

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

CLC

DEBRA L. MARCH,)
)
Petitioner,)
)
v.) Docket No. 6161-17 L.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

On September 4, 2018, we received from petitioner Debra L. March two filings that we will deem to be (1) a motion for reconsideration of our order of August 31, 2018 (Doc. 18), making absolute our Order to Show Cause dated August 10, 2018 (Doc. 13), and (2) a declaration in support of that deemed motion. We will deny the deemed motion for reconsideration.

Background

Ms. March's income in 2009 and 2010

Petitioner Debra L. March received in 2009 and 2010 items of income from various third parties (presumably reported to the IRS in Forms 1099 or the like), but she did not file Federal income tax returns for those years.

CDP hearing before IRS Appeals

The IRS eventually assessed tax against Ms. March for 2009 and 2010, and filed notices of lien against her. Ms. March requested a collection due process ("CDP") hearing before the Office of Appeals of the IRS, and Appeals issued a notice of determination sustaining the lien filings.

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Ms. March's petition

Ms. March filed with this Court a petition (Doc. 1) requesting our review of Appeals' determination. Her petition included the following assertions:

IRS failed [to] allow Petitioner the opportunity to challenge the liability of the assessed tax. * * *

IRS' claim that Petitioner had a taxable income and tax liability was not supported by any admissible evidence.

That is, Ms. March's petition includes challenges to the IRS's determination of her income tax liability.

Order to Show Cause

Pursuant to Rule 91, the Commissioner proposed to Ms. March a stipulation of facts. The proposed stipulation asserted that Ms. March received in 2009 and 2010 items of income from various third parties but that she did not file Federal income tax returns for those years. She did not respond. On August 8, 2018, the Commissioner filed a motion for an order to show cause. (Doc. 12.) The motion asked the Court to order petitioner Debra L. March, to "show cause" (i.e., to explain in writing) why proposed facts and evidence should not be accepted as established, as provided in Rule 91(f).

On August 10, 2018, we issued an Order to Show Cause (Doc. 13), which ordered--

that petitioner Debra L. March shall, on or before August 27, 2018, file a response in compliance with the provisions of Rule 91(f)(2), with proof of service of a copy thereof on opposing counsel, showing why the matters set forth in the Commissioner's proposed stipulation of facts, and accompanying exhibits, should not be deemed admitted for purposes of the pending case. For the matters that Ms. March does admit, her response should so indicate; for the matters she does not admit, her response should explain why and should state what she believes the actual facts to be. If no response is filed within the period specified above with respect to any matter or portion thereof, or if the response is evasive or not fairly directed to the proposed stipulation or

portion thereof, that matter or portion thereof will be deemed stipulated for purposes of the pending case, and an order will be entered accordingly, pursuant to Rule 91(f)(3).

Ms. March did not timely file a response in compliance with our order. She did mail to the Court a document entitled “Amended Petition” on T.C. Form 2, which we received on August 29, 2018. We assumed that this document was her response to our order to show cause, and we characterized it as such. (Evidently, this was not her intention, as appears below.) The document did not respond fairly to the facts alleged in the IRS’s stipulation, and by our order of August 31, 2018 (Doc. 18), we made absolute the Order to Show Cause (Doc. 13), thus deeming stipulated those facts about Ms. March’s receipt of income and non-filing of returns.

Ms. March’s late filing

On September 4, 2018, the Court received from Ms. March a document entitled “Petitioner’s Response to Respondent’s Motion to Show Cause * * *”. We construe this to be a response not only to respondent’s motion for an order to show cause but also to our Order itself, since her filing refers to our Order. The U.S. Postal Service mailing label on the envelope in which it was sent indicates that it was mailed August 28, 2018. This was one day after the date by which we had ordered her to respond. However, we will not disregard it but will exercise our discretion to treat it as a motion for reconsideration under Rule 161 and will address its merits.

Ms. March’s filing does not address the issues of her receipt of income or her non-filing of returns. Rather, she broadly criticizes the IRS’s handling of her case; and, as relevant here, she argues that, in a CDP case, the Tax Court’s review is limited to the administrative record developed by IRS Appeals during the agency-level CDP hearing, for which proposition she cites Robinette v. Commissioner, 439 F.3d 455, 459 (8th Cir. 2006), rev’g 123 T.C. 85 (2004), and other opinions of certain of the U.S. Courts of Appeals. She therefore contends it is improper for the Commissioner to attempt to develop evidence (such as by stipulation) that is outside that record.

However, this Court remains of the view that it is not confined to the administrative record in CDP cases, and this is especially so where the CDP case involves a challenge to the underlying liability, pursuant to section 6330(c)(2)(B), and thus resembles the more typical deficiency case. Of course, we do submit to

the Courts of Appeals, and we therefore follow the law as construed by the Court of Appeals to which a given case is appealable, even where we disagree; but in this case appeal would be to the Court of Appeals for the 10th Circuit, which, as far as we know, has not spoken on this issue. Cf. Kasper v. Commissioner, 150 T.C. No. 2, slip op. at 19, n.13 (2018) (surveying circuit law). (Ms. March cites Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994), but it is not a CDP case, has no obvious relation to tax, and was decided before section 6330 was even enacted.)

The Commissioner's principal contention about liability appears to be that Ms. March is not permitted to challenge her underlying liability in this suit because she had a prior "opportunity to dispute such tax liability", for purposes of section 6330(c)(2)(B). We do not decide that issue now. We do decide that, to the extent that Ms. March's underlying liability is properly at issue, both parties are permitted to put on evidence outside the administrative record. That evidence could include deemed stipulations about Mr. March's receipt of income in, and her non-filing of returns for, the years at issue. (Either party intending to offer evidence outside the administrative record should note the obligation, imposed in our standing pretrial order issued April 23, 2018 (Doc. 10), to exchange such evidence with one's opponent no later than 14 days before trial—i.e., by September 10, 2018.

Since Ms. March has still made no actual response to the Commissioner's proposed stipulation in compliance with our Order to Show Cause, we do not vacate our order making absolute that order. The deemed stipulations still stand.

Submitting the case under Rule 122

Ms. March explains to the Court that, because of health problems, it would be difficult for her to appear for a trial. She suggests that the case should be fully stipulated and should be decided pursuant to Rule 122; and this may indeed be the best means of proceeding with this case. Ms. March suggests that the contents of the administrative record should be stipulated; and this, too, seems to be a reasonable suggestion.

For reasons we have already stated, we do not agree with Ms. March that the stipulation would have to be limited to that administrative record, if either party wished to submit additional evidence and that evidence could be stipulated. We encourage the parties to attempt a comprehensive stipulation that would make possible the submission of the case under Rule 122. In the absence of any

stipulation by the parties, we cannot now order that the case is submitted under Rule 122, but we will address that possibility if it is presented.

For the foregoing reasons, it is

ORDERED, as to petitioner's two filings that the Court received on September 4, 2018, that the Clerk of the Court shall file "Petitioner's Response to Respondent's Motion to Show Cause * * *" as Ms. March's motion for reconsideration of our Order of August 31, 2018 (Doc. 18), and shall file "Declaration of Debra L. March in Support of Petitioner's Response * * *" as a declaration in support of that deemed motion. It is further

ORDERED that Ms. March's deemed motion for reconsideration is hereby denied. It is further

ORDERED that if either of the parties believes that it would be helpful to have a telephone conference with the Court and the IRS, then they may telephone the Chambers Administrator of the undersigned judge (at 202-521-0850) for the purpose of scheduling such a conference.

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
September 5, 2018