

UNITED STATES TAX COURT
WASHINGTON, DC 20217

CLC

THOMAS A. DENNEY,)	
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Petitioner(s),)	
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v.)	Docket No. 12192-16 L.
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COMMISSIONER OF INTERNAL REVENUE,)	
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Respondent)	
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ORDER AND DECISION

This case is on our June 12, 2018 Buffalo trial calendar. It arises from the Commissioner’s decision to levy (i.e., seize) Thomas Denney’s state income-tax refund, and to record a federal tax lien on the rest of his property. The Commissioner moved for summary judgment and, although we gave him the opportunity, Denney did not respond. Summary judgment is appropriate where “there is no genuine dispute as to any material fact and . . . a decision may be rendered as a matter of law.” Tax Court Rule 121(b). #co_footnote B00332003712468 “[A]n adverse party may not rest upon the mere allegations or denials of such party’s pleading, but such party’s response . . . must set forth specific facts showing that there is a genuine dispute for trial.” Tax Court Rule 121(d). Denney has not done this. We therefore find that there is no genuine dispute as to any material fact set out in the Commissioner’s affidavit and exhibits.

Those facts are that the Commissioner audited Denney’s 2009 tax return and, with Denney’s agreement, assessed tax and underpayment interest against him for that year. The Commissioner then asked Denney to pay the assessment. When Denney didn’t, the Commissioner seized his state income-tax refund and sent him a notice that he could request a Collection Due Process (CDP) hearing to appeal the seizure.

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Denney asked for the CDP hearing, and he said: “We are attempting to get an installment agreement that meets our financial ability.”¹ The Commissioner sent Denney a letter in early February 2016 to let Denney know that he had forwarded his CDP request to IRS Appeals.² The Commissioner also attached a financial-information form to the letter and explained that he couldn’t consider any collection alternatives without the financial information. The settlement officer (SO) assigned to the case then sent Denney another letter on March 15, 2016 -- that letter scheduled Denney’s CDP hearing for April 5, 2016 and gave Denney 14 days to provide the completed financial-information form. Denney had given a power of attorney to his accountant, who waited until the appointed date to call the SO for the first time. He also failed to turn over any financial information beforehand. The accountant explained that it was a busy time of year for him -- tax-filing season -- and asked for almost two more months to provide the financial information. After noting that her letter gave Denney 14 days to respond if the date of the CDP hearing was inconvenient, the SO still agreed to give Denney an additional week (until April 12, 2016) to provide the financial information. The SO then waited until April 18, 2016, and still no financial information came.³ She therefore determined that the levy was appropriate and all the other rules and procedures that the IRS has to follow were obeyed.

Denney appealed. His only argument: “A reasonable amount of time was not granted for compiling the requested information required to file a complete and accurate IRS Form 433-A.”⁴

¹ Denney didn’t sign the first Form 12153, Request for a Collection Due Process or Equivalent Hearing, that he sent in. The Commissioner told Denney that was a problem, but gave him a couple weeks to correct it. The Commissioner got back a Form 12153 signed by Denney’s power of attorney, which might explain the use of “we” and “our” on the form. The Commissioner accepted it as a timely CDP hearing request.

² The Commissioner sent a separate letter saying that in a CDP hearing Denney could contest only the levy because he had missed the deadline to contest the lien.

³ Denney’s accountant did send in an *incomplete* financial-information form *after* that date. Even though it was more than a week late, the SO still looked at the form. The problem was that it included very little actual information about Denney’s finances -- there was, for example, no information about his monthly income and expenses. The late-filed form thus failed to change the SO’s mind.

⁴ This is the financial-information form we’ve been talking about.

When, as here, the amount of liability is not at issue, our standard of review is abuse of discretion. *Sego v. Commissioner*, 114 T.C. 604, 610 (2000); *Goza v. Commissioner*, 114 T.C. 176, 181-82 (2000). This means that we look to see if the Commissioner's decision was based on an error of law or rested on a clearly erroneous finding of fact, or whether he ruled irrationally. *Antioco v. Commissioner*, 105 T.C.M. 1234, 1237 (2013).

Even though Denney sought an installment agreement in his CDP hearing request, the SO didn't abuse her discretion when she rejected his request because he failed to submit complete financial information. We've said before that an SO might abuse her discretion if she *unreasonably* denies a request for more time to submit financial information, *see Shanley v. Commissioner*, 97 T.C.M. 1062, 1065 (2009), but that's not what happened here. The Commissioner informed Denney in early February 2016 -- about two months before the CDP hearing -- that he was going to have to provide financial information if he wanted an installment agreement. The SO then told Denney again in her March 15, 2016 letter that he needed to provide financial information by March 29, 2016 for her to consider an installment agreement. When that information didn't arrive before the April 5, 2016 CDP hearing, the SO gave Denney until April 12, 2016 to hand it in. And that's not all: Denney failed to meet the April 12, 2016 deadline, but the SO waited another week -- until April 18, 2016 -- before she made her determination that Denney didn't qualify for a collection alternative because he failed to provide complete financial information. Denney had a reasonable amount of time to provide financial information here, and the SO granted a reasonable one-week extension and also waited another week before she made her determination. We can't find that the SO abused her discretion. *See Sullivan v. Commissioner*, 104 T.C.M. 713, 718 (2012).

The notice of determination also shows that the SO (1) verified that the requirements of applicable law and administrative procedures had been met, (2) considered issues raised by Denney, and (3) determined that the levy balanced the need for efficient collection of taxes with Denney's concern that collection action be no more intrusive than necessary. *See I.R.C. § 6330(c)(3)*. It is therefore

ORDERED that respondent's motion for summary judgment is granted. It is also

ORDERED and DECIDED that respondent may proceed with the collection of petitioner's federal income-tax liability for the tax year 2009 as described in the

Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code, dated April 27, 2016.

**(Signed) Mark V. Holmes
Judge**

ENTERED: **MAY 15 2018**