unable to consider an installment agreement because petitioners were not in compliance with their filing obligations and because petitioners had not submitted a completed Form 433-A as requested. The settlement officer then informed Mrs. Horwitz that it was Appeals' determination to sustain the proposed levy. The following day, Appeals issued a notice of determination sustaining the levy.

We must decide whether it was an abuse of discretion for the settlement officer to deny petitioners' request for an installment agreement in lieu of the proposed levy.

Section 6159 authorizes the Commissioner to enter into written agreements allowing taxpayers to pay tax in installment payments if he deems that the "agreement will facilitate full or partial collection of such liability." Thompson v. Commissioner, 140 T.C. 173, 179 (2013). The decision to accept or reject installment agreements lies within the discretion of the Commissioner. Id. If an Appeals or settlement officer follows all statutory and administrative guidelines and provides a reasoned and balanced decision in his determination concerning a collection action, the Court will not reweigh the equities. See Fifty Below Sales & Mktg., Inc. v. United States, 497 F.3d 828, 830 (8th Cir. 2007); Murphy v. Commissioner, 125 T.C. at 320-321.

In their amended petition, petitioners state: "Need time to complete additional returns to request installment payments." In view of petitioners' pro se status, we construe their pleadings liberally and "interpret them to raise the strongest arguments that they suggest." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). We therefore interpret petitioners' statement as a claim that they were not given sufficient time to prepare their delinquent returns. Petitioners also state in their amended petition that "levy would create enormous hardship", which we interpret as a claim of undue hardship.

In their response to respondent's motion, petitioners make three additional allegations: (1) petitioners were at some point erroneously told by IRS personnel that by filing returns for 2010, 2011, and 2012, their filing obligations would be satisfied; (2) during the CDP hearing the settlement officer did not provide Mrs. Horwitz an adequate forum in which to present her claims; and (3) neither the settlement officer specifically nor the Commissioner generally has properly accounted for petitioner Michael Horwitz's health problems resulting from exposure to Agent Orange during his service in Vietnam in 1971 and 1972.

We hold that there is no genuine dispute as to any material fact and that respondent is entitled to judgment as a matter of law. First, assuming that petitioners were in fact given erroneous advice concerning their filing obligations, such advice was at most a misrepresentation of an issue of law, which cannot form the basis of an estoppel. See Metals Refining Ltd. v. Commissioner, T.C. Memo. 1993-115 (no estoppel where IRS agent's alleged acceptance of returns as constituting satisfactory filing was at most a misrepresentation of an issue of law).

Second, at the time of the settlement officer's determination, petitioners had not filed a Form 433-A as she requested in her March 20, 2015 letter. The March 20 letter plainly states that in order for the settlement officer to consider an installment agreement, petitioners must provide a completed Form 433-A. A copy of the form was enclosed with the March 20 letter. Yet, at the time of the hearing--one month from the date of the March 20 letter--petitioners still had not submitted a Form 433-A. We have consistently held that an Appeals officer does not abuse his discretion by denying a taxpayer's request for a collection alternative when the taxpayer fails to submit requested financial information, including a Form 433-A. See 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; see also sec. 301.6330-1(e)(1), Proced. & Admin. Regs. ("Taxpayers will be expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts and issues involved in the hearing.").

Even accounting for Mr. Horwitz's illness, we find nothing arbitrary or capricious about the settlement officer's determination upholding the proposed levy. First, petitioners have not claimed that Mrs. Horwitz herself had any medical problems during the period at issue that prevented her from completing and submitting a Form 433-A. Cf. Ranuio v. Commissioner, T.C. Memo. 2010-178 (illness of taxpayer's counsel's daughter does not excuse failure to provide Form

433-A information). Second, as noted, petitioners had one month to complete and submit a Form 433-A. There is no requirement that the Commissioner wait a certain amount of time before making a determination as to a proposed levy, and we have previously held that allowing a taxpayer a mere 14 days in which to submit a Form 433-A is not an abuse of discretion. See Shanley v. Commissioner, T.C. Memo. 2009-17. We therefore find no abuse of discretion here.[5]

A taxpayer alleging that collection of the liability would create undue hardship must submit a current Form 433-A to enable the Commissioner to evaluate the taxpayer's qualification for collection alternatives or other relief. See Picchiottino v. Commissioner, T.C. Memo. 2004-231; Newstat v. Commissioner, T.C. Memo. 2004-208. There is no dispute that petitioners failed to submit the Form 433-A detailing their financial circumstances that the settlement officer requested. Consequently, any failure of the settlement officer to consider a hardship claim was not an abuse of discretion, as she had no basis on which to assess hardship.

Petitioners have failed to raise a genuine issue of material fact regarding the appropriateness of the determination by Appeals to sustain the proposed levy to collect petitioners' unpaid Federal income tax liabilities for 2010, 2011, and 2012. Accordingly, because undisputed facts demonstrate that petitioners were ineligible to have an installment agreement or their hardship claim considered, we conclude that respondent is entitled to judgment in his favor as a matter of law.

On the basis of the foregoing, it is

ORDERED that respondent's motion for summary judgment, filed June 21, 2017, is granted. It is further

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[5]Petitioners' failure to submit a Form 433-A as requested is, standing alone, fatal to their right to have an installment agreement considered. We therefore need not and do not decide whether three months was a reasonable period of time for petitioners to file their delinquent returns.

ORDERED and DECIDED that respondent may proceed with the collection action for the taxable years 2010, 2011, and 2012, as determined in the notice of determination, dated April 21, 2015, upon which this case is based.

(Signed) Joseph H. Gale
Judge

ENTERED: **AUG 08 2017**