

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DRC

RUSSELL T. BURKHALTER,)	
)	
Petitioner,)	
)	
v.)	Docket No. 14345-16 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

Pursuant Rule 152(b) of the Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioner and to respondent a copy of the pages of the transcript of the proceedings in the above case before the undersigned judge at Atlanta, Georgia, containing his oral findings of fact and opinion rendered at the trial session at which the case was heard.

In accordance with the oral findings of fact and opinion, decision will be entered for respondent.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
February 6, 2018

SERVED Feb 06 2018

1 Bench Opinion by Judge David Gustafson
2 January 23, 2018
3 Russell T. Burkhalter v. Commissioner of Internal Revenue
4 Docket No. 14345-16L

5 THE COURT: The Court has decided to render in
6 this case the following as its oral Findings of Fact and
7 Opinion. This Bench Opinion is made pursuant to the
8 authority granted by section 7459(b) of the Internal
9 Revenue Code, and Rule 152 of the Tax Court Rules of
10 Practice and Procedure, and it shall not be relied on as
11 precedent in any other case.

12 This "collection due process" ("CDP") case is
13 brought by petitioner Russell T. Burkhalter pursuant to 26
14 U.S.C. section 6330(d), asking this Court to review the
15 determination by the Office of Appeals of the Internal
16 Revenue Service ("IRS") to sustain a notice of proposed
17 levy to collect Mr. Burkhalter's unpaid income tax,
18 additions to tax, penalty, and interest for the three
19 years 2010, 2011, and 2013.

20 The Commissioner previously filed a motion for
21 summary judgment as to Mr. Burkhalter's challenge to his
22 underlying liability, and we granted that motion and
23 precluded his liability challenge by our order of July 12,
24 2017. We therefore proceeded to trial on the collection
25 issues -- particularly, IRS Appeals' supposed failure to

1 enter into an installment agreement or to put Mr.
2 Burkhalter into currently non-collectible status.

3 Mr. Burkhalter represented himself at trial, and
4 Jason P. Oppenheim represented the Commissioner.

5 FINDINGS OF FACT

6 Mr. Burkhalter resided in Georgia at the time he
7 filed his petition. (Stip. 1.)

8 Liabilities and notice of levy

9 As of October 2015, the IRS's records reflected
10 that Mr. Burkhalter had unpaid income tax liabilities
11 (Stip. 7) totaling more than \$300,000 (Ex. 4-J). On
12 October 8, 2015, the IRS issued to Mr. Burkhalter a
13 "Notice of Intent to Levy and Notice of Your Right to a
14 Hearing". (Stip. 8; Ex. 4-J.)

15 CDP hearing

16 On November 8, 2015, Mr. Burkhalter timely sent
17 to the IRS a Form 12153, "Request for a Collection Due
18 Process ... Hearing" (Ex. 5-J; Stip. 5). On the form he
19 checked a box indicating "I cannot pay balance." He did
20 not check a box indicating that he wanted an Installment
21 Agreement ("IA") or an Offer in Compromise ("OIC").

22 Mr. Burkhalter's case was assigned in IRS
23 Appeals to Settlement Officer ("SO") Brewton in Atlanta.
24 On April 20, 2016, SO Brewton sent Mr. Burkhalter a letter
25 (Ex. 14-R) introducing herself and the CDP process, and

1 scheduling a telephone conference for May 12, 2016. The
2 letter bore her address at the Atlanta Appeals Office.
3 The letter explained that, in order to be considered for a
4 collection alternative such as an IA or an OIC, Mr.
5 Burkhalter must submit a financial information statement
6 on Form 433-A ("Collection Information Statement") and his
7 income tax returns for 2014 (due in April 2015) and 2015
8 (then recently due in April 2016). SO Brewton's letter
9 said, "Please send me the items listed above".

10 The May 12, 2016, hearing took place as
11 scheduled, as a telephone conference between SO Brewton
12 and Mr. Burkhalter. We find that Mr. Burkhalter did not
13 provide a Form 433-A or his 2014 and 2015 tax returns at
14 or before that hearing. In the phone conference, SO
15 Brewton explained that because Mr. Burkhalter had not
16 provided that financial information, she could not enter
17 into an IA with him nor put him in "currently not
18 collectible" ("CNC") status. He did not request
19 additional time to submit the information.

20 Notice of Determination and petition

21 On May 31, 2016, IRS Appeals issued to Mr.
22 Burkhalter a "Notice of Determination" (Ex. 6-J) that
23 sustained the proposed levy. The "Summary and
24 Recommendation" attached to the notice stated: "A
25 determination was made to sustain the Notice of Intent to

1 Levy due to all legal and procedural requirements having
2 been met. Form 433-A, Collection Information Statement
3 for Wage Earners and Self-Employed Individuals, needed to
4 determine eligibility for collection alternatives, was not
5 submitted. Therefore, the case is being returned to the
6 Collection Field Function for the appropriate action."

7 On June 21, 2016, Mr. Burkhalter timely filed
8 his petition with this Court.

9 This case was called from the Court's trial
10 calendar and tried on January 22, 2018.

11 OPINION

12 I. Collection Due Process principles

13 If a taxpayer fails to pay any Federal income
14 tax liability after demand, section 6331(a) authorizes the
15 IRS to collect the tax by levy on the taxpayer's property.
16 However, the IRS must first issue a final notice of intent
17 to levy, and notify the taxpayer of the right to an
18 administrative hearing before the Office of Appeals. Sec.
19 6330(a) and (b)(1). After receiving such a notice, the
20 taxpayer may request an administrative hearing before IRS
21 Appeals. Sec. 6330(a)(3)(B), (b)(1).

22 At the CDP hearing, the appeals officer must
23 make a determination whether the proposed collection
24 action may proceed. The appeals officer is required to
25 take into consideration several things:

1 First, the appeals officer must obtain
2 verification that the requirements of any applicable law
3 and administrative procedure have been met by IRS
4 personnel (see sec. 6330(c)(3)(A)). Mr. Burkhalter raised
5 no verification issue, either in his petition or at trial;
6 and at trial the Commissioner made a showing that all
7 applicable law and administrative procedure had indeed
8 been met. Second, the appeals officer must consider any
9 collection alternatives proposed by the taxpayer (see sec.
10 6330(c)(3)(B), citing sec. 6330(c)(2)). Mr. Burkhalter
11 contends that the IRS erred in this regard. And third,
12 the appeals officer must determine "whether any proposed
13 collection action balances the need for the efficient
14 collection of taxes with the legitimate concern of the
15 person that any collection action be no more intrusive
16 than necessary" (see sec. 6330(c)(3)). Mr. Burkhalter
17 raised no issue as to this balancing, either in his
18 petition or at trial; and at trial, through SO Brewton's
19 testimony, the Commissioner made a showing that she had
20 made the appropriate balancing.

21 II. Standard of review

22 In considering Appeals' denial of a collection
23 alternative (such as an IA), the Court reviews the
24 administrative determination for an abuse of discretion.
25 See Sego v. Commissioner, 114 T.C. 604, 610 (2000).

1 III. Collection alternatives

2 Mr. Burkhalter contends that IRS Appeals abused
3 its discretion by failing to grant him a collection
4 alternative, i.e., either an IA or CNC status. Appeals'
5 reason for the denial was Mr. Burkhalter's failure to
6 provide financial information. To grant CNC status, the
7 IRS needs to know whether the taxpayer's financial
8 situation is such that he truly cannot afford to make
9 payment toward the tax; and to grant an IA, the IRS needs
10 to know both that the taxpayer cannot afford to currently
11 make full payment of the liability and that he can afford
12 to make the payments that he proposes. If the taxpayer
13 fails or refuses to provide financial information on Form
14 433-A, then Appeals does not abuse its discretion in
15 declining to grant the collection alternative. See
16 Huntress v. Commissioner, T.C. Memo. 2009-161, slip op. at
17 12.

18 We do not find credible Mr. Burkhalter's
19 testimony at trial that, in response to a request from
20 another IRS employee, he sent Form 433-A to an address in
21 Washington, D.C., that was given on the form. He
22 initially testified that this occurred three years ago,
23 which would have been in early 2015 -- i.e., before his
24 CDP hearing. He could not say the name of the IRS
25 employee (nor say certainly that he was from Appeals), nor

1 produce a copy of the Form 433-A that he supposedly
2 submitted. He did not testify that, at the May 12, 2016,
3 CDP hearing, he told SO Brewton of this supposed mailing
4 to Washington, D.C.

5 With the intention of verifying, if possible, at
6 least some of Mr. Burkhalter's testimony on this point, we
7 solicited respondent's non-objection to our taking
8 judicial notice after trial of the Form 433-A in effect in
9 2015, as it appears on the IRS website. We learned that
10 the form includes no Washington, D.C., address and no
11 instruction as to mailing. Thus, the only instructions
12 given to Mr. Burkhalter about the Form 433-A were in the
13 letter from Appeals, directing that he send it to SO
14 Brewton in Atlanta. He did not do so and does not allege
15 that he did.

16 CONCLUSION

17 IRS Appeals did not abuse its discretion when it
18 declined to grant a collection alternative to Mr.
19 Burkhalter.

20 This concludes the Court's oral Findings of Fact
21 and Opinion in this case.

22 (Whereupon, at 9:09 a.m., the above-entitled
23 matter was concluded.)

24

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