

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

WILLIAM S. CARTER,)
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 Petitioner,)
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 v.) Docket No. 25561-16 L.
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 COMMISSIONER OF INTERNAL REVENUE,)
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 Respondent.)
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ORDER AND DECISION

This collection review case is before the Court on respondent’s Motion For Summary Judgment, filed May 18, 2018. Respondent seeks to sustain a Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated October 26, 2016 (notice of determination), as supplemented by a Supplemental Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated November 16, 2017 (supplemental notice of determination). The notice of determination, as supplemented, upheld a proposed levy to collect petitioner’s outstanding income tax liabilities for the taxable (calendar) years 2005, 2009, 2010, and 2011.¹ Although the Court directed petitioner to file a response to respondent’s motion, petitioner failed to do so.²

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

² Notably, in the Order directing petitioner to respond to respondent’s motion, the Court expressly advised petitioner that “Failure to comply with this Order may result in the granting of respondent’s motion for summary judgment and a decision, if appropriate, may be entered against petitioner.” In order to assist petitioner in the preparation of a response, the Court attached to that order a copy of Q&As the Court has prepared on the subject “What is a motion for summary judgment? How should I respond to one?”. The Court considers the merits of respondent’s motion even though by failing to respond to it, petitioner waived his right to contest it. Rule 121(d); see, e.g., Lunsford v. Commissioner, 117 T.C. 183, 187 (2001).

I. Background

The record establishes and/or the parties do not dispute the following background facts:

Petitioner did not timely file a Federal income tax return for 2005. On February 14, 2012, petitioner filed a delinquent return for 2005. Pursuant to section 6201(a)(1), respondent assessed the self-reported liability shown on that return on March 26, 2012, as well as related additions to tax and statutory interest. On that same date, respondent sent to petitioner a “statutory notice of balance due”, i.e., notice and demand for payment. See sec. 6303(a). Petitioner failed to remit payment.

Petitioner did not timely file a Federal income tax return for 2009. On February 14, 2012, petitioner filed a delinquent return for 2009. Pursuant to section 6201(a)(1), respondent assessed the self-reported liability shown on that return on March 19, 2012, as well as related additions to tax and statutory interest. On that same date, respondent sent to petitioner a statutory notice of balance due. Petitioner failed to remit payment.

Petitioner did not timely file a Federal income tax return for 2010. On February 14, 2012, petitioner filed a delinquent return for 2010. Pursuant to section 6201(a)(1), respondent assessed the self-reported liability shown on that return on April 30, 2012, as well as related additions to tax and statutory interest. On that same date, respondent sent to petitioner a statutory notice of balance due. Petitioner failed to remit payment.

On August 13, 2012, petitioner file a Federal income tax return for 2011. Pursuant to section 6201(a)(1), respondent assessed on September 24, 2012, the self-reported liability shown on that return, as well as additions to tax and statutory interest. On that same date, respondent sent to petitioner a statutory notice of balance due. Petitioner failed to remit payment.

Sometime in 2014, petitioner and respondent entered into an installment agreement for petitioner’s unpaid 2005, 2009, 2010, and 2011 tax liabilities. Under that agreement petitioner was required to pay \$1,668 to respondent on the 22nd of every month. On or about August 30, 2014, petitioner defaulted on his installment agreement because an insufficient installment payment was made. On September 25, 2014, respondent applied that \$864 payment by petitioner to his 2009 tax liability.

On May 4, 2016, respondent issued to petitioner a Notice LT11, Intent To Seize Your Property Or Rights To Property, for his unpaid 2005, 2009, 2010, and 2011 tax liabilities, which then aggregated \$1,642.62 for 2005, \$23,289.31 for 2009, \$32,627.73 for 2010, and \$11,667.23 for 2010. That Notice LT11 further informed petitioner of his right to request a so-called collection due process (CDP) hearing. Petitioner timely submitted to the IRS Office of Appeals (Appeals Office) a Form 12153, Request For A Collection Due Process Or Equivalent Hearing. During the original administrative phase of this case petitioner challenged his tax liabilities for 2005, 2009, 2010, and 2011 in that petitioner requested abatement of the penalties assessed against him for those years. Petitioner also expressed interest in a collection alternative.

Petitioner's CDP hearing request was assigned to an Appeals Office settlement officer (SO), who verified that she did not have prior involvement with petitioner for the tax or tax years at issue in this case. The SO mailed petitioner a letter dated August 10, 2016, informing him that a telephone CDP hearing was scheduled for September 15, 2016. If petitioner wished to have the Appeals Office consider a collection alternative, the SO's letter requested from petitioner financial information, including a completed Form 433-A, Collection Information Statement For Wage Earners And Self-Employed Individuals, with supporting attachments documenting petitioner's income, expenses, assets, etc. The letter requested that such items be provided by petitioner to the SO on or before August 24, 2016.

On September 15, 2016, the SO conducted the telephone CDP hearing with petitioner. Petitioner requested a collection alternative in the form of either an installment agreement or an offer in compromise. The SO explained that she could not consider collection alternatives unless she received the above requested information regarding petitioner's financial situation, including the Form 433-A. Petitioner requested more time to provide such information. The SO granted him 14 days in which to provide it.

Petitioner never provided the SO with any documents supporting his challenge to the existence or amount of the penalties for 2005, 2009, 2010, and 2011. Petitioner also failed to provide the SO with any financial information, such as a Form 433-A, regarding his financial situation.

On October 26, 2016, respondent issued to petitioner the notice of determination sustaining the proposed levy for 2005, 2009, 2010, and 2011. On November 25, 2016, after respondent had closed the administrative phase of this proceeding, petitioner faxed to respondent a letter addressed to the Clerk of the U.S. Tax Court, included with which was a Form 433-A. The fax did not have any supporting documentation to verify petitioner's assets, liabilities, and expenses.

On November 28, 2016, petitioner filed an imperfect petition commencing the present Tax Court case. On January 18, 2017, petitioner filed an amended petition expressing disagreement with the notice of determination, asserting that the proposed levy would create a financial hardship, and indicating his interest in an installment agreement and in penalty abatement.

On August 3, 2017, the Court issued an Order remanding this case to the Appeals Office for a supplemental CDP hearing. On October 17, 2017, Appeals held a supplemental hearing with petitioner. On October 17 and October 18, 2017, petitioner faxed some financial information to the SO. However, as of October 18, 2017, petitioner failed to provide complete financial information to the SO, nor had petitioner furnished his 2016 income tax return. Although petitioner indicated he would provide additional financial information and information regarding his 2016 return by October 19, 2017, petitioner never provided the Appeals Office with such information or his 2016 income tax return. Petitioner further never provided the Appeals Office with any documents supporting his challenge to the existence or amount of the penalties for 2005, 2009, 2010, and 2011. After considering the information petitioner did

supply, Appeals issued to petitioner on November 16, 2017, the supplemental notice of determination, again sustaining the proposed levy action for 2005, 2009, 2010, and 2011.

II. Discussion

Summary judgment serves to “expedite litigation and avoid unnecessary and expensive trials.” Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Either party may move for summary judgment upon all or any part of the legal issues in controversy. Rule 121(a). The Court may grant summary judgment only if there are no genuine disputes or issues of material fact. Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

Respondent, as the moving party, bears the burden of proving that no genuine dispute or issue exists as to any material fact and that respondent is entitled to judgment as a matter of law. FPL Group, Inc. v. Commissioner, 115 T.C. 554, 559 (2000). In deciding whether to grant summary judgment, the factual materials and the inferences drawn from them must be considered in the light most favorable to the nonmoving party. FPL Group, Inc. v. Commissioner, 115 T.C. at 559. The party opposing summary judgment must set forth specific facts which show that a question of genuine material fact exists and may not rely merely on allegations or denials in the pleadings. Rule 121(d); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Under Rule 121(d), if an adverse party does not respond to a motion for summary judgment, then this Court may enter a decision where appropriate against that party. Petitioner has not responded to the motion for summary judgment. As indicated supra in note 2, on page 1, the Court could grant respondent’s motion on that ground alone. In any event, as discussed below, the record in this matter shows that respondent is entitled to summary judgment on the merits of the case.

Section 6331(a) authorizes the Secretary to levy on property and rights to property of a taxpayer liable for taxes who fails to pay those taxes within 10 days after notice and demand for payment is made. Section 6331(d) provides that the levy authorized in section 6331(a) may be made with respect to “unpaid tax” only if the Secretary has given written notice to the taxpayer 30 days before the levy. Section 6330(a) requires the Secretary to send a written notice to the taxpayer of the amount of the unpaid tax and of the taxpayer’s right to an administrative hearing at least 30 days before the levy is begun.

The administrative hearing under section 6330 is conducted by respondent’s Appeals Office, which is charged with verifying that the requirements of any applicable law or administrative procedure have been met. Sec. 6330(c)(1), (3)(A). The taxpayer may raise at the hearing “any relevant issue relating to the unpaid tax or the proposed levy”. Sec. 6330(c)(2)(A), (3)(B). The taxpayer may also raise challenges to the existence or amount of the underlying tax liability at the hearing if the taxpayer did not receive a statutory notice of deficiency with respect to the underlying tax liability or did not otherwise have an opportunity to dispute that liability. Sec. 6330(c)(2)(B); see Montgomery v. Commissioner, 122 T.C. 1 (2004). The Appeals Office must balance the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. Sec. 6330(c)(3)(C).

This Court has jurisdiction under section 6330 to review the Commissioner's administrative determinations. Sec. 6330(d)(1). Where the underlying tax liability is properly at issue, the Court reviews the determination de novo. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Where the underlying tax liability is not at issue, the Court reviews the determination for abuse of discretion. Id. at 182. Whether an abuse of discretion has occurred depends upon whether the exercise of discretion is without reasonable basis in fact or law. Freije v. Commissioner, 125 T.C. 14, 23 (2005).

Petitioner during the original and supplemental administrative phase of this case challenged the existence or amount of the penalties for 2005, 2009, 2010, and 2011 in that he requested abatement of those penalties. Petitioner also disagreed with the proposed levy, requested a collection alternative, and stated that petitioner was unable to pay the balance, which can signal a request for currently not collectible status.

Section 6330(c)(2)(B) provides that the existence or amount of the underlying tax liability can only be contested if the taxpayer did not receive a notice of deficiency for the tax liabilities in question or did not otherwise have an earlier opportunity to dispute such tax liability. Goza v. Commissioner, 114 T.C. at 180-181. In reviewing the Appeals officer's determinations, this Court will not review an underlying tax liability if raised for the first time on appeal of a notice of determination and ordinarily will consider only those issues that the taxpayer raised at the administrative hearing. Giamelli v. Commissioner, 129 T.C. 107, 113 (2007). The merits of the underlying tax liability are not properly raised during the course of the administrative hearing if the taxpayer professes to challenge the underlying tax liability but fails to present the Appeals Office with any evidence with respect to that liability after being given a reasonable opportunity to present such evidence. Sec. 301.6330-1(f)(2), Q&A-F3, Proced. & Admin. Regs.; see also Pough v. Commissioner, 135 T.C. 344, 349 (2010) (taxpayer did not file amended tax returns during the hearing). With respect to challenges to penalties or additions to tax, a taxpayer must make a "meaningful challenge" during the administrative hearing. Taggart v. Commissioner, T.C. Memo. 2013-113, at *4.

Petitioner failed to present any evidence to support his challenge to the existence or the amount of the penalties for 2005, 2009, 2010, and 2011 to the SO, both during the original and the supplemental administrative phases of this case after being given reasonable opportunity to do so. Petitioner's challenge to the existence or amount of those penalties is not properly before this Court. Giamelli v. Commissioner, 129 T.C. at 113; sec. 301.6330-1(f)(2), Q&A-F3, Proced. & Admin. Regs.

Installment agreements and offers in compromise are forms of collection alternatives. As a prerequisite for consideration or approval by the IRS of such types of collection alternatives, including the administrative relief afforded by currently not collectible status, it is generally incumbent on a taxpayer to provide requested financial information to the settlement officer in order to permit evaluation of the taxpayer's ability to pay. See secs. 6159, 7122; Kindred v. Commissioner, 454 F.3d 688, 697 (7th Cir. 2006); Olsen v. United States, 414 F.3d 144, 151 (1st Cir. 2005); Doonis v. Commissioner, T.C. Memo. 2014-168, at *10 (noting that to be eligible for currently not collectible status, taxpayers must show they have no ability to pay their outstanding tax liability based on their current assets, income, and expenses). Similarly, IRS guidelines with

respect to collection alternatives direct that the taxpayer must be in current compliance with filing and estimated payment obligations. E.g., McLaine v. Commissioner, 138 T.C. 228, 243 (2012); Giamelli v. Commissioner, 129 T.C. 115-116. Moreover, it is not an abuse of discretion for the Appeals Office to decline to consider an installment agreement or offer in compromise where no specific collection alternative proposal is ever placed before the reviewing officer. See, e.g., Kindred v. Commissioner, 454 F.3d at 696; Kendricks v. Commissioner, 124 T.C. 69, 79 (2005). Stated otherwise, it is the obligation of the taxpayer, not the reviewing officer, to start negotiations regarding a collection alternative by making in the first instance a specific proposal.

The record reflects that during both the original and supplemental administrative phases of this case, petitioner failed to submit all of the financial information that the SO needed to evaluate petitioner's eligibility for a collection alternative, including being placed in currently-not-collectible status. It is clear that the Appeals Office provided ample warning, instruction, and opportunity for petitioner to open the door for the SO to consider collection alternatives. Case law highlights the lack of abuse of discretion in analogous scenarios. See, e.g., Murphy v. Commissioner, 125 T.C. 301, 315 ("An appeals officer does not abuse her discretion when she fails to take into account information that she requested and that was not provided in a reasonable time."); Dinino v. Commissioner, T.C. Memo. 2009-284 (noting consistency with IRS guidelines stating that, for purposes of good case management, no more than 14 days should be allowed for submission of financial information); Gazi v. Commissioner, T.C. Memo. 2007-342 ("There is no requirement that the Commissioner wait a certain amount of time before making a determination as to a proposed levy."); see also sec. 301.6330-1(e)(3), Q & A-E9, *Proced. & Admin. Regs.*

The Court is satisfied that the Appeals Office properly verified that the requirements of all applicable laws and administrative procedures have been met and balanced the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. In sum, the Appeals Office did not abuse its discretion in this case.

Upon due consideration and for cause, it is

ORDERED that respondent's Motion For Summary Judgment, filed May 18, 2018, is granted. It is further

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ORDERED AND DECIDED that respondent may proceed with the proposed collection action (levy) to collect petitioner's outstanding income tax liabilities for the taxable (calendar) years 2005, 2009, 2010 and 2011, as determined in the Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated October 26, 2016, as supplemented by the Supplemental Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated November 16, 2017, upon which notice this case is based.

(Signed) Robert N. Armen
Special Trial Judge

ENTERED: **JUL 11 2018**