

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

SALVADOR ABRICA & JENNIFER ABRICA,)	
)	
Petitioners,)	
)	
v.)	Docket No. 21654-17SL.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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ORDER

This is a collection review case involving a levy on petitioners’ State tax refund made to collect petitioners’ Federal tax liability for the taxable (calendar) year 2012. Presently pending before the Court is respondent’s Motion For Summary Judgment, filed February 1, 2018. Respondent also filed on that date the Declaration Of [Counsel] Kevin R. Oveisi and the Declaration Of [Settlement Officer] Kristine Martinez Padua in support of his motion. On March 1, 2018, petitioners filed a Response to the motion objecting to its granting. Most recently, on June 21, 2018, respondent’s motion was assigned to the undersigned for disposition.

Background

Petitioners timely filed an income tax return for 2012 and reported tax of \$12,004. Petitioners claimed withholding credits of \$11,701, and they accompanied their return with a payment of \$303, thereby paying in full their reported liability.

In June 2014 respondent determined a deficiency in petitioners’ income tax for 2012 of \$4,804. The deficiency is attributable to unreported income of \$16,032

based on third-party reporting.¹ Respondent sent petitioners duplicate original notices of deficiency that were sent by certified mail and addressed to petitioners at the same address listed by them in the present proceeding. Petitioners did not commence an action in this Court for redetermination of deficiency.

In or about May 2017 respondent levied on petitioners' State tax refund of \$771.42 and sent them notice of the seizure and their right to a hearing. In response, petitioners filed with respondent Form 12153, Request For A Collection Due Process Or Equivalent Hearing. In such form, and throughout the administrative process that followed, petitioners challenged the existence or amount of the underlying Federal tax liability for 2012.

The administrative process culminated in the issuance of a Notice Of Determination dated September 11, 2017, that sustained the collection action. Petitioners responded by timely filing a petition, which commenced the present case. In their petition, petitioners continue to challenge the existence or amount of the underlying liability for 2012.

Discussion

As previously stated, respondent filed his Motion For Summary Judgment and supporting Declarations on February 1, 2018. In his motion respondent contends that petitioners are barred from challenging the existence or amount of their underlying liability for either (or both) of two reasons. First, respondent invokes I.R.C. section 6330(c)(2)(B) and argues that "a taxpayer may not challenge the existence or amount of the underlying tax liability in a CDP [collection due process] hearing if the taxpayer received a statutory notice of deficiency for the tax liability or otherwise had an opportunity to dispute the tax liability." Respondent candidly admits that he cannot prove that petitioners actually received the notice of deficiency, but instead relies on various presumptions involving official regularity, mailing, and receipt. Second, respondent cites Giamelli v. Commissioner, 129 T.C. 107, 114-115, (2007), for the proposition that "a taxpayer is precluded from disputing the underlying tax liability in a CDP judicial review proceeding if the taxpayer failed to properly raise the merits of the underlying tax liability as an issue during the CDP hearing."

¹ Petitioners were credited with additional withholding of \$1,375 that was attributable to the third-party reporting. Also, an adjustment to petitioners' child tax credit was made, but it is not clear whether this was merely a mechanical adjustment.

The matter presented to the Court for decision at this time arises in the context of a motion for summary judgment and not after a trial. Therefore, 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); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, 85 T.C. 527, 529 (1985). 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. 559; Bond v. Commissioner, 100 T.C. at 36; Naftel v. Commissioner, 85 T.C. at 529.

The petition filed in this case expressly denies receipt of “a statutory notice of deficiency to go to Tax Court to contest the [additional] income”. Similarly in the petition it is alleged that “I was never * * * given a statutory notice which would had allowed me to petition the Tax Court before collection activity.”² Further, throughout both the administrative and judicial proceedings petitioners have been crystal clear and perfectly consistent in their position of not receiving the additional income determined by respondent in the notice fo deficiency based on third-party reporting.

Further, given petitioners’ aforementioned position, no useful purpose would have been served by petitioners filing an amended income tax return (Form 1040X) for 2012 “removing the erroneous income”, as advised to do by respondent’s settlement officer. After all, there was nothing to “remove”, as petitioners’ original return was just fine from petitioners’ point-of-view.

In view of the foregoing, the Court concludes that petitioners are not barred, under either rationale as advanced by respondent in his motion, from challenging the existence or amount of their underlying liability in the present proceeding. Accordingly, it is hereby

ORDERED that respondent’s Motion For Summary Judgment, filed February 1, 2018, is denied.

² Admittedly, paragraph 5 of the petition uses the singular pronoun, but the petition is signed by both petitioners. For purposes of this Order the Court will not differentiate between petitioner Salvador Abrica and petitioner Jennifer Abrica.

The parties are advised that unless sooner settled by mutual agreement after consultation and communication between the parties, this case will be noticed for trial in due course at Los Angeles, CA pursuant to petitioners' previously-filed Request For Place Of Trial.

(Signed) Robert N. Armen
Special Trial Judge

Dated: Washington, D.C.
July 12, 2018