

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DRC

DOUGLAS E. HOREJS, PETITIONER AND)
MARY M. BALDWIN, INTERVENOR,)
)
Petitioner(s),)
)
v.) Docket No. 4035-17.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)
)
)

ORDER AND ORDER AND DECISION

This case was calendared for trial at the Court’s April 9, 2018, trial session in Salt Lake City, Utah. On April 20, 2017, petitioner’s spouse, Mary Baldwin intervened. Pending before us is petitioner’s Motion for Summary Judgment, filed February 21, 2018, as supplemented, and petitioner’s oral Motion for Costs Under Rule 231, made April 9, 2018. Respondent filed an Objection to petitioner’s Motion for Summary Judgment on March 22, 2018, to which was attached a copy of a decision document signed by petitioner, intervenor and counsel for respondent. In the decision document, respondent conceded the deficiency in full. We held a hearing on April 9, 2018, at which petitioner and counsel for respondent appeared and were heard.

Background

The following facts have been drawn from petitioner’s amended petition and the parties filings and argument before us. At issue originally was whether petitioner had received cancellation of debt (COD) income in 2014, as reported by Citibank to respondent on Form 1099-C. Petitioner informed respondent that the Form 1099-C was incorrect, referring respondent to litigation between petitioner and Citibank. Respondent asked petitioner for information regarding the dispute that petitioner did not provide. In particular, respondent asked petitioner to contact Citibank for a corrected Form 1099-C and to send respondent a copy. Petitioner

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alleges that respondent erred by asking petitioner to contact Citibank and request the information. Petitioner also appears to allege that respondent erred in relying on the Form 1099-C filed by Citibank. After more letters and telephone calls, the parties were unable to resolve the case administratively.

On the basis of the Form 1099-C, respondent then issued a notice of deficiency for 2014, dated November 28, 2016, to petitioner and intervenor. Petitioner timely petitioned for reconsideration. Intervenor did not sign the petition so respondent assessed the deficiency against her and she paid the outstanding liability and interest on September 21, 2017, in the amount of \$1,464.75. In the interim, on July 6, 2017, respondent requested underlying records from Citibank and on or about September 23, 2017, received a corrected Form 1099-C from Citibank which reported that petitioner had received no COD income in 2014. Respondent prepared and sent to petitioner and intervenor a decision document reflecting that respondent conceded the deficiency. Petitioner and intervenor signed that document on January 17, 2018, and respondent's counsel signed it on January 30, 2018.

Analysis

While this case appears to have been resolved by the parties without court intervention, petitioner is not satisfied with respondent's concession. In addition to asking us to find that he has no deficiency and to order a refund of the deficiency paid by intervenor, his motion for summary judgment asks us to order respondent to pay him the \$60 filing fee and \$500 for "time, phone, gas, auto, in dealing with this matter." Petitioner's motion also seeks letters of apology from IRS officials and damages from Citibank for filing a false document, to be paid to intervenor.

We explained at the April 9, 2018, hearing that we do not have jurisdiction to order apologies or damages from Citibank. See sec. 7442 (we are a court of limited jurisdiction)¹; Kluger v. Commissioner, 83 T.C. 309, 314 (1984) (same); see also, e.g., secs. 6213 (granting us jurisdiction over deficiency) 6214(a) (same); 6015(e) (granting us jurisdiction over innocent spouse claims); 7430 (granting us jurisdiction over administrative and litigation costs). And at the hearing, counsel for respondent stated that respondent would issue a refund to intervenor as soon as this case is resolved. To that end, the parties have filed a stipulation showing

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended and in effect for the years at issue. Rule references are to the Tax Court Rules of Practice and Procedure.

petitioner's and intervenor's statement of accounts. Therefore, with the exception of litigation costs, petitioner's motion is moot as to those matters over which we have jurisdiction.

We now turn to petitioner's request for costs. In addition to requesting costs in his motion for summary judgment, petitioner also made an oral motion under Rule 231 for litigation costs pursuant to section 7430. Respondent is correct that petitioner has not met the requirements under our Rules for a motion for litigation costs but as we explained in the hearing, the parties' submissions already address the key question of whether respondent's original position was "substantially justified". Therefore, we will decide this issue without requiring additional briefing.

Section 7430 authorizes us to award reasonable administrative or litigation costs to a "prevailing party" under certain circumstances. Respondent argues that petitioner is not a "prevailing party" because respondent's position was "substantially justified" within the meaning of section 7430(c)(4)(B). That provision provides that "[a] party shall not be treated as the prevailing party * * * if the * * * [Commissioner] establishes that the position of the * * * [Commissioner] in the proceeding was substantially justified. *Id.*; see, e.g., Corson v. Commissioner, 123 T.C. 202, 206 (2004) (explaining that petitioner bears the burden of proving substantial justification).

The position of the Commissioner is substantially justified if it has a "reasonable basis both in law and fact" and is "justified to a degree that could satisfy a reasonable person". Pierce v. Underwood, 487 U.S. 552, 565 (1988); see sec. 301.7430-5(c)(1), *Proced. & Admin. Regs.* The reasonableness of the Commissioner's position is predicated on whether the Commissioner knew or should have known that his position was invalid at the outset. See Nalle v. Commissioner, 55 F.3d 189, 191 (5th Cir. 1995), *aff'g* T.C. Memo. 1994-182. The Commissioner's position is not substantially justified where the Commissioner does not diligently investigate a case prior to taking that position. See, e.g., Powers v. Commissioner, 100 T.C. 457, 473 (1993), *aff'd in part, rev'd in part, and remanded on other grounds*, 43 F.3d 172 (5th Cir. 1995). That the Commissioner ultimately concedes issues is not solely determinative of a taxpayer's claim for litigation costs, although it is a factor to be considered. Hanson v. Commissioner, 975 F.2d 1150, 1155-1156 (5th Cir. 1992), *rev'g an unpublished order of this Court*; Maggie Mgmt. Co. v. Commissioner, 108 T.C. 430, 443 (1997).

Respondent's original position was that petitioner had unreported COD income. Generally the taxpayer has the burden of proving the Commissioner's determinations are in error. Rule 142(a); Welch v. Helvering, 290 U.S. 111 (1933). With respect to unreported income, however, the Commissioner may need to investigate third-party payment reports to show some indicia that the taxpayer received the reported income. Portillo v. Commissioner, 932 F.2d 1128, 1133-1134 (5th Cir. 1992), aff'g in part and rev'g in part T.C. Memo. 1990-68. And when a taxpayer raises a reasonable dispute with respect to income reported on a third-party information return, section 6201(d) shifts to the Commissioner the burden of producing in a court proceeding "reasonable and probative information concerning" the disputed income, in addition to the information return. However, the burden only shifts if the taxpayer "has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within control of the taxpayer as reasonably requested by the Secretary)." Sec. 6201(d)

On the facts as pled by petitioner and argued by respondent, we conclude that respondent's position was substantially justified. The mistake giving rise to the dispute between the parties was made not by respondent but by a third-party. Respondent received third-party information reporting that petitioner and intervenor had COD income. Petitioner challenged the third-party reporting and respondent took reasonable steps to investigate by asking petitioner for additional information. As soon as respondent received the corrected reporting from the third-party, respondent advised petitioner that he would concede the case. While petitioner may have preferred that respondent ask Citibank for information directly, he bears the burden of proof generally and we hold it was not reasonable in these circumstances for petitioner to require respondent to seek third-party discovery from Citibank without first having attempted to secure the information himself. For the foregoing reasons, and based on the record before us, it is therefore

ORDERED that petitioner's Motion for Summary Judgment filed February 21, 2018, as supplemented, is DENIED. It is further

ORDERED that petitioner's oral Motion for Costs Under Rule 231, made April 9, 2018, is DENIED. It is further

ORDERED AND DECIDED that there is no deficiency in income tax due from, nor overpayment due to, petitioner for the taxable year 2014; and

that there is no deficiency in income tax due from intervenor for the taxable year 2014; and that intervenor's claim for innocent spouse relief pursuant to I.R.C. sec. 6015 is therefore moot. It is further

ORDERED AND DECIDED that there is an overpayment in income tax due to intervenor in the amount of \$1,464.75, which amount respondent assessed against intervenor as a non-petitioning spouse on April 17, 2017 and which amount intervenor paid on September 21, 2017, which date was after the mailing of the Notice of Deficiency and for which amount a claim for refund could have been filed under the provisions of I.R.C. sec. 6511(b)(2).

**(Signed) Cary Douglas Pugh
Judge**

ENTERED: **JUN 21 2018**