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UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOHN CURRAN & CAREY CURRAN,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 7500-16 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	
	)	
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O R D E R

This is a collection review case involving a proposed levy to collect petitioners' outstanding income tax liability for the taxable (calendar) year 2011. See generally sec. 6330; Rules 330-334.[1] Pending before the Court is respondent's Motion For Summary Judgment, together with a supporting Memorandum of Law and a supporting Declaration of respondent's Appeals settlement officer, all filed January 11, 2017. Thereafter, on April 7, 2017, petitioners filed an Opposition to respondent's motion, supported by the Declaration of petitioners' representative in the administrative proceeding. Respondent's Motion For Summary Judgment was assigned to the undersigned for disposition by Order of the Chief Judge dated July 3, 2017. Most recently, on August 30, 2017, respondent filed a First Supplement to his pending Motion For Summary Judgment.

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended and in effect at all relevant times. All Rule references are to the Tax Court Rules of Practice and Procedure.

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I. Background

Petitioners listed their address on the Petition that was filed to commence the present case as a street address on Allenhurst Blvd. E. in Cincinnati, Ohio (hereinafter, the Cincinnati, Ohio address). Such address has remained petitioners' address-of-record throughout this case.

Petitioners filed their 2011 Federal income tax return on or about November 13, 2012, and reported zero income tax liability. Petitioner did not report on their return any part of the $97,793 of disability benefits that Mr. Curran received from Prudential Insurance Company of America (Prudential Insurance) in 2011 and that was reported by it on a Form W-2, Wage And Tax Statement, for 2011 as "wages, tips, other comp.". According to a February 21, 2017 letter from Prudential Insurance to Mr. Curran, he received an overpayment of his disability benefits in the amount of $37,368 for 2011. The letter acknowledges Mr. Curran's repayment of the "overpaid disability benefits" he received from 2010 through 2015, specifically including the $37,368 overpayment received in 2011.

On December 16, 2013, respondent sent a duplicate original notice of deficiency for 2011 to each petitioner. In the notice respondent determined a deficiency in income tax of $15,383, an accuracy-related penalty under section 6662(a) of $3,077, and a failure to file addition to tax ("penalty") under section 6651(a)(1) of $769. Each notice of deficiency was sent by certified mail to each petitioner at the Cincinnati, Ohio address and was delivered to that address. However, petitioners did not commence an action for redetermination with this Court challenging the notice of deficiency. See sec. 6213(a). Accordingly, the determined deficiency, penalty, and addition to tax, as well as statutory interest, were assessed, see sec. 6213(c), and notice and demand for payment was made, see sec. 6303(a).

Preliminary collection notices were issued, but the amount owing remained unpaid. Therefore, on August 12, 2014, respondent issued a Final Notice Of Intent To Levy And Your Right To A Hearing to petitioners at their Cincinnati, Ohio address. In response, petitioners' representative timely submitted on their behalf a Form 12153, Request For Collection Due Process Or Equivalent Hearing.[2] The Form 12153 listed petitioners' address as the Cincinnati, Ohio address. On the

[2] Petitioner's representative executed the Form 12153 as their authorized representative, identifying himself (among several other designations) as a CPA, CFE, CEO, CFO, and "Director Litigation Support".

Form 12153 the box for "installment agreement" was checked as a collection alternative, and a letter contesting the underlying liability was attached to the form.

On November 10, 2014, respondent's Appeals settlement officer sent a letter to petitioners scheduling a telephone conference for December 16, 2014, and requested that petitioners provide financial information required for a collection alternative. On January 5, 2015, the settlement officer sent a letter to petitioners informing them that she was unable to reach them for the scheduled telephone conference. Additionally, she requested that petitioners provide financial information required for a collection alternative and notified petitioners that because they had received a notice of deficiency they would be unable to challenge their underlying liability.[3]

On January 18, 2015, petitioners' representative contacted the settlement officer and requested a face-to-face hearing. Thereafter, a new settlement officer was assigned, who then sent a letter to petitioners scheduling a face-to-face hearing in the Cincinnati, Ohio Appeals Office for July 10, 2015. The letter also requested that petitioners provide certain financial information.

Throughout the administrative process petitioners submitted financial information to the settlement officer, who reviewed petitioners' requested collection alternative but referred petitioners' challenge to the underlying liability to an Appeals officer in respondent's Cincinnati, Ohio Appeals Office. In an August 25, 2015 letter to petitioners' representative, the Appeals Officer concluded that the payments received by petitioner in 2011 "are fully taxable", stating in part as follows:

> Section 104(a)(3) of the 1986 Code is indeed the provision that applies to these types of payments. As you noted in your fax, that section addresses the situation at hand, to wit, when the employer and [sic] is paying for the coverage in the plan, either by way of a nontaxable payment on behalf of the employee or by paying directly for the coverage. The text of section 104(a)(3) states that exclusion applies only to such payments "other than amounts received by an employee, to the extent such amounts (A) are attributable to

[3] In that regard the settlement officer's letter stated that "Your are precluded from raising the liability issue within the Office of Appeals as the notice of deficiency which gave you prior opportunity was dated December 26 [sic], 2013 and mailed certified to you at the same address the collection due process was from."

> contributions by the employer which were not includable in the gross income of the employee, or (B) are paid by the employer." Therefore, to prevail in excluding the payments under Section 104(a)(3), the taxpayer will need to show that he paid for the coverage with after-tax dollars. The facts that you stated, which are recited above, i.e. that the employer Jet Blue was paying for the coverage and that employees were not, is dispositive of the issue of exclusion. To be clear, the facts that you are stating unequivocally lead to the conclusion that the payments may not be excluded from gross income. They are fully taxable.

The Appeals Officer afforded petitioners' representative several opportunities to respond, but he never did. Accordingly, by letter dated November 10, 2015, the Appeals Officer advised the representative, in part, as follows:

> I have allowed extensions of time to reply on a number of occasions. Your fax of October 23, 2015 states that your reply will be sent October 27, 2015. To date, I have not received your reply.
>
> I have considered the information in the administrative file and have concluded that there is no doubt as to the taxpayer's liability. The analysis that I communicated by letter dated August 25, 2015 explains why there is not doubt as to liability. This case is being worked by a Settlement Officer; it will be returned to her for disposition of the case.

The administrative process culminated in the issuance of a Notice Of Determination Concerning Collection Action(s) Under 6320 and/or 6330, dated February 25, 2016, which sustained the proposed levy. The Summary Of Determination stated in pertinent part as follows:

> You submitted a Collection Due Process request under Internal Revenue Code 6330 regarding the proposed levy action. The request was received timely. You raised the issue of liability. Your issue was considered and the determination was made that there was no doubt as to liability. You raised the issue of an installment agreement as a collection alternative. You did not provide the financial documents necessary to consider your request. The proposed levy action is sustained.

The determination regarding the liability issue was addressed in detail in an Appeals Case Memorandum authored by the Appeals Officer and approved by his Appeals Team Manager in an Appeals Transmittal And Case Memo dated February 24, 2016. Pertinent portions of the Appeals officer's Appeals Case Memorandum follow:

> Section 104(a)(3) states that generally, accident and health insurance benefits are not taxable with certain exceptions. This section specifically prescribes an exception when the payments "are attributable to contributions by the employer which were not includible in the gross income of the employee, or [] are paid by the employer". What this means is that if the employer contributed to a sick leave plan, and the taxpayer was not required to include the contributions in his gross income, or, on the other hand, if the employer directly paid the sick payments to the employee, then the sick payments are not excluded by section 104 and are therefore fully taxable.
>
> In the present case, the employer did not pay the benefits directly; instead they were paid pursuant to the employer's sick leave plan by Prudential. The employer made contributions to the plan from which the sick pay benefits were paid. The employer did not include these contributions in the employee's W-2 form and the employee was not required to report the contributions as income. Under the text of section 104(a), these payments are fully taxable.

In response to the notice of determination, petitioners timely commenced the present action. Petitioners continue to challenge their underlying tax liability and contend that they submitted all the financial information requested by the settlement officer.

II. Discussion

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). 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, if any, show that there is no genuine dispute or issue as to any material

fact and that a decision may be rendered as a matter of law." Rule 121(a) and (b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994); Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

A. Underlying Liability

Section 6330(c)(2)(B) permits a taxpayer to challenge his or her underlying liability only if the taxpayer did not receive a notice of deficiency or did not otherwise have an opportunity to dispute such tax liability. In the present case the record demonstrates that respondent sent petitioners a properly addressed notice of deficiency for 2011 and that such notice was delivered to petitioners' Cincinnati, Ohio address. Hence, petitioners had an opportunity to dispute the deficiency, penalty, and addition to tax by commencing an action for redetermination with this Court. See sec. 6213(a). Petitioners failed to do so, however, and they are therefore statutorily barred from challenging their tax liability in the present collection review case.

Additionally, even though petitioners did not have the right to raise the existence or amount of the underlying tax liability before the settlement officer, the settlement officer did provide petitioners an administrative hearing and an Appeals officer considered petitioners' arguments regarding the underlying liability. Such approach does not constitute a waiver of the section 6330(c)(2)(B) bar and does not empower this Court to review petitioners' challenge to their underlying tax liability in the present proceeding. See Behling v. Commissioner, 118 T.C. 572, 577-579 (2002); sec. 301.6330-1(e)(3), Q & A-E11, Proced. & Admin. Regs.

Even if petitioners were not statutorily barred from challenging the underlying tax liability, it is clear that their arguments are unavailing. Petitioners cite section 104(a)(3) to support their contention that the disability benefits they received in 2011 are not taxable. Section 104(a)(3) provides that amounts received through accident and or health insurance for personal injuries or sickness may be excluded from income, if the taxpayer paid the premiums or his employer paid the premiums and the premiums were includable in the taxpayer's gross income. Petitioners did not challenge, and have not challenged, the Appeals officers' finding that Mr. Curran's employer paid for the coverage and that the premiums were not included in Mr. Curran's gross income. See Rule 121(d) and in particular the final two sentences thereof. Based on the record before the Court it appears that Mr. Curran's employer paid for the coverage and that the premiums were not includable in Mr. Curran's gross income. Therefore, section 104(a)(3) does not serve to exclude any amount from gross income.

Petitioners also contend that "an overpayment sent by Prudential for 2011 of $37,368 gives rise to the doubt of liability, because this claim of right letter sets forth a refund or a credit for Petitioners". Where a taxpayer is required to include in income amounts received under a claim of right but in a subsequent year is required to repay a portion of the amounts or use the amounts to discharge the obligation of the transferor of the funds, the taxpayer may then be entitled to a deduction or credit in the later year to the extent allowed by law. See sec. 1341; Krim-Ko Corp. v. Commissioner, 16 T.C. 31, 40 (1951). However, the amounts required to be included in the taxpayer's income for the year of receipt remain unaffected. Nordberg v. Commissioner 79 T.C. 655, 664 (1982), aff'd without published opinion, 720 F.2d 658 (1st Cir. 1983). In the present case petitioners received taxable disability benefits of $97,793 from Prudential Insurance in 2011. The year in which petitioners repaid a portion of their disability benefits – as per the February 21, 2017 letter from Prudential Insurance – is not properly at issue before the Court. Therefore, petitioners reliance on the "claim of right letter" that they received from Prudential Insurance is misplaced.[4]

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[4] The February 21, 2017 letter from Prudential Insurance states in part as follows:

> We are sending this Claim of Right letter to provide you with the information necessary for you to either claim credit on your current income tax return for taxes paid on your prior income tax return(s) or, take a deduction on your current income tax return.
> * * *
> If you previously included the overpayment in your reported income, you may be entitled to a deduction on your current year tax return. You may report the overpayment as an income tax deduction this year under the Claim of Right if you:
>
> 1. Had to repay the amount that was previously included in your income, and
> 2. Included the repayment in your gross income because you thought you had an unrestricted right to it.

[Emphasis added.]

B. Collection Alternative

Petitioners requested an installment agreement as a collection alternative on their Form 12153. In response, the settlement officer requested financial information. At this time the record is unclear as to what financial information petitioners submitted to the settlement officer although petitioners contend that they submitted all of the financial information that had been requested of them. In sum, viewing the facts in a light most favorable to petitioners as the Court is obliged to do given the nature of the pending motion, the Court concludes that there is a genuine issue or dispute of material fact.

In order to give effect to the foregoing, it is hereby

ORDERED that respondent's Motion For Summary Judgment, filed January 11, 2017, and supplemented August 30, 2017, is granted in part in that petitioners' are statutorily barred from challenging the existence or amount of their underlying tax liability for 2011. It is further

ORDERED that respondent's aforementioned motion, as supplemented, is denied in part in that there is genuine issue or dispute of material fact regarding whether petitioners furnished all of the financial information requested by respondent's settlement officer reasonably necessary to support a collection alternative in the form of an installment agreement.

(Signed) Robert N. Armen
Special Trial Judge

Dated: Washington, D.C.
September 20, 2017