**UNITED STATES TAX COURT**
**WASHINGTON, DC 20217**

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| EDDIE BOOKER, | ) | |
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| Petitioner, | ) | |
| | ) | |
| v. | ) | Docket No. 27354-16 L. |
| | ) | |
| COMMISSIONER OF INTERNAL REVENUE, | ) | |
| | ) | |
| Respondent | ) | |

# ORDER

This collection due process (CDP) case is calendared for trial during the Court's trial session commencing May 7, 2018, in Jackson, Mississippi. This case is currently before the Court on respondent's motion for summary judgment, filed February 23, 2018. On March 23, 2018, petitioner filed his opposition to respondent's motion.[1]

## Background

On November 16, 2016, respondent issued the notice of determination upon which this case is based. The notice of determination sustains a Notice of Intent to Levy and Notice of Your Right to a Hearing (notice of intent to levy) with respect to petitioner's 2010 and 2013 income tax liabilities.

The notice of determination states that relief was denied because (1) petitioner did not cooperate at the CDP hearing, (2) petitioner did not present any information to dispute the appropriateness of the collection actions, and (3) petitioner was not in compliance with filing requirements. The notice of determination also states that petitioner submitted a request for an installment agreement and a Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals.

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

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Petitioner's timely petition claims that, before the CDP hearing, petitioner's counsel submitted (1) a request for "an installment agreement amount of $388.76" (which seems to mean a request for an installment agreement with payments of $388.76 per month), (2) a Form 433-A, and (3) a Form 656-L, Offer in Compromise, Doubt as to Liability (OIC-DATL).

Respondent's motion for summary judgment asserts that (1) petitioner's 2010 and 2013 income tax liabilities were assessed on the basis of returns petitioner filed, (2) petitioner did not raise underlying liability at the CDP hearing and therefore may not dispute underlying liability in this proceeding, and (3) respondent's settlement officer did not abuse her discretion in denying petitioner's proposed installment agreement because petitioner had not filed income tax returns for 2014 and 2015.

In his opposition to respondent's motion, petitioner appears to claim that underlying liability is at issue. The opposition also appears to repeat the claims in the petition, i.e., that petitioner's counsel submitted an installment agreement, a Form 433-A, and an OIC-DATL.

## Discussion

The Court may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). The moving party bears the burden of showing that there is no genuine issue of material fact. Sundstrand Corp. v. Commissioner, 98 T.C. at 520. In deciding whether to grant summary judgment, we view the factual materials and inferences drawn from them in the light most favorable to the nonmoving party. Id.

As a general rule, documents that are not part of the record must be introduced to the Court, in connection with a motion for summary judgment, by way of an authenticating affidavit or declaration made on personal knowledge. See 11 Moore's Federal Practice, sec. 56.92[3] (2018); Rule 121(d). With respect to motions for summary judgment and oppositions to such motions, "[s]upporting and opposing affidavits or declarations shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit or

a declaration shall be attached thereto or filed therewith." Rule 121(d); see also Fed. R. Civ. P. 56(c)(1) and (4).

Respondent's motion and petitioner's opposition include paragraphs making various factual assertions. These paragraphs include references to various documents identified as exhibits. We note that instead of properly supporting their respective motion and opposition, the parties have merely attached documents to the motion or opposition. Neither respondent's counsel nor petitioner's counsel filed an affidavit or declaration in support of their respective motion or opposition, nor do they rely on the pleadings, answers to interrogatories, depositions, admissions, or any other acceptable materials in the record. See Rule 121(b).

Statements in briefs do not constitute evidence. Rule 143(c). In addition, the exhibits attached to respondent's motion have not been properly authenticated in accordance with Rules 901 and 902 of the Federal Rules of Evidence. Without a proper affidavit or declaration, neither the factual assertions in the parties' motion and opposition nor the attached exhibits can be relied on by this Court in deciding respondent's motion. See, e.g., Martz v. Union Labor Life, 757 F.2d 135, 138 (7th Cir. 1985).

We will give the parties an opportunity to supplement their motion and opposition to bring them into compliance with the Court's Rules.

2010 Assessments

The Commissioner generally cannot collect a tax until it has been properly and timely assessed. The Commissioner generally may summarily assess, without a notice of deficiency, the amount of tax liability shown on a return filed by a taxpayer. Sec. 6201(a). In the case of a deficiency, however, the Commissioner generally must first issue a notice of deficiency and wait 90 days before assessing the tax. Secs. 6212(a), 6213(a). Section 6330(c)(1) requires an IRS officer conducting a CDP hearing to verify (among other things) that, if necessary, a valid notice of deficiency was issued to the taxpayer. Jordan v. Commissioner, 134 T.C. 1, 12 (2010); Hoyle v. Commissioner, 131 T.C. 197, 200 (2008).

In his motion, respondent claims that the liabilities at issue were summarily assessed (without a notice of deficiency) on the basis of returns filed by petitioner. Inconsistently, however, the notice of determination also states: "Because you [i.e., petitioner] did not file your voluntarily self-assessed 2010 tax return, a Substitute for Return (SFR) was filed by the Internal Revenue Service (IRS)". The

notice of determination seems to suggest that assessment was made on the basis of the SFR. Meanwhile, the account transcript for petitioner's 2010 income tax liability states that the "tax per return" was $0 and appears to indicate that, while an SFR was filed for petitioner, no amount was assessed in conjunction with that return. According to the account transcript, petitioner did file several returns. Even so, the amounts assessed do not appear to have been assessed in conjunction with the returns filed. The assessments appear to have taken place more than a year after petitioner's last amended return was filed.

In the light of the foregoing, there may be a genuine dispute as to whether the assessments for 2010 were made on the basis of returns petitioners submitted. If the assessments were not made on the basis of returns, then respondent's assessments for 2010 may be invalid, as it appears no notice of deficiency was ever issued with respect to petitioner's 2010 income tax liability. We expect the parties to clarify this issue.

Underlying Liability

A taxpayer may not challenge underlying liability if the taxpayer received a notice of deficiency or had another opportunity to dispute the liability. Sec. 6330(c)(2)(B). As the record presently before us does not establish that notices of deficiency were issued for 2010 or 2013 or that petitioner otherwise had an opportunity to dispute underlying liability, we are unable to conclude that petitioner was foreclosed from disputing underlying liability pursuant to section 6330(c)(2)(B).

Respondent asserts that petitioner did not dispute underlying liability at the CDP hearing. Petitioner claims, in his petition and in his opposition to respondent's motion, that he submitted an OIC-DATL along with his request for an installment agreement and his Form 433-A. We have held that a challenge to the amount of the tax liability made in the form of an OIC-DATL, in instances where the taxpayer has received a notice of deficiency, is a challenge to underlying liability. Baltic v. Commissioner, 129 T.C. 178, 183 (2007); Anderson v. Commissioner, T.C. Memo. 2016-219, at *12.

Consequently, the issue of whether underlying liability is in dispute would appear to hinge on whether an OIC-DATL was submitted at the hearing. But even if we were to disregard the parties' failure to properly support their respective motion and opposition by way of affidavits or declarations, the record presently before us is inadequate to resolve this issue.

First, respondent did not submit the complete administrative record. For example, respondent failed to submit a case activity record print providing a record of the CDP hearing and the CDP administrative case more generally. And while the notice of determination states that petitioner "did not present any information to dispute the appropriateness of the collection actions", the notice of determination goes on to report, inconsistently, that respondent's CDP officer received an installment agreement and a Form 433-A from petitioner. Respondent did not include the installment agreement request or Form 433-A among the documents attached to his motion.

On the other hand, petitioner has also failed to set forth specific facts, as required by Rule 121(d), to show that there is genuine dispute of fact as to whether an OIC-DATL was filed or whether petitioner otherwise properly disputed underlying liability at the CDP heearing. Petitioner's opposition does not include a copy of the OIC-DATL that petitioner allegedly submitted at the CDP hearing or even an affidavit setting forth what was submitted at the CDP hearing.[2]

Installment Agreement

Respondent's motion asserts that the CDP officer did not abuse her discretion in declining to consider petitioner's proposed installment agreement because at the time petitioner was not current with his filing requirements for tax years 2014 and 2015. In his opposition to respondent's motion, petitioner does not appear to dispute that he was not current with his filing requirements and does not otherwise set forth specific facts, as required by Rule 121(d), to show that there is any genuine dispute for trial in this regard.

It is presently unclear to us what petitioner's argument is with respect to his installment agreement request. As far as we can tell, petitioner has raised no dispute of fact, nor does he appear to argue that respondent's legal arguments (respondent cites to Giamelli v. Commissioner, 129 T.C. 107, 112 (2007), and Balsamo v. Commissioner, T.C. Memo. 2012-109) are incorrect. We expect petitioner's counsel to clarify or we will deem any argument with respect to the installment agreement request to have been waived or conceded.

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[2]We note that if it should become necessary for petitioner's counsel to serve as a witness at trial in this case, he must take whatever steps would be necessary to obviate a conflict of interest or other violation of the ABA Model Rules of Professional Conduct. See Rule 24(g).

We remind both respondent's and petitioner's counsel that a practitioner before this Court is required to carry out his or her practice in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association. See Rule 201(a) and 202(a)(3). Rule 1.1 of the Model Rules states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

In accord with the foregoing, it is

ORDERED: That, on or before April 13, 2018, respondent may file a supplement to his motion for summary judgment and an affidavit or declaration in support of respondent's motion. It is further

ORDERED: That, on or before April 20, 2018, petitioner may file a supplement to his opposition to respondent's motion and an affidavit or declaration in support of his opposition. It is further

ORDERED: That in addition to the parties' present obligation to file, on or before April 23, 2018, pretrial memoranda complying with the Court's standing pretrial order dated December 7, 2017, the parties shall include in their pretrial memoranda detailed discussions setting forth--

> (1)(a) The issues of fact (including any issues subsidiary to ultimate issues) and (b) the issues of law (including any issues subsidiary to ultimate issues) to be resolved by the Court. Such issues should be set forth in sufficient detail to enable the Court to decide the case in its entirety by addressing each of the issues listed.
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> (2) A clear, complete, and concise exposition of each party's position and the theory underlying that position with respect to each of the issues that are set forth pursuant to (1) above. In this regard, each party shall include a statement in narrative form of what each party expects to prove.
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> (3) A list of witnesses each party expects to call, if any, including (a) a description of the testimony expected from each witness, (b) an estimate of the duration of each witness' testimony, and (c) a schedule of each witness' availability.

(4) A description of any motions each party expects to make.

(5) The status of the preparation of the stipulations of facts and preparation for trial, including the estimated length of trial.

(6) A description of the efforts of the parties to narrow the issues in anticipation of trial or to settle the case thus far. It is further

ORDERED: That the statement of issues set forth pursuant to (1) above shall control the admissibility of evidence at trial and evidence offered at trial will be deemed irrelevant unless it pertains to one or more of the issues set forth pursuant to (1) above. It is further

ORDERED: That neither party will be allowed to advance a position or theory underlying that position with respect to any of the issues set forth pursuant to (1) above that is different from the positions or theories set forth pursuant to (2) above. It is further

ORDERED: That the parties shall stipulate to the complete administrative record, to the maximum extent possible. If the parties are unable to stipulate to the administrative record, or if the administrative record is incomplete, the parties shall explain, in their pretrial memoranda, (1) why they are unable to stipulate to the administrative record, (2) why the administrative record is incomplete, and (3) whether remand to assemble the complete administrative record would be helpful, necessary, or productive.

**(Signed) Michael B. Thornton**
**Judge**

Dated: Washington, D.C.
April 3, 2018