

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

ALBERT TESORIERO,)	
)	
Petitioner,)	
)	
v.)	Docket No. 20335-16 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER AND DECISION

This collection review case involving a proposed levy to collect petitioner’s outstanding income tax liabilities for 2004, 2006,¹ 2007, 2008, and 2010 is before the Court on respondent's Motion For Summary Judgment (motion), filed April 20, 2017, pursuant to Rule 121,² and supported by a declaration submitted by Darlene Macaulay Internal Revenue Service (IRS) Office of Appeals (Appeals Office) Settlement Officer (SO). Although the Court directed petitioner to file a response to respondent’s motion, petitioner failed to do so.³ By Order dated August 24, 2017, respondent’s motion was assigned for disposition to the undersigned. See sec. 7443A(b)(4), (c).

Petitioner resided in Texas at the time he timely filed his petition with the Court.

¹ On August 18, 2017, the Court granted respondent’s motion to dismiss petitioner’s tax year 2006 on grounds of mootness because petitioner paid year 2006 and the levy is no longer necessary.

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, in effect at all relevant times.

³ Notably, in the Order directing petitioner to respond to respondent’s motion, the Court expressly instructed petitioner to “point out the specific facts in dispute if * * * [he] disagrees with the facts set forth in respondent’s motion”, and to “state * * * [his] position on the disputed legal issues if * * * [he] disagrees with respondent’s argument as to the law.” To further assist petitioner, the Court attached to the order a copy of Q&As that the Court has prepared on the subject, “What is a motion for summary judgment? How should I respond to one?” In addition, the Order expressly notified petitioner that “[f]ailure to comply with this Order may result in the granting of respondent’s motion for summary judgment and a decision, if appropriate, may be entered against” him. Nevertheless, the Court considers the merits of respondent’s motion even though by failing to respond, petitioner waived his right to contest the motion. See Rule 121(d); see, e.g., Lunsford v. Commissioner, 117 T.C. 183, 187 (2001).

Section 6330 prescribes procedures for administrative and judicial review of respondent's levy actions. In rendering an administrative determination in a collection review proceeding under section 6330, the Appeals Office must verify that the requirements of all applicable laws and administrative procedures were met in processing the case. Sec. 6330(c)(1). The Appeals Office also must consider any issues raised by the taxpayer, including offers of collection alternatives, appropriate spousal defenses, and challenges to the appropriateness of the collection action. Sec. 6330(c)(2)(A). A taxpayer may challenge the existence or amount of his or her underlying tax liability if the taxpayer did not receive a notice of deficiency or did not otherwise have an opportunity to dispute such tax liability. Sec. 6330(c)(2)(B). Finally, the Appeals Office must consider whether the collection action balances the need for efficient collection against the taxpayer's concern that collection be no more intrusive than necessary. Sec. 6330(c)(3)(C).

If the taxpayer's underlying tax liability is properly in issue, the Court reviews the matter de novo. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). In the instant case, the record reflects that petitioner did not raise the issue of liability at the Collection Due Process (CDP) hearing. Petitioner stated on the Form 12153, Request for Collection Due Process or Equivalent Hearing, that, he "requests an alternative other than levy action" and checked the boxes for installment agreement, offer in compromise, and cannot pay balance. The Court will not consider a challenge to liability if it was not raised during the CDP hearing. Sections 301.6320-1(f)(2) Q&A-F3, 301.6330-1(f)(2) Q&A-F3 Proced. & Admin. Reg.; Giamelli v. Commissioner, 129 T.C. 107 (2007). Thus, the taxpayer's liability is not in dispute.

If the taxpayer's underlying tax liability is not in dispute, as is the case here, the Court reviews the Appeals Office's determination for abuse of discretion. Goza v. Commissioner, 114 T.C. at 181-182. An abuse of discretion occurs if the Appeals Office exercises its discretion "arbitrarily, capriciously, or without sound basis in fact or law". Woodral v. Commissioner, 112 T.C. 19, 23 (1999). Summary judgment may be granted with respect to all or any part of the legal issues in controversy "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Rule 121(a) and (b). In the instant case respondent's motion is well founded based on the averments therein and exhibits attached thereto. The Court concludes that there is no genuine dispute as to a material fact and that respondent is entitled to judgment as a matter of law sustaining the notice of determination on which this case is based.

The record reflects that petitioner requested an installment agreement (IA) and an offer-in-compromise (OIC), and currently not collectable (CNC) as collection alternatives on the Form 12153. On June 29, 2016, prior to the CDP hearing, the SO wrote to petitioner and requested that petitioner submit a Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals and a Form 656 Office in Compromise with an initial payment. Petitioner faxed an unsigned Form 433-A to the SO on July 18, 2016. The record also reflects that the SO scheduled a telephone CDP hearing with petitioner for July 21, 2016, and neither petitioner nor his authorized representative Sidney Goldin called the SO. Based upon the Form

433-A, which reported a monthly gross income of \$71,705, the SO calculated using the allowable expense calculator and determined a minimum monthly payment amount of \$44,981.

The SO left a voicemail with Mr. Goldin offering an IA of at least \$10,000 per month. Mr. Goldin responded on August 3, 2016 with a facsimile stating that \$500 per month is all petitioner could agree to because he intends on retiring soon. The SO responded that when and if petitioner's income changes, the payment could be lowered, but that the initial payment must be based upon his current income. Later that day, Mr. Goldin sent another facsimile re-affirming that all his client can commit to was \$500 per month and that "if you need to close the case and issue a determination notice that's your decision".

It is not an abuse of discretion for the settlement officer to reject a proposed installment agreement because it did not reflect a taxpayer's ability to pay. Boulware v. Commissioner, T.C. Memo. 2014-80, 2014 WL 1796342, at *12. Ability to pay is determined by comparing a taxpayer's monthly income to allowable expenses. Friedman v. Commissioner, T.C. Memo. 2013-44, 2013 WL 499876, at *9. Petitioner submitted a Form 433-A indicating a current monthly income of \$71,705 and the SO subtracted out the allowable expense for Dallas County, Texas, where petitioner resides and found a minimum monthly payment of \$44,981 per month, well in excess of the \$500 amount petitioner was willing to pay.

Finally, the record shows that the Appeals Office properly verified that the requirements of all applicable laws and administrative procedures were met in the processing of petitioner's case and that the collection action balances the Government's need for the efficient collection of taxes with petitioner's concerns that the collection action be no more intrusive than necessary. In sum, the Court concludes that the Appeals Office did not abuse its discretion in this case.

Premises considered, it is

ORDERED that respondent's Motion For Summary Judgment, filed April 20, 2017, is granted. It is further

ORDERED AND DECIDED that respondent's notice of determination concerning collection action(s) under section 6320 and/or section 6330, dated August 11, 2016, upon which this case is based, is sustained respondent may proceed with the proposed collection action (levy) in respect of petitioner's outstanding liabilities for 2004, 2007, 2008, and 2010.

(Signed) Peter J. Panuthos
Special Trial Judge

ENTERED: **AUG 25 2017**