

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DANIEL JAMES HUMISTON,)	
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Petitioner(s),)	CZ
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v.)	Docket No. 25787-16 L.
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COMMISSIONER OF INTERNAL REVENUE,)	
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Respondent)	
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ORDER

This case is on the Court’s June 12, 2018 Buffalo trial calendar. It arises from the Commissioner’s notices that he would record a federal tax lien on Daniel Humiston’s property and that he also intended to levy (i.e., seize) Humiston’s property, all in an effort to collect the tax debt that the Commissioner says Humiston owes. Humiston’s liability is unusual: He owes more than \$200,000 in trust-fund recovery penalties (TFRPs) that the Commissioner assessed against him under I.R.C. § 6672(a) after Tanning Bed Inc. -- Humiston’s business -- failed to pay over tanning excise taxes it was supposed to collect from its customers. Humiston argued at his collection due process (CDP) hearing that he couldn’t pay the balance owed and that Tanning Bed Inc. would pay some or all of it through its bankruptcy liquidation. He turned over some bankruptcy documentation but didn’t provide any personal financial information. The settlement officer (SO) determined that the lien and levy should stand because the bankruptcy liquidation had not yet happened and Humiston had failed to provide personal financial information. The Commissioner wants us to sustain the SO’s determination; he moved for summary judgment.

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). “[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). Humiston wants us to deny the Commissioner’s motion. He argues that he and the SO focused on Tanning Bed Inc.’s intention to pay the liability, and that there is a remaining factual dispute as to whether the SO even asked for his personal financial information.

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). To decide whether the SO abused his discretion, we review the administrative record to determine whether he: (1) properly verified that the requirements of applicable law or administrative procedure have been met; (2) considered any relevant issues petitioner raised; and (3) considered whether the proposed collection action balances the need for efficient tax collection with the petitioner’s legitimate concern that any collection action be no more intrusive than necessary. I.R.C. § 6330(c)(3); *see also, e.g., Lloyd v. Commissioner*, 113 T.C.M. 1287, 1289 (2017).

We’ll start and end our analysis with the first item -- whether the SO properly verified that the requirements of applicable law or administrative procedure have been met. Because the requirement is mandatory, we “review the [SO’s] verification under section 6330(c)(1) without regard to whether the taxpayer raised it at the [CDP] hearing.” *Hoyle v. Commissioner*, 131 T.C. 197, 202-03 (2008).

Here’s what the SO said about the verification requirement in the notice of determination:

I . . . verified the requirements of any applicable law or administrative procedure were met. IRS records confirmed the proper issuance of the notice and demand, Notice of Intent to Levy and/or Notice of Federal Tax Lien (NFTL) filing, and notice of a right to a Collection Due Process (CDP) hearing.

An assessment was properly made for each tax and period listed on the CDP notice.

* * *

I reviewed the Collection file, IRS records and information you provided. My review confirmed that the IRS followed all legal and procedural requirements, and the actions taken or proposed were appropriate under the circumstances.

The Commissioner did submit with his motion Forms 4340, Certificates of Assessments, Payments, and Other Specified Matters, for each tax period. This would ordinarily be enough for us to move past the verification requirement of § 6330(c)(1) and (3)(A). *See, e.g., Dinino v. Commissioner*, 98 T.C.M. 559, 564 (2009) (“The appeals officer would have seen th[e] entries [on the Forms 4340] when he consulted [IRS] records before the notice of determination was issued”). But the parts of the administrative record that accompany the Commissioner’s motion say nothing about the SO verifying that the Commissioner complied with § 6751(b)(1) when he assessed the TFRPs against Humiston -- the SO doesn’t say anything about the requirement in the notice of determination, and there are no Forms 4183 attached to his declaration. *Cf. Blackburn v. Commissioner*, 150 T.C. ___, ___ (slip op. at 9) (Apr. 5, 2018). And the Forms 4340 themselves don’t give any information about the Commissioner’s compliance (or lack thereof) with § 6751(b)(1).

Our Court’s spent a lot of time lately thinking about I.R.C. § 6751(b)(1), which says that “[n]o penalty under [the Code] shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination.” Indeed, the Second Circuit -- to which this case is presumably appealable -- told us last year that “the written-approval requirement of § 6751(b)(1) is appropriately viewed as an element of a penalty claim.” *Chai v. Commissioner*, 851 F.3d 190, 222 (2d Cir. 2017), *aff’g in part, rev’g in part* 109 T.C.M. 1206 (2015). We’re dealing here with a liability that consists only of penalties -- TFRPs under § 6672(a) -- so we don’t immediately see why § 6751(b)(1)’s penalty-approval requirement wouldn’t apply,¹ and the Commissioner hasn’t argued that it doesn’t. This is important

¹ These are called penalties *under the Code*, and it would be a tough sell to argue that they were automatically calculated through electronic means -- before he could assess the TFRPs against Humiston, the Commissioner had to determine that Humiston was the “person required to collect” the taxes and that he “willfully” failed to collect, account for, and pay them over. *See* I.R.C. §§ 6751(b)(2)(B) and 6672(a).

because we recently held that the Commissioner satisfied the § 6330(c)(1) verification requirement in a TFRP case because the administrative record included a Form 4183, Recommendation re: Trust Fund Recovery Penalty Assessment, which showed that an IRS supervisor approved her subordinate's determination to assert TFRPs against a taxpayer. *See Blackburn*, 150 T.C. at ___ (slip op. at 9) (“the mere existence of the form in the administrative record supports the settlement officer's verification”). The problem here is that there's nothing like that in the portion of the administrative record we have, and the SO failed even to mention § 6751(b)(1) in the notice of determination.

We do note that Humiston failed in his petition to assign error to the SO's § 6330(c)(1) verification, and we recognize that “[a]ny issue not raised in the assignments of error shall be deemed to be conceded.” Tax Court Rule 331(b)(4); *see also, e.g., Lloyd*, 113 T.C.M. at 1288 n.3 (2017); *Dinino*, 98 T.C.M. at 564. But we also recognize that the issue of § 6751(b)(1) compliance is cutting edge by Tax Court standards -- *Blackburn* was released only a month ago -- and Humiston, like so many other petitioners in our Court, is *pro se*. Humiston should therefore be prepared to state whether he wishes to raise this issue when his case is called at the trial session next month. But because this is a motion for summary judgment, we won't hold that the Commissioner is entitled to judgment as a matter of law because it's unclear whether the SO properly verified that the requirements of applicable law and administrative procedure had been met. It is therefore

ORDERED that respondent's motion for summary judgment is denied.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
May 23, 2018