UNITED STATES TAX COURT
WASHINGTON, DC 20217

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SCOTT KIMREY GOLDSMITH,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 21235-16 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
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ORDER AND DECISION

This case was on the September 18, 2017 St. Paul, Minnesota trial calendar, and is an appeal from the Commissioner's notice of determination that sustained the filing of a federal tax lien against Goldsmith's property for unpaid employment taxes for thirteen quarters dating back to 1999.[1] Appellate venue lies in the Eighth Circuit, so the Court will follow *Robinette v. Commissioner*, 439 F.3d 455 (8th Cir. 2006), and review the determination on the basis of the administrative record. *See id.* at 460.

The parties dispute the contents of the administrative record, and Goldsmith wants to add three items to it. Both parties have moved for summary judgment; in analyzing the Commissioner's motion, we will assume that Goldsmith's proposed additions to the administrative record *are* part of the administrative record.

[1] Employers must generally deduct and withhold employment taxes -- including income tax, Social Security tax, and Medicare tax -- from their employees' paychecks. I.R.C. §§ 3102(a), 3402(a); *Slodov v. United States*, 436 U.S. 238, 242-43 (1978). The income tax withheld is a credit against the income tax owed by the taxpayer. *Slodov*, 436 U.S. at 243. The Social Security and Medicare taxes have two portions -- one paid by the employer and one paid by the employee; the employer pays its portion and withholds the employee's. I.R.C. §§ 3101, 3102(a), 3111.

Goldsmith has practiced law in the past. We will therefore assume the parties' familiarity with the background facts of the case and the general rules on summary-judgment motions.

Background

It is undisputed that this case arises from a notice of determination that the IRS issued about thirteen quarters of employment taxes that Goldsmith allegedly owes. This debt dates back to 1999, and arises from his former law practice, Goldsmith & Associates. We have previously described the problems that Goldsmith and his firm encountered all those years ago in a related case, *Goldsmith v. Commissioner*, 113 T.C.M. 1090 (2017). They led to Goldsmith's indictment and conviction for, among other charges, failure to pay over income and FICA taxes owed for the 1999-2002 tax years. *See United States v. Goldsmith*, 486 F.3d 404 (8th Cir. 2007), *vacated and remanded*, 552 U.S. 1089 (2008).

This case concerns only employment taxes that the Commissioner says Goldsmith owes for thirteen quarters. And not quite the employment taxes themselves -- owed apparently by the now inactive law firm -- but trust-fund-recovery penalties that are owed by Goldsmith himself.[2]

Before holding an individual responsible for these penalties, the IRS typically sends a letter -- Letter 1153 -- in which it "proposes" that it will assess a trust-fund-recovery penalty.[3] This also lets a taxpayer get an administrative

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[2] The withheld income tax and the employee's withheld share of Social Security and Medicare taxes are held in trust for the United States. I.R.C. § 7501(a). This is called the "trust fund" system, and taxes that employers withhold from their employees' wages are known as "trust fund taxes." *Slodov*, 436 U.S. at 243; I.R.C. § 7501(a). The Commissioner may collect unpaid employment taxes from a responsible person within the company; i.e., someone who was required to pay over the tax. I.R.C. §§ 6671(b), 6672(a). The money that's assessed and collected this way is called "trust-fund-recovery penalt[ies]." *United States v. Bisbee*, 245 F.3d 1001, 1005 (8th Cir. 2001); I.R.C. § 6672(a).

[3] "Assessment" is an important concept in tax procedure. It is the recording of a tax debt in the IRS's records, I.R.C. § 6203, and it enables the IRS to use collection methods (such as liens and levies) without having to go to court. I.R.C. §§ 6321, 6331; *see Bull v. United States*, 295 U.S. 247, 260 (1935). The IRS generally has to give taxpayers whom it thinks owe *income* tax a notice of deficiency before assessing, which gives them the opportunity to challenge the proposed tax in Tax Court. I.R.C. § 6213(a). But trust-fund-recovery penalties are different:

hearing with a part of the IRS called the Appeals Office before any penalty is assessed. *See Bland v. Commissioner*, 103 T.C.M. 1459, 1462 (2012). Goldsmith got his Letter 1153 and asked for a hearing.

At the hearing he argued that he had filed returns for each of the thirteen quarters. This, he argued, meant that the statute of limitations for assessing the tax, which begins to run when a tax return is filed, I.R.C. § 6501(a), and ends three years later, *id.*, had run out. A blown statute of limitations means no collectible tax debt.[4] The IRS officer who conducted the hearing concluded that Goldsmith was liable for the trust-fund-recovery penalty and had not in fact filed the employment taxes. Goldsmith received a letter from the IRS in October 2014 that rejected his pre-assessment challenge and told him the matter would be turned over to IRS Collections.

And so it was. The IRS told Goldsmith that it would try to collect these penalties by both lien and levy. The Commissioner issued both a notice of a filing of federal tax lien and a notice of intent to levy to try to collect these unpaid debts.[5] The Code, in sections 6320 (for liens) and 6330 (for levies) gives taxpayers the right to a hearing when they get these notices.

Goldsmith exercised his right to a hearing by filing the proper form. He wanted to argue again that he didn't owe the taxes because he had turned them in

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The Code makes them directly assessable, which means no judicial review before they are assessed. *See, e.g.*, *Wilt v. Commissioner*, 60 T.C. 977, 978 (1973).

[4] Goldsmith's argument is that he gave the returns to an IRS criminal investigator, which is "filing" under *Dingman v. Commissioner*, 101 T.C.M. 1562 (2011). Although, as we explain below, we need not reach the legal merits of this argument, this is a misreading of *Dingman*. A return is "filed" when it is received by the IRS at the proper service center. *See Winnett v. Commissioner*, 96 T.C. 802, 808 (1991). The point of *Dingman* is that -- *even though the taxpayer didn't file it in the right place* -- the returns somehow ended up in the right place and were processed by the IRS. *See Dingman*, 101 T.C.M. at 1570. That's what made those returns *filed* returns. There are no records of Goldsmith's returns ever ending up in the right service center.

[5] Once the Commissioner assesses a tax, he can collect any unpaid portion of it by filing liens against, and levying upon, a taxpayer's property. *See* I.R.C. §§ 6321, 6331(a). But first he has to notify the taxpayer whose property he wants to take. *See* I.R.C. § 6330(a)(1). He does this by sending the taxpayer standard forms -- the CDP Notices -- to tell the taxpayer that he has filed a Notice of Federal Tax Lien or that he intends to levy upon the taxpayer's property (a Notice of Intent to Levy). *See* 26 C.F.R. §§ 301.6320-1(a)(1), 301.6330-1(a)(1).

to the IRS criminal investigator. The first IRS officer who was assigned to run the hearing believed him, and included in her case notes her observation that "[b]ased on this and the court case sited [sic] to be in the taxpayers [sic] favor with the similar situation [i.e., *Dingman v. Commissioner*, 101 T.C.M. 1562 (2011)], I believe the taxpayer can raise the liability and the assessment of the TFRP is not valid."

But this officer never wrote up her observations and conclusions into a notice of determination. She was, for some reason (and here we'll draw an inference in Goldsmith's favor and assume it had to do with her drawing these conclusions), taken off the case. The next officer worked on it for a while, but then realized he had had prior involvement in the matter. This meant that he should never have been assigned to it at all. *See* I.R.C. §§ 6320(b)(3), 6330(b)(3).

It finally came to rest with Settlement Officer Curtis Megyesi. Officer Megyesi took his own look through the fast-growing files and concluded that Goldsmith's turning over the returns to the criminal investigator was not a "filing" and that his prior hearing at IRS Appeals before the IRS assessed the trust-fund-recovery penalties meant that he didn't have the right to challenge his liability for them again in a CDP hearing.

Megyesi then wrote up and got his manager's approval to send Goldsmith the notice of determination that led to this case. Here's the key passage:

> [Y]ou already had a prior opportunity to challenge the liability during a prior appeal of the IRS' proposal to assess the Trust Fund Recovery Penalty against you for the periods at issue during this hearing **and** during an appeal regarding the assessment of employment tax returns for Goldsmith & Associates, Ltd.

Megyesi did not sustain the notice of intent to levy because of Goldsmith's straitened financial circumstances, but he did sustain the lien.

Goldsmith timely filed an appeal to our Court. Both parties moved for summary judgment.

Discussion

1. The first point of contention is what the Court should look at as the IRS's "determination". Goldsmith argues that the first settlement officer's notes are a

determination -- and a determination in his favor because she concluded that he could challenge the underlying liability, and that the statute of limitations had run because the criminal investigator should have turned over the returns in his possession for processing in the normal course.

In Goldsmith's view, that should be the end of that: "Respondent was stuck. The decisions, once made, could not be unmade. The bell has been rung, and the cow has left the barn * * *. Petitioner submits that the statutes require that this Court give full force and effect to her findings, decisions and agreements."

But is Goldsmith right? He is certainly right that sections 6320 and 6330 do not define the word "determination". The applicable regulation does, however:

> Q-E8. How will Appeals issue its determination?
>
> A-E8. (i) Taxpayers will be sent a dated Notice of Determination by certified or registered mail. The Notice of Determination will set forth Appeals' finding and decisions.

26 C.F.R. § 301.6330-1(e)(3).

This tells us that the "determination" that we analyze is the determination that we need to establish our jurisdiction in the first place -- not an earlier draft, not preliminary notes, not an outline an IRS officer jots down to help her write a Notice of Determination. As we said in *Lunsford v. Commissioner,* 117 T.C. 159, 164 (2001), "[o]ur jurisdiction under section 6330(d)(1)(A) is established when there is a written notice that embodies a determination to proceed with the collection of the taxes in issue, and a timely filed petition." And this has to be what "determination" means under I.R.C. § 6330(d)(1), which gives a taxpayer "within 30 days of a determination under this section [the right to] petition the Tax Court for review of such determination" -- if it were anything preliminary to this, how would a taxpayer even know he had a right to appeal or what to appeal from?

So, the first IRS officer's entries on her case activity report are not the determination that is before us.

2. This then leads us to the validity of the notice of determination here. Our scope of review is the administrative record. *See Robinette*, 439 F.3d at 460. Our standard of review is abuse of discretion, which means that we look to see if the Commissioner's decision was based on an error of law or rested on a clearly

erroneous finding of fact, or whether he ruled irrationally. *See Fargo v. Commissioner*, 447 F.3d 706, 709 (9th Cir. 2006), *aff'g* 87 T.C.M. 815 (2004); *United States v. Sherburne*, 249 F.3d 1121, 1125-26 (9th Cir. 2001).

Goldsmith's challenge is a purely legal one. He says that he can challenge his liability for the trust-fund-recovery penalties and the Commissioner says he can't because he had a prior opportunity to do so.

The answer is in the regulations. 26 C.F.R. section 301.6330-1(e)(3) A-E2 tells us that "[a]n opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability."

That's just what Goldsmith received when he responded to the IRS's sending him form Letter 1153 by asking for a preassessment conference to challenge his responsibility for the trust-fund-recovery penalties at issue here. And so long as he had this opportunity *before* his CDP hearing got under way -- and there's no dispute that he did -- he doesn't get to challenge his liability again in the CDP hearing or on appeal from the notice of determination. *Mason v. Commissioner*, 132 T.C. 301, 317-18 (2009); *see also, e.g.*, *Hassel Family Chiropractic, DC, PC v. Commissioner*, 368 F. App'x 695, 696 (8th Cir. 2010), *aff'g* 97 T.C.M. 1662 (2009); *Bishay v. Commissioner*, 109 T.C.M. 1543, 1546 (2015); *Orian v. Commissioner*, 100 T.C.M. 356, 359 (2010).

We conclude that the settlement officer committed no legal error, and therefore did not abuse his discretion, in reaching the same result in the notice of determination.

It is therefore

ORDERED that respondent's motion for summary judgment is granted. It is also

ORDERED that petitioner's motion for summary judgment is denied. It is also

ORDERED and DECIDED that respondent may proceed with the collection of petitioner's Trust Fund Recovery Penalty liabilities for all four quarters of 1999, 2000, and 2001; and the first quarter of 2002, as described in the Notice of

Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code dated August 24, 2016.

(Signed) Mark V. Holmes
Judge

ENTERED: **SEP 29 2017**