UNITED STATES TAX COURT
WASHINGTON, DC 20217

MARK MARINEAU,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 9469-16 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

On April 25, 2016, petitioner timely filed a petition to review the Internal Revenue Service's (IRS)[1] Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330[2] (notice of determination). The notice of determination sustained a proposed levy relating to petitioner's unpaid tax liability for 2012.

On June 23, 2016, respondent filed a Motion for Summary Judgment (respondent's motion) pursuant to Rule 121. Respondent's motion is supported by a declaration submitted by Mary G. Hallman, IRS Office of Appeals (Appeals Office) settlement officer.

By order dated July 5, 2016, the Court directed petitioner to file a response to respondent's motion. Petitioner did not file a response. Instead, on October 19, 2016, petitioner filed a Motion for Summary Judgment (petitioner's motion), wherein he objects to respondent's motion. On January 23, 2017, respondent filed

[1]The Court uses the term "IRS" to refer to administrative actions taken outside of these proceedings. The Court uses the term "respondent" to refer to the Commissioner of Internal Revenue, who is the head of the IRS and is respondent in this case, and to refer to actions taken in connection with this case.

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

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a response in which he objected to petitioner's motion. Petitioner filed a reply to respondent's response on March 24, 2017.

Respondent's motion and petitioner's motion were assigned for disposition to the undersigned on July 5, 2017. See sec. 7443A(b)(4), (c). The Court ordered respondent to file a supplement to his motion to explain the disparity between the address listed in the Form 3877 attached to his motion and at which the notice of deficiency was mailed and the attempted delivery of the notice of deficiency to a different city and state. The Court also ordered petitioner to file a response to respondent's supplement on or before September 14, 2017. On July 28, 2017, respondent filed a First Supplement to Motion For Summary Judgment, supported by a declaration submitted by Jeremy D. Cameron, respondent's counsel in this case. Petitioner has not filed a response to respondent's supplement.

Upon review of the pleadings, the parties' motions, the parties' responses, petitioner's reply, and the supporting documents attached thereto, the Court concludes that there is a genuine issue of material fact as to whether the IRS mailed the notice of deficiency for 2012 to petitioner at his last known address. Accordingly, the Court denies respondent's motion and petitioner's motion.

Petitioner resided in Florida when he filed his petition.

Background

The IRS prepared a substitute for return for 2012 pursuant to section 6020(b) when petitioner failed to file a Federal income tax return for that year. On June 8, 2015, petitioner mailed a letter addressed to "Internal Revenue Service, 1111 Constitution Ave., N.W., Washington, DC 20224", the IRS headquarters. In that letter petitioner stated that the IRS should consider the letter an official notification of his change of address and requested that the IRS update his records to reflect his then-current mailing address of P.O. Box 203, Fraser, Michigan 48026 (Fraser, MI address).

On June 18, 2015, the IRS mailed to petitioner by certified mail a notice of deficiency for 2012 dated June 22, 2015. The notice of deficiency was addressed to petitioner at 3311 Massena Drive, Pensacola, Florida 32536 (Pensacola, FL address). The United States Postal Service (USPS) attempted delivery of the notice of deficiency on June 23, 2015, to a "Roseville, MI 48066" location (Roseville, MI location) and left a notice. Respondent has not explained why the USPS attempted delivery of the notice of deficiency to the Roseville, MI location

even though the notice of deficiency was addressed to the Pensacola, FL address. The notice of deficiency remained unclaimed, and on July 21, 2015, the USPS returned it to the IRS.

Petitioner did not file a petition for redetermination of the notice of deficiency for 2012. On November 2, 2015, respondent assessed the tax reported on the substitute for return, additions to tax under sections 6651(a)(1) and (2) and 6654, and interest and sent petitioner a notice and demand for payment letter for the assessments. Petitioner did not pay the tax liability for 2012.

The IRS mailed to petitioner a Notice of Intent to Levy and Notice of Your Right to a Hearing (notice of intent to levy) dated December 14, 2015, with respect to petitioner's unpaid tax liability for 2012. The notice of intent to levy was mailed to petitioner at the Pensacola, FL address.

Petitioner filed a Form 12153, Request for Collection Due Process or Equivalent Hearing, challenging the proposed levy. Petitioner listed his address as the Pensacola, FL address. In the Form 12153 petitioner did not check any of the boxes to propose a collection alternative. Instead, in the "other" section petitioner wrote:

> I am requesting a Face-to-Face CDP in an office closest to me, which I will record. I don't believe I am liable for the assessed tax and I should NOT be held responsible for the penalties. I would like verification of whether or not the IRS followed all procedures required by law. If it is proven that I owe the tax then I would like to discuss all the collection options available to me.

Petitioner's collection due process (CDP) hearing request was assigned to the settlement officer (SO), who verified that she did not have prior involvement with petitioner for the tax or tax year at issue. By letter dated February 2, 2016, the SO notified petitioner that a telephone CDP hearing was scheduled for March 1, 2016. The SO's letter was mailed to petitioner at the Pensacola, FL address. In that letter the SO also notified petitioner that in order to have a face-to-face CDP hearing he needed to provide (1) a Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, (2) a tax return for 2012, and (3) tax returns for 2013 and 2014 or to notify her if he was not required to file a tax return for either year.

On February 18, 2016, petitioner sent the SO a letter, acknowledging receipt of her letter dated February 2, 2016. Petitioner listed his address as the Pensacola, FL address in the letter. Petitioner again requested a face-to-face CDP hearing, stating: "In my original Request for Collection Due Process Hearing, I specifically requested for a face-to-face Collection Due Process Hearing closest to me. I am under the impression that I am entitled to one if I did specifically request one". Petitioner did not attach to his letter a Form 433-A or any of the requested tax returns.

In response to petitioner's letter, the SO mailed to petitioner at his Pensacola, FL address a second letter dated February 23, 2016. In that letter the SO directed petitioner to refer to her letter dated February 2, 2016, for the requirements to qualify for a face-to-face CDP hearing and included a copy of that letter.

Petitioner did not call the SO on March 1, 2016, for the scheduled CDP hearing and did not submit the requested Form 433-A or tax returns.

The Appeals Office issued the notice of determination, dated March 17, 2016, sustaining the proposed levy with respect to petitioner's unpaid tax liability for 2012. The notice of determination was sent to petitioner's Pensacola, FL address. Petitioner sent the SO a letter dated March 17, 2016, again requesting a face-to-face CDP hearing. Petitioner's letter did not include a Form 433-A or any of the requested tax returns.

Petitioner timely petitioned the Court for review of the notice of determination and listed his Pensacola, FL address as his mailing address. In his petition, petitioner asserted that the SO: (1) did not properly verify that the IRS followed all proper assessment procedures; (2) failed to afford him the opportunity to challenge the underlying tax liability; (3) denied him a face-to-face hearing at a location closest to his residence; and (4) did not address the issues he raised in his letters.

Discussion

A. Summary Judgment

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Either party may move for summary judgment upon all or any part of the

legal issues in controversy. Rule 121(a). The Court may grant summary judgment only "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); see Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

The party moving for summary judgment bears the burden of proving that no genuine dispute exists as to any material fact and that he is entitled to judgment as a matter of law. See FPL Group, Inc. v. Commissioner, 115 T.C. 554, 559 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, 85 T.C. at 529. In deciding whether to grant summary judgment, the factual materials and inferences drawn from them must be considered in the light most favorable to the nonmoving party. FPL Group, Inc. v. Commissioner, 115 T.C. at 559; Bond v. Commissioner, 100 T.C. at 36; Naftel v. Commissioner, 85 T.C. at 529. The party opposing summary judgment must set forth specific facts which show that a question of a genuine material fact exists and may not rely merely on allegations or denials in the pleadings. Rule 121(d); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Grant Creek Water Works, Ltd. v. Commissioner, 91 T.C. 322, 325 (1988); King v. Commissioner, 87 T.C. 1213, 1217 (1986); Shepherd v. Commissioner, T.C. Memo. 1997-555, 1997 Tax Ct. Memo LEXIS 645, at *7.

Where the record viewed as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no "genuine issue for trial". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

B. Genuine Issue of Material Fact

There is a genuine issue of material fact as to whether the Appeals Office verified that the requirements of any applicable law or administrative procedure had been met. See sec. 6330(b)(1), (c)(1). In particular a question exists as to whether the IRS mailed the notice of deficiency for 2012 to petitioner at his last known address. Therefore, the Court will not grant either petitioner's or respondent's motion.

In the Form 12153, in his petition, and in his motion petitioner has challenged the IRS' verification of the assessment for 2012. More specifically, in his motion and in his reply petitioner argues that the assessment for 2012 is invalid because the notice of deficiency was not mailed to his last known address.

Regardless of whether a taxpayer raised the issue of verification at the CDP hearing, the settlement officer is required by statute to verify that the requirements of any applicable law or administrative procedure have been met. Hoyle v. Commissioner, 131 T.C. 197, 202-203 (2008). One requirement of applicable law is that, generally, no deficiency may be assessed until after a notice of deficiency is mailed to the taxpayer at his last known address. Sec. 6212(a) and (b); see Hoyle v. Commissioner, 131 T.C. at 200. If a notice of deficiency is mailed to the taxpayer at the taxpayer's last known address, actual receipt of the notice is immaterial; the notice is valid. See Pugsley v. Commissioner, 749 F.2d 691, 692 (11th Cir. 1985); Snodgrass v. Commissioner, T.C. Memo. 2016-235, at *10. On the other hand, as a general rule, if the IRS has not duly mailed a notice of deficiency, no collection of an assessment of the deficiency may proceed. Hoyle v. Commissioner, 131 T.C. at 200.

The regulations provide that the taxpayer's "last known address" is the address on the taxpayer's most recently filed and properly processed tax return unless the IRS has been given "clear and concise notification" of a different address. Sec. 301.6212-2(a), Proced. & Admin. Regs. Additionally, the IRS will automatically update a taxpayer's address of record on the basis of data accumulated and maintained in the USPS National Change of Address (NCOA) database. Sec. 301.6212-2(b)(2), Proced. & Admin. Regs.; Rev. Proc. 2010-16, sec. 3.02, 2010-19 I.R.B. 664, 665; see Snodgrass v. Commissioner, T.C. Memo. 2016-235, at *11. In other words, the address in the NCOA database is the last known address for the taxpayer unless (and until) the taxpayer files and the IRS processes a tax return with a different address from that in the NCOA database or the taxpayer provides the IRS with "clear and concise notification of a change of address" that is different from the NCOA database address. Sec. 301.6212-2(b)(2)(ii), Proced. & Admin. Regs.; see Snodgrass v. Commissioner, T.C. Memo. 2016-235, at *11.

The notice of deficiency for 2012 was mailed to petitioner at the Pensacola, FL address. In his reply petitioner argues that he notified the IRS of his change of address to the Fraser, MI address before the IRS mailed the notice of deficiency for 2012 and that his notification was a "clear and concise notification" of his change of address. Petitioner argues that the Fraser, MI address was his last known address at the time the IRS mailed the notice of deficiency for 2012. In the supplement to his motion respondent contends that the Fraser, MI address was not petitioner's last known address because, pursuant to Rev. Proc. 2010-16, 2010-1 C.B. 664, petitioner sent his letter dated June 8, 2015, to the incorrect processing

location; the letter was not "clear and concise"; and, even if it was, the IRS did not have enough time to process the notification.

According to section 5.02(3) of Rev. Proc. 2010-16, 2010-1 C.B. 664, "[a] clear and concise written notification of a change of address will be considered properly processed after a 45-day processing period". In his reply petitioner attached a handwritten letter dated June 8, 2015, to the IRS in which he requested that his records be updated to reflect his new Fraser, MI address. In that letter petitioner also listed his old address as the Pensacola, FL address. Petitioner also attached a USPS certified mail receipt postmarked June 8, 2015, and a USPS Product & Tracking Information document corresponding to the tracking number on the USPS certified mail receipt. The IRS' address on the USPS certified mail receipt corresponds to the IRS address in Washington, DC, listed in petitioner's letter dated June 8, 2015.

According to the postmarked USPS certified mail receipt and the USPS Product & Tracking Information, petitioner mailed the letter to the IRS by certified mail on June 8, 2015, and it was delivered on June 15, 2016. The IRS mailed the notice of deficiency for 2012 on June 18, 2015. Therefore petitioner's written notification to the IRS of his change of address, even if it was mailed to the appropriate location and constituted a "clear and concise notification", would not have been properly processed because it was received three days before the notice of deficiency was mailed.

However, this does not resolve whether the Pensacola, FL address was in fact petitioner's last known address when the IRS mailed the notice of deficiency for 2012. In the supplement to his motion respondent argues that petitioner's last known address was the Pensacola, FL address. However, neither respondent nor the SO's notes in the case activity record reference what information the IRS relied upon to determine that the Pensacola, FL address was petitioner's last known address at the time the notice of deficiency was mailed.

On the basis of the record of the parties' motions, the Court is not persuaded that either respondent or petitioner have made a showing that there is not any dispute as to a genuine issue of material fact as to whether the notice of deficiency for 2012 was mailed to petitioner at his last known address.

Premises considered, it is hereby

ORDERED that respondent's motion for summary judgment, as supplemented, is denied. It is further

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

(Signed) Diana L. Leyden
Special Trial Judge

Dated: Washington, D.C.
October 6, 2017