

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

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| WILLIAM L. TONEY, JR., |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Docket No. 25496-16SL. |
| |) | |
| COMMISSIONER OF INTERNAL REVENUE, |) | |
| |) | |
| Respondent |) | |

ORDER AND DECISION

This case is currently set for trial on May 14, 2018, in Charleston, West Virginia. Mr. Toney filed a petition with the Tax Court challenging the Commissioner’s determination to sustain a lien. The Commissioner filed a motion for summary judgment under Rule 121.¹

In the motion the Commissioner argues that the settlement officer did not abuse his discretion in refusing to consider the underlying liability during Mr. Toney’s collection hearing because Mr. Toney had a prior opportunity to challenge the liability in a previous appeals hearing. The Commissioner also argues that Mr. Toney has not raised any other issues in his petition to the Tax Court and consequently the Commissioner is entitled to a judgment in his favor as a matter of law. Mr. Toney argues that he has not had an opportunity to dispute the underlying liability, despite having received a Letter 1153 and a prior appeal hearing. We find for the Commissioner.

Background

On June 25, 2014, the Commissioner sent Mr. Toney a Letter 1153, informing him of the Commissioner’s intention to assess a trust fund recovery

¹All Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect for the years in issue, unless otherwise indicated.

penalty against him under section 6672. The penalty relates to unpaid payroll taxes for a company called Engineering & Testing 2000 Inc., for two quarters in 2011, all four quarters of 2012, and two quarters in 2013. The letter also informed Mr. Toney of his right to appeal the penalty. He took advantage of that right and filed a protest on August 21, 2014.

Soon after the protest was filed, a revenue officer sent a letter informing Mr. Toney that his request for an appeal had been received and reviewed. Based on the information presented in the protest, the revenue officer found that Mr. Toney had not offered any new facts that would change the previous determination that he was the responsible person under section 6672. The revenue officer also reported that he had forwarded the protest to the appeals office for a hearing.

An appeals officer conducted a hearing on December 4, 2014, and found that Mr. Toney was the person responsible for the payroll tax liability. He also found that Mr. Toney had a duty to collect, truthfully account for, and pay the unpaid payroll taxes and that he willfully failed to carry out those obligations. On December 15, 2014, the appeals officer sent a letter sustaining the previous determination concerning the penalties under section 6672.

On April 5, 2016, the Commissioner issued Mr. Toney a notice of federal tax lien and right to a hearing under section 6320. Mr. Toney timely filed a request for an appeals hearing under section 6320. In his request for a hearing, Mr. Toney asked that the appeals officer discharge the lien. He also stated that he could not pay the balance, that he was requesting an offer in compromise, and that the outstanding payroll taxes “should be paid by the assets of TDH Holdings, LLC”.

On August 10, 2016, the settlement officer assigned to conduct the hearing sent Mr. Toney a letter scheduling a telephone conference for September 13, 2016. In the letter, the settlement officer requested that Mr. Toney return a completed Form 433-A, Collection Information Statement, within 14 days. On August 29, 2016, Mr. Toney mailed the settlement officer a completed Form 433-A, but he did not submit substantiating documents.

In preparation for the hearing, the settlement officer confirmed that he had no prior involvement with Mr. Toney and that the all legal and administrative requirements were met with respect to the lien. The settlement officer also confirmed that Mr. Toney had a prior opportunity to challenge the underlying liability. Finally, the settlement officer reviewed Mr. Toney’s Form 433-A and found that Mr. Toney had equity in assets that would pay the liability in full if

liquidated and that Mr. Toney would qualify for an installment agreement with payments between \$1,331 and \$3,337 per month depending on the terms.

On September 13, 2016, the settlement officer conducted Mr. Toney's appeals hearing. At the hearing he explained the appeals process and Mr. Toney's options including an installment agreement of around \$3,000 a month and a 60-day extension to pay the liability in full. The settlement officer also noted that Mr. Toney's Form 433-A showed equity in assets that could be liquidated to pay the liability in full.

During the conference, Mr. Toney explained that he believed that his business partner should be 50% responsible for the liability. He also noted that his claimed expenses on the Form 433-A were legitimate and he only had \$165 of monthly disposable income to pay toward the liability. Ultimately, Mr. Toney requested a 60-day extension to pay the liability in full.

The settlement officer agreed to send Mr. Toney the necessary paperwork to complete the 60-day extension, which Mr. Toney agreed to sign. On September 26, 2016, the settlement officer prepared and sent Form 12257, Summary Notice of Determination, Waiver of Right to Judicial Review of a Collection Due Process Determination, Waiver of Suspension of Levy Action and Waiver of Periods of Limitation in Section 6330(e)(1). Almost two weeks later, after receiving no response from Mr. Toney, the settlement officer contacted Mr. Toney. When Mr. Toney returned the settlement officer's call he confirmed that he had received the Form 12257 and that he would sign and return it.

On October 18, 2016, over a week later, the settlement officer had still not received the signed Form 12257. That day the settlement officer granted the 60-day extension beginning from September 27, 2016, and sustained the lien. He prepared the determination letter and concluded the appeal.

A notice of determination concerning collection action(s) under section 6320 and/or 6330 was sent to Mr. Toney on October 21, 2016. The notice stated that the settlement officer who conducted the hearing verified that all applicable laws and administrative procedures were met, considered all of the issues raised by Mr. Toney, and balanced the proposed collection action with the legitimate concerns that such collection action be no more intrusive than necessary. The notice also stated that Mr. Toney had agreed to the proposed collection action and that there was nothing that indicated that withdrawal of the lien should have been considered.

Mr. Toney filed a timely petition for redetermination challenging the settlement officer's determination to sustain the lien. In the petition Mr. Toney argues that he should not be liable for penalty under section 6672. The petition makes no mention of the appeals process and does not allege any defects with respect to the appeals hearing or argue that the settlement officer abused his discretion by sustaining the lien.

On March 14, 2018, the Commissioner filed a motion for summary judgment under Rule 121. In the motion he argues that the settlement officer did not abuse his discretion and that the underlying liabilities were not properly at issue during the appeals hearing or in the case currently before the Court. The Commissioner states that Mr. Toney had and used his prior opportunity to contest the liability when he received the Letter 1153 in 2014, and consequently liability for the penalty under section 6672 are not properly before the Court.

The Court ordered a response to the motion, and Mr. Toney filed a timely response. In his response Mr. Toney argues that he did not have an opportunity to contest the underlying liability and that he should have the opportunity to do so. He does not contest that he received a Letter 1153 or that he had an appeals hearing following that letter, only that if he had received a full hearing on the underlying liability he would have received an adjustment on the amount owed.

Discussion

The question before the Court is whether the Commissioner is entitled to judgment in his favor as a matter of law. Under Rule 121(a), either party may move for summary judgment regarding all or any part of the legal issues in controversy. We may grant summary judgment only if there are no genuine disputes as to any material fact.²

The party moving for summary judgment bears the burden of demonstrating that there is no genuine dispute as to any material fact.³ In deciding whether to grant summary judgment, the factual materials and the inferences drawn from them

²Rule 121(b); Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

³Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994).

must be considered in the light most favorable to the nonmoving party.⁴ When a motion for summary judgment is made and properly supported, the nonmoving party may not rest on mere allegations or denials, but must set forth specific facts showing that there is a genuine dispute for trial.⁵

Judicial Review of Appeals Determinations

In a collection hearing, a taxpayer may raise any issue that is relevant to an unpaid tax or proposed levy, including challenges to the appropriateness of the collection action and offers of collection alternatives.⁶ In addition, a taxpayer may challenge the existence or amount of the underlying tax liability if the taxpayer did not have the opportunity to dispute the liability.⁷ Receipt of a Letter 1153 constitutes a prior opportunity to dispute penalties under section 6672.⁸

Here Mr. Toney received a Letter 1153. Not only did he receive the letter, but he also filed a protest to appeal the assessment of the trust fund recovery penalty. He received an appeal hearing and the penalty was sustained in that earlier administrative process. Consequently, the underlying liability was not properly before the settlement officer and is not properly before the Court.

When the taxpayer does not properly raise the underlying liability, we review the Commissioner's collection determination for an abuse of discretion.⁹ A taxpayer may prove an abuse of discretion by showing that the Commissioner exercised his discretion arbitrarily, capriciously, or without sound basis in fact or law.¹⁰ The determination by the settlement officer must take three things into

⁴FPL Group, Inc. v. Commissioner, 115 T.C. 554, 559 (2000).

⁵Rule 121(d).

⁶Sec. 6330(c)(2)(A).

⁷Sec. 6330(c)(2)(B).

⁸Bishay v. Commissioner, T.C. Memo. 2015-105, at *16-*17; see Mason v. Commissioner, 132 T.C. 301, 317-318 (2009).

⁹Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181-182 (2000).

¹⁰See Giamelli v. Commissioner, 129 T.C. 107, 111 (2007).

consideration: (1) verification that the requirements of the applicable law and administrative procedure have been met, (2) issues raised by the taxpayer, and (3) whether any proposed collection action balances the need for efficient tax collection with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary.¹¹

Here the settlement officer did not abuse his discretion. He verified that all legal and administrative requirements were met with respect to the filing of the lien. He addressed the issues that Mr. Toney raised and he determined that the collection action was no more intrusive than necessary. He granted the 60-day extension that Mr. Toney requested, and ultimately determined that the lien should be sustained. Consequently we find that the Commissioner is entitled to summary judgment. Accordingly, it is

ORDERED that the Commissioner's motion for summary judgment, filed March 14, 2018, is granted. It is further

ORDERED AND DECIDED that the Commissioner may proceed with the collection action (lien) in respect of petitioner's outstanding liabilities for trust fund recovery penalties for the eight quarterly periods ending September 30, 2011, December 31, 2011, March 31, 2012, June 30, 2012, September 30, 2012, December 31, 2012, March 31, 2013, and June 30, 2013, as determined by the Commissioner's notice of determination concerning collection action(s) under section 6320 and/or 6330, dated October 21, 2016.

(Signed) Ronald L. Buch
Judge

Entered: **APR 24 2018**

¹¹Secs. 6320(c), 6330(c)(3); Lunsford v. Commissioner, 117 T.C. 183, 184 (2001).