UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

JAMES HOUK AND MARSHA HOUK, DECEASED,	)	
Petitioners,	)	
v.	)	Docket No. 22140-15 L.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

Now before the Court is the Commissioner's motion for entry of decision filed May 29, 2018 (ECF 32). Mr. Houk filed his response to the Commissioner's motion on June 13, 2018 (ECF 34). The Court will order the Commissioner to supplement his motion and Mr. Houk to file a response to that supplement.

Background

It appears that the Houks filed a Federal income tax return for 2013 on which they reported an income tax liability that they did not pay. The IRS served on them a notice of levy, on the basis of which they requested a Collection Due Process ("CDP") hearing before IRS Appeals. The petition in this case shows that, after that CDP hearing, the Office of Appeals issued to the Houks a "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330" dated July 31, 2015 (ECF 4). That notice stated that "[t]he proposed installment agreement or offer-in-compromise could not be considered during this CDP hearing because the taxpayers failed to provide all requested information" and stated that "the proposed levy action is the appropriate action in this case."

The Commissioner moved for summary judgment. (ECF 9.) On June 5, 2017, this Court entered an order (ECF 17) granting the motion in part—i.e., "as to 'innocent spouse' relief [conceded by the Houks] and collection issues")—but

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remanding the case to IRS Appeals for further consideration of the Houks' challenge to their 2013 liability.

Mr. Houk participated in a supplemental hearing in August 2017. Evidently, Mr. Houk submitted an amended 2013 income tax return and succeeded in persuading Appeals that his liability was lower than the amount that had been assessed in accordance with the Houks' original return; and on October 25, 2017, IRS Appeals issued a "Supplemental Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330" ("supplemental notice"; see ECF 32, Ex. B).

However, we cannot tell the exact meaning of the supplemental notice and the determination that it states. The supplemental notice states that Appeals "made the determination to adjust your account to the amended return filed to correct the amount of taxes you now owe. The Appeals Officer submitted the Form 3870, Request for Adjustment for an abatement of prior tax assessment in the amount of $7,369.00." This might mean that the total original assessment was $7,369 and it has all been abated, but the supplemental notice elsewhere states that the "Settlement Officer informed [Mr. Houk] that if there's still a balance due we would have to discuss a collection resolution." That "if" leaves us uncertain. Since the supplemental notice states that it "supplements the Notice of Determination dated July 31, 2015", that might mean that it leaves standing the prior determination in the July 2015 notice that "the proposed levy action is the appropriate action in this case", or perhaps silence about the levy might mean that the levy will not be necessary and is not sustained.

As far as we can tell, the record in this case so far does not include either the Houks' original return or their amended return, and the record does not show what the amount of their originally assessed liability was, nor what the adjusted liability is, nor how much of that adjusted liability remains unpaid.

On May 29, 2018, the Commissioner filed a motion (ECF 32) for entry of decision sustaining the supplemental notice. The Commissioner's motion alleges that the parties have reached a basis of settlement and that the proposed decision document is consistent with their agreement. The proposed decision document provides, as to Mr. Houk, simply "That the determination set forth in the Supplemental Notice of Determination ... is sustained in full" (and later specifies that "The proposed levy action is sustained"). However, it proposes no explicit decision embodying the resolution of his liability challenge, and it does not state

explicitly whether there is an unpaid balance that would warrant the sustaining of the levy.

On June 13, 2018, Mr. Houk filed his response to the IRS's motion for entry of decision (ECF 34). He does not seem to dispute the assertion that the parties have come to an agreement.

Discussion

A decision entered by the Tax Court pursuant to section 7459 in a CDP case (as in any case) should resolve all of the issues in the case. Where an unambiguous notice of determination explicitly addresses all those issues, it may be sufficient for the decision to sustain that determination. But where the notice of determination is otherwise, the decision to be entered may require more.

In a deficiency case, the Court's decision must "specify[] the amount of the deficiency." Sec. 7459(c). This is an instructive analogy. In a CDP case in which a liability challenge is sustained in whole or in part, the best practice would seem to be that the decision specify the amount of the adjusted liability. The decision entered by this Court in Dykstra v. Commissioner, No. 8984-15L (Jan. 9, 2018; ECF 25), is a helpful example.

The perennial question in a CDP case is whether the Court should sustain the filing of the lien notice or the issuance of the proposed levy. A decision that simply sustains the notice of determination may be sufficient if that notice of determination is clear about what it determines. Where a supplemental notice of determination has intervened, the potential for unclarity may arise—unless that supplemental notice is clear about what it revises in the original notice and what it leaves unchanged.

In the supplemental notice issued here, Appeals determined that the Houks' 2013 tax liability should be reduced by $7,369, but it does not state what that adjusted liability is nor whether it has been paid in full. Moreover, the supplemental notice purports to sustain the proposed levy, but we cannot tell whether there is any unpaid portion of the 2013 liability to make the levy appropriate.

We will therefore order that the motion for entry of decision be supplemented and be accompanied by a revised proposed decision document that sufficiently resolves the issues in this case.

Boilerplate language in Appeals' notices

Sometimes a CDP hearing addresses a lien notice (see section 6320), sometimes a levy notice (see section 6330), and sometimes both. Presumably for that reason, IRS Appeals has developed "and/or" letters and forms that are intended to serve in all three of those circumstances. That approach sometimes causes confusion.

The notices of determination that conclude the CDP hearing, announce Appeals' final decision, and provide an opportunity for judicial review are, we observe, always entitled--

> NOTICE OF DETERMINATION CONCERNING COLLECTION ACTIONS UNDER SECTION 6320 **and/or** 6330. [Emphasis added.]

Indication whether the notice addresses a lien or a levy or both does not appear on the first page. Lawyers and judges know to look on subsequent pages to find references to "lien" (or "NFTL" or "6320") or "levy" (or "NOIL" or "6330") or both, but we think that people of ordinary intelligence who do not have tax training and who have previously received both a lien notice and a levy notice and have requested CDP hearings for both (apparently not Mr. Houk's circumstance) must find this confusing.

The original notice of determination that IRS Appeals issued in this case and the supplemental notice that it issued both include this sentence:

> There was a balance due when the Notice of intent to Levy was issued **or** when the NFTL filing was requested. [Emphasis added.]

Since in this case there was only a "Notice of intent to levy" ("NOIL") and not any "NFTL [notice of federal tax lien] filing", it seems clear that this sentence is boilerplate intended to do double duty for both liens and levies. But when one sees this unedited sentence, one knows that it was not composed to address the actual circumstances of the case then before Appeals. One assumes that someone at Appeals actually did address the question whether there was a balance due when the notice was issued, but one dislikes assuming. (And in this case, in its current posture, the question whether there remains a balance due is a very good question, for which an answer in the supplemental notice would have been helpful.)

It appears this case is headed for settlement, in which event all is well. But we cannot endorse the "and/or" approach reflected in IRS Appeals' notices.

To give effect to the foregoing, it is

ORDERED that, no later than July 13, 2018, the Commissioner shall file a supplement to his motion for entry of decision, in which he shall set forth what collection actions, if any, were sustained in Appeals' determination and are to be sustained here pursuant to the agreement of the parties. If collection activity is to be sustained to any exent, then to that supplement, the Commissioner shall attach documentation, such as copies of account transcripts or other appropriate records, showing the remaining liability, if any, for the Houk's 2013 year. To that supplement the Commissioner shall attach a revised proposed decision document that resolves the issues in this case. It is further

ORDERED that, no later than July 27, 2018, Mr. Houk shall file a response to the motion for entry of decision, as supplemented.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
June 29, 2018