

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ATL & SONS HOLDINGS INC.,)
)
 Petitioner,)
)
 v.) Docket No. 16288-16 L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER

This is a “collection due process” (“CDP”) case brought pursuant to 26 U.S.C. sec. 6330(d) by petitioner ATL & Sons Holdings, Inc. (“ATL”), acting through Ralph T. Allen, Jr. Respondent (the IRS) has moved for summary judgment; petitioner has filed an opposition; and the IRS has replied. We will order the IRS to supplement its motion and address section 6751(b)(1).

We assume the following facts, derived from the parties’ submissions:

ATL is an S corporation, wholly owned by Mr. Allen and his wife. Mr. and Mrs. Allen timely filed a request for an extension of the due date for their personal income tax return for the year 2012. The extension was granted to October 15, 2013, and they timely filed their Form 1040 (“U.S. Individual Income Tax Return”) on October 14, 2013. Because the extension had been requested and granted, the IRS did not assess any addition to tax under section 6651(a)(1) for the late filing of the return.

However, with their Form 1040, the Allens also filed for ATL a Form 1120S (“U.S. Income Tax Return for an S Corporation”). They had not filed a separate request for an extension of time for ATL’s return. The IRS thereafter assessed against ATL a penalty under section 6699 (“Failure to File S Corporation Return”).

It appears that Mr. Allen may have taken similar action for 2013--i.e., obtaining an extension for his Form 1040 but not for ATL's Form 1120S, and then filing both forms within the extension granted for the Form 1040--and that the IRS initially proposed a penalty against ATL but later relented.

However, the IRS has not relented as to the penalty assessed against ATL for 2012. Rather, when ATL did not pay the 2012 penalty, the IRS issued to ATL a notice of intent to levy on January 15, 2016. In response to that notice, Mr. Allen requested on ATL's behalf a CDP hearing before IRS Appeals, during which he challenged the IRS's determination that ATL was liable for the penalty.

At the CDP hearing, the Appeals Officer evidently undertook to comply with the "verification" requirement of section 6330(c)(1) ("The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met"). Some of that compliance is set out in the notice of determination that Appeals issued on June 20, 2016. The notice states generally,

The Service met the requirements of all applicable laws, regulations and administrative procedures during the assessment and collection phases of this investigation.

The notice of determination sustained the notice of levy. Mr. Allen timely filed in this Court a petition on behalf of ATL on July 19, 2016.

On August 17, 2017, the IRS filed a motion for summary judgment. The motion very generally refers to the verification requirement of 6330(c)(1), but does not describe that verification. In particular, the motion (like the notice of determination) makes no mention of compliance with section 6751(b)(1), which requires (with exceptions) special supervisory approval of the "initial determination" of penalties. Under section 7491(c), the IRS has the burden of production as to penalties "in any court proceeding", i.e., including this one. For all we can tell, the section 6699 penalty is subject to supervisory approval under section 6751(b)(1), and IRS Appeals' "verification" should have included a verification of compliance with the supervisory approval requirement of section 6751(b)(1).

It is ORDERED that, no later than January 12, 2018, the IRS shall either--

(a) file a supplement to its motion for summary judgment that shows the

IRS's compliance with the supervisory approval requirement of section 6751(b)(1) in connection with ATL's liability for penalty under section 6699 for 2012, or that explains why such a showing is not necessary to the success of the motion; or

(b) withdraw the motion for summary judgment and file a motion to remand the case to IRS Appeals for purposes of obtaining verification as to the supervisory approval requirement; or

(c) make another appropriate filing.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
December 7, 2017