

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

CRAIG K. POTTS & KRISTEN H. POTTS,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 9307-17 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER AND DECISION**

This case was commenced under Internal Revenue Code section 6330(d) in response to a notice of determination sustaining collection action. It is currently before the Court on respondent's Motion for Summary Judgment. Although the record is extensive, the material facts are straightforward and not the subject of a genuine dispute. Summary judgment is therefore appropriate if respondent is entitled to judgment as a matter of law. Rule 121(b), Tax Court Rules of Practice and Procedure.

The notice of determination on which this case is based relates to a notice of levy issued for petitioners' unpaid tax liabilities for four years. Petitioners' liabilities for three of the years, 2008, 2009, and 2010, were the subject of a final Tax Court decision entered October 27, 2015, in docket No. 25957-13. The fourth, for 2012, was an agreed liability decided on September 16, 2015, by petitioners' execution of a Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment. Thus petitioners had a prior opportunity to dispute the liability for each year in issue. Petitioners' primarily seek to raise arguments concerning their liabilities for 2005, which, along with their liability for 2013, was the subject of a previous section 6330 hearing in which summary judgment was rendered in favor of respondent. See Potts v. Commissioner, T. C. Memo. 2017-228.

Because petitioners received a statutory notice of deficiency for 2008, 2009, and 2010, they are not entitled to dispute the underlying liabilities in this case. Sec. 6330(c)(2)(B). They waived their right to contest the 2012 liability in this

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proceeding when they settled the amount for that year during a previous Appeals hearing. See Potts v. Commissioner, at \*10 (quoting Estate of Deese v. Commissioner, T.C. Memo. 2007-362); Lance v. Commissioner, T.C. Memo 2009-129; Rivera v. Commissioner, T.C. Memo. 2003-35. Because they had a section 6330(c) hearing with respect to 2005, they are not entitled to a second hearing for that year. Sec. 6330(b)(2). The issue in this case, therefore, is only whether the notice of determination constituted an abuse of discretion. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). An abuse of discretion is found where action is arbitrary, capricious, or without foundation in fact or in law. See, e.g., Giamelli v. Commissioner, 129 T.C. 107, 111 (2007).

All of the material facts have been stipulated. On March 30, 2016, the Internal Revenue Service (IRS) sent a Notice of Intent to Levy and Your Right to a Hearing to each petitioner for 2008, 2009, 2010, and 2012. Petitioners requested a hearing, and their case was assigned to Settlement Officer Martin Engelbrecht (SO) in St. Louis, Missouri. Petitioners' counsel informed the SO that they had submitted an Efficient Tax Administration (ETA) offer-in-compromise to an office in Long Beach, California. The SO advised petitioners that he would wait for the Long Beach office to consider the offer-in-compromise. The Long Beach office returned the offer on February 1, 2017, after petitioners failed to present financial information that had been requested. The SO then requested that financial information be submitted to him for consideration of collection alternatives. Petitioners refused to do so, contending that the information was unnecessary for an ETA offer-in-compromise but at the same time said that the offer should be recharacterized as one based on doubt as to liability (DATC). The SO advised petitioners that the offer would have to be considered outside of the section 6330 hearing. The SO performed the verification procedures specified in section 6330(c)(1) with respect to assessments and notices. The notice of determination sustaining the levy was sent April 3, 2017.

Respondent reserved relevance objections in the stipulation to numerous historical documents relating to years not the subject of the notice of determination in this case. At most the documents show continuing disputes about the amounts and payments of petitioners' income tax liabilities over a long period of years. We agree with respondent that those documents submitted by petitioners are not relevant, and we disregard them.

The thrust of petitioners' objection to respondent's Motion for Summary Judgment is that the notice of determination did not address the processing of an amended return for 2012, did not address petitioners' claims that they were not

required to submit financial information, did not address their switch from one type of offer-in-compromise to another, did not address their claim that a revenue officer's recommendation to accept one offer was not followed by separate hearing offices, and did not address the law regarding refunds of offer-in-compromise payments. They submit numerous materials that were not presented to the SO during the hearing, are not part of the administrative record, and cannot be considered here. See Keller v. Commissioner, 568 F.3d 710, 716 (9th Cir. 2009) aff'g in part, vacating in part T.C. Memo. 2006-166; Giamelli v. Commissioner, 129 at 114.

To the extent that petitioners criticize the SO for failing to engage in a complicated discourse about how the offer-in-compromise should have been processed, they would involve him in matters extraneous to the years before him and before us in this case. He reasonably agreed to wait for the Long Beach office to act. It did, and he did all that was expected of him.

Respondent's Motion for Summary Judgment was the subject of a hearing in Phoenix, Arizona, on April 30, 2018. Petitioners requested the opportunity to present further argument and were granted the opportunity to file a further memorandum. Respondent filed a response to the additional factual assertions and legal arguments made in petitioners' memorandum. Most of the additional materials submitted by the parties were not before the SO and relate to petitioners' history of submitting unorthodox forms of offers-in-compromise to different offices of the IRS. These materials are useful only in assessing whether they preclude summary judgment.

Essentially petitioners argue that it was an abuse of discretion for the SO not to delay action while petitioners' missteps--whether intentional and strategic or inadvertent--were straightened out. Those missteps were altering the prescribed form for submitting an offer-in-compromise, submitting various altered forms to different offices of the IRS, attempting to recharacterize the form from ETA to one based on DATC, and continuously raising new arguments not properly raised with the Appeals office during the years that administrative proceedings were pending. Petitioners' inconsistencies and strategies of altering forms and resubmitting them to different IRS offices apparently were intended to avoid submitting financial information and to support their claim that the payment made with the offer was refundable.

Petitioners were precluded in this case from disputing the underlying liabilities because of prior opportunities to do so. (They pursued a similar strategy

of ambiguous offers unsuccessfully in their earlier case. See Potts v. Commissioner, T.C. Memo. 2017-228.) The Appeals office exercised patience and restraint in attempting to sort out the confusion that petitioners generated. There was no abuse of discretion in the determination to sustain the collection action and leave petitioners to pursue compromise outside of the section 6330(c) hearing. The determination was not arbitrary, capricious, or otherwise an abuse of discretion. See generally, Baltic v. Commissioner, 129 T.C. 178, 183-184 (2007). Respondent is entitled to judgment as a matter of law. Upon due consideration and for cause, it is hereby

ORDERED that respondent's Motion for Summary Judgment filed February 26, 2018, is granted. It is further

ORDERED that petitioners' Motion for Continuance is denied as moot. It is further

ORDERED AND DECIDED that collection may proceed as set forth in the notice of determination on which this case is based.

**(Signed) Mary Ann Cohen  
Judge**

ENTERED:           **JUN 20 2018**