

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DRC

VK&S INDUSTRIES, INC.,)
)
 Petitioner(s),)
)
 v.) Docket No. 23295-14 L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER OF DISMISSAL

This case is before us to review a determination and a supplemental determination by the Internal Revenue Service Office of Appeals (Appeals) that the Secretary's filing of a notice of levy with respect to petitioner's unpaid 2009 Federal income tax should stand. We review the determination, as supplemented, pursuant to section 6330(d)(1). LG Kendrick, LLC v. Commissioner, 146 T.C. 17, 36 (2016) (upon return of a case from Appeals on remand, we review the determination as supplemented), *aff'd*, 684 F. App'x 744 (10th Cir. 2017). Respondent has moved that we dismiss this case on the grounds of mootness (motion). Petitioner objects to our granting the motion. We will grant the motion.

Background

On December 23, 2013, respondent sent petitioner a Notice of Intent to Levy and Notice of Your Right to a Hearing (levy notice) regarding petitioner's unpaid 2009 Federal income tax. In response, petitioner requested a collection due process (CDP) hearing with Appeals. On August 27, 2014, respondent issued the determination sustaining the levy notice. Among other things, Appeals determined that petitioner could not raise the existence or amount of its underlying liability for tax for 2009 because it had received a statutory notice of deficiency with respect to that liability. Petitioner timely petitioned for us to review the determination. By order dated November 10, 2015, we remanded the case to Appeals for further consideration.

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On remand, Appeals Officer (AO) S. Matthew considered petitioner's challenge to the adjustments that respondent had made with respect to petitioner's 2009 income tax for bad debts, depreciation, K-1 loss, travel, meals and entertainment, and research and development. As a result of AO Matthew's consideration, Appeals abated \$33,796 of petitioner's 2009 Federal income tax liability of \$133,126. Petitioner's representative requested that Appeals make further adjustment for bad debts. AO Matthew reviewed the request but declined to recommend any further adjustment. The \$33,796 abatement eliminated petitioner's liability for any unpaid 2009 income tax and, in fact, generated a refund of \$5,925.41, which respondent paid to petitioner. In the supplemental determination, Appeals determined: "The proposed levy action for the 2009 income tax year will [not] be sustained as you no longer owe any balance for this tax year."

In support of the motion, respondent argues that, as there is no remaining case or controversy to sustain the Court's jurisdiction (i.e., no pending collection of unpaid tax), petitioner's claim is no longer justiciable and must be dismissed as moot. Respondent relies primarily on Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006).

Petitioner argues that, since it was not allowed to raise its underlying tax liability in its initial CDP hearing, Greene-Thapedi is distinguishable.

Discussion

In Greene-Thapedi v. Commissioner, 126 T.C. at 8, we said that, where a liability was fully paid and "the proposed levy is moot, petitioner has no independent basis to challenge the existence or amount of * * * [the] underlying tax liability." In other words, where the proposed levy is moot because the liability giving rise to the collection action has been satisfied, we lack jurisdiction in a section 6330 proceeding either to determine an overpayment or to order a refund or credit of taxes. Id. at 9; see also MacDonald v. Commissioner, T.C. Memo. 2009-240, 2009 WL 3399256, at *2. We did not in Greene-Thapedi, however, rule out the possibility that we might have to consider in a section 6330 proceeding whether the taxpayer had paid more than was owed where such a determination was necessary for a correct and complete determination of whether the proposed collection action should proceed. See MacDonald v. Commissioner, 2009 WL 3399256, at *3. As we explained in Greene-Thapedi v. Commissioner, 124 T.C. at 11, n.19:

Conceivably, there could be a collection action review proceeding where (unlike the instant case) the proposed collection action is not moot and where pursuant to sec. 6330(c)(2)(B), the taxpayer is entitled to challenge "the existence or amount of the underlying tax liability". In such a case, the validity of the proposed collection action might depend upon whether the taxpayer has any unpaid balance, which might implicate the question of whether the taxpayer has paid more than was owed.

Apparently, petitioner would place itself within the special circumstance described in the quoted footnote from Greene-Thapedi on the ground that, during its initial CDP hearing, Appeals would not allow it to raise the amount of its underlying liability for tax. While that may be true, Appeals apparently did give it that opportunity during the hearing on remand. In any event, since there is no unpaid balance of petitioner's 2009 tax liability that respondent might levy to collect, petitioner is without the special circumstance described in the quoted footnote. We agree with respondent that we lack jurisdiction to allow petitioner to raise his underlying liability for tax.

Conclusion

As we said, we will grant the motion. It is, therefore,

ORDERED that respondent's motion to dismiss, as supplemented, is granted, and this case is dismissed on the ground of mootness.

**(Signed) James S. Halpern
Judge**

Entered: **AUG 31 2017**