UNITED STATES TAX COURT
WASHINGTON, DC 20217

DAN GEORGE GANOUSIS & MARY MARGARET GANOUSIS,	)	
Petitioners,	)	**ALS**
v.	)	Docket No. 16095-17 L.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER & DECISION

This is a "collection due process ("CDP") case brought under I.R.C. section 6330 by petitioners Dan George Ganousis and Mary Margaret Ganousis. Now before the Court is the Commissioner's motion for summary judgment. Mr. and Mrs. Ganousis contend, "This entire court case is centered on ONE issue and that is 'Why did the IRS deny our deduction for a home office expense'?" Since Mr. and Mrs. Ganousis did receive statutory notices of deficiency for the years in suit, and did not file Tax Court petition to challenge those determinations, they are now barred by section 6330(c)(2)(B) from challenging their underlying liability in this CDP case, and we will grant the Commissioner's motion.

Background

The facts assumed here are as stated by Mr. and Mrs. Ganousis or as shown by the Commissioner and not disputed by Mr. and Mrs. Ganousis.

Pre-suit years

Mr. and Mrs. Ganousis assert, and we assume, that they have claimed home office deductions on their Federal income tax returns for more than 15 years, that for some of those years their returns were audited by the IRS, and that their home office deductions have not been disallowed until the years at issue here. They

SERVED Sep 06 2018

assert that they possess, for the years at issue here, the same sorts of supporting documentation that sufficed for prior years.

Suit-year returns

For each of the three years 2010 through 2012, Mr. and Mrs. Ganousis filed Federal income tax returns (Exs. 18, 19, 20). To each of those returns they attached a Schedule A, on each of which they claimed deductions for unreimbursed employee expenses totaling $28,275. Those deductions consisted of home office expense deductions. (See Ex. 18, page 8 of 9.)

Audit and SNODS

The IRS examined the three returns, disallowed the home office expense deductions, and for each year issued a statutory notice of deficiency ("SNOD")--for 2010 in March 2012 (Ex.12) and for 2011 and 2012 in May 2014 (Exs.14, 16). The SNODs determined deficiencies of tax, accuracy related penalties under 6662(a), and, for 2011 and 2012, additions to tax under section 6651(a)(1) for late filing. (The Commissioner now concedes the section 6662(a) accuracy-related penalties because he is unable to show compliance with section 6751(b)(1), and we will not discuss those penalties further.)

The IRS mailed the SNODs by certified mail. (See Exs. 13, 15, 17.) Mr. and Mrs. Ganousis received the SNODs (Ex. 21 at 3; Ex. 23 at 9), but they did not file petitions in the Tax Court to dispute the deficiency determinations.

Assessment and collection

The IRS assessed the tax determined in the SNODs and sent Mr. and Mrs. Ganousis a notice of their balance due. Mr. and Mrs. Ganousis did not pay the liabilities, and on November 7, 2016, the IRS issued to them a notice of intent to levy. (Ex. 1.)

CDP request and hearing

Mr. and Mrs. Ganousis timely requested a CDP hearing. (See Ex. 2.) Their request indicated interest in an Offer In Compromise ("OIC"), but they did not provide information to support an OIC. Their petition in this case does not assign as error any failure by Appeals to consider or grant a collection alternative, so we consider any such potential contention as conceded. See Rule 331(b)(4).

During the CDP hearing, Mr. and Mrs. Ganousis attempted to challenge their underlying liability for the years at issue--i.e., to dispute whether they owed the amounts that the IRS had assessed. The Settlement Officer ("SO") who conducted the hearing determined that SNODs had been issued to Mr. and Mrs. Ganousis for the years at issue, and that they had received the SNODs but had not filed Tax Court petitions to challenge the SNODs. She therefore concluded that Mr. and Mrs. Ganousis were not entitled to dispute their underlying liabilities.

The SO did offer to submit on petitioners' behalf a request for audit reconsideration by IRS "Exam" (i.e., outside the CDP hearing context before IRS Appeals) if they could provide substantiation for their dispute. They provided some information, which she forwarded to Exam; but Exam advised the SO that the documentation they submitted would not support reconsideration.

The CDP hearing concluded with Appeals' issuance on June 28, 2017, of a notice of determination sustaining the proposed levy. (Ex. 23.)

Tax Court proceedings

On July 28, 2017, Mr. and Mrs. Ganousis timely filed a petition in this Court pursuant to section 6330, seeking our review of Appeals' determination. The sole issue advanced in the petition is that their home office expense deduction should have been allowed.

The Commissioner filed a motion for summary judgment, arguing that the only contention that Mr. and Mrs. Ganousis raised in their petition was a challenge to their underlying liability (i.e., based on their asserted entitlement to the home office expense deduction). Citing section 6330(c)(2)(B), the Commissioner contends that Mr. and Mrs. Ganousis are not entitled to challenge their underlying liability and that the Commissioner is therefore entitled to summary judgment in this case as a matter of law.

Discussion

I. Summary judgment standard

Where the pertinent facts are not in dispute, a party may move for summary judgment to expedite the litigation and avoid an unnecessary trial. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be

granted where there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(a) and (b); see Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994); Zaentz v. Commissioner, 90 T.C. 753, 754 (1988). There is no dispute in this case about the material facts.

II. General CDP procedures

A. Right to a CDP hearing

If a taxpayer fails to pay any Federal income tax liability after demand, section 6331(a) authorizes the IRS to collect the tax by levy on the taxpayer's property. However, the IRS must first issue a final notice of intent to levy, and notify the taxpayer of the right to an administrative hearing before IRS Appeals. Secs. 6320(a), 6330(a) and (b)(1). After receiving such a notice, the taxpayer may request an administrative hearing before IRS Appeals. Sec. 6330(a)(3)(B), (b)(1).

B. Collection issues at the CDP hearing

At the CDP hearing, IRS Appeals must make a determination whether the proposed collection action may proceed. In so doing, Appeals is required to: verify that the requirements of any applicable law and administrative procedure have been met by IRS personnel, see sec. 6330(c)(3)(A); consider any collection alternatives proposed by the taxpayer, see sec. 6330(c)(3)(B) (citing sec. 6330(c)(2)); and consider "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary", see sec. 6330(c)(3)(C).

Mr. and Mrs. Ganousis do not contend that Appeals erred in any of these respects. Rather, they claim that Appeals erred in failing to correct a supposed error in the IRS's prior determination of their underlying tax liability.

C. Liability challenges in the CDP hearing

Such a liability challenge may sometimes be raised in an agency-level CDP hearing (and in the subsequent Tax Court suit). Section 6330(c)(2)(B) provides:

> The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person

did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability. Thus, in creating the CDP remedy, Congress manifestly intended that the pre-assessment deficiency case under section 6213 (authorized when an SNOD is issued) continue to be the principal vehicle for the litigation of liability. A taxpayer who receives an SNOD determining a tax liability has available to him the remedy of a deficiency case in the Tax Court. When a taxpayer foregoes the opportunity for that challenge, he may not thereafter attempt the challenge in a CDP hearing before IRS Appeals (or in a CDP case before the Tax Court).

D. Tax Court review

When IRS Appeals issues its determination, the taxpayer may "petition the Tax Court for review of such determination", pursuant to section 6330(d)(1), as Mr. and Mrs. Ganousis have done. Where the validity of the underlying liability is properly at issue, we review that determination de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000). For other issues, we review the determination for abuse of discretion. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). That is, we decide whether the determination was arbitrary, capricious, or without sound basis in fact or law. See Murphy v. Commissioner, 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Sego v. Commissioner, 114 T.C. at 610; Goza v. Commissioner, 114 T.C. at 181-182.

III. Analysis

This case is resolved simply: The only contention that Mr. and Mrs. Ganousis advance is barred by section 6330(c)(2)(B). When they previously received from the IRS the SNODs determining tax liabilities, Mr. and Mrs. Ganousis thereby had prior opportunities to challenge those liability determinations. They did not do so. They are barred from doing so now in this CDP case.

We note that section 6330(c)(2)(B) does not bar them from paying the tax in dispute, filing a timely administrative claimed for refund, and, if it is denied, timely litigating that refund claim in the district court or the Court of Federal Claims. See 26 U.S.C. secs. 6511(a), 6532(a), 7422(a); 28 U.S.C. secs. 1346(a)(1), 1491(a)(1).

However, we also note that the principal argument in favor of their home office deduction that Mr. and Mrs. Ganousis make in their response to the

Commissioner's motion for summary judgment (and that they appear to have attempted to make in the agency-level CDP hearing) is not promising:

> [T]his exact deduction was approved during an audit of four prior tax returns and approved. In fact, I have been working ... from a remote home office for more than 15 years. In all those years I have deducted--and had approved during several IRS audits--my home office deductions.

Even assuming this is true, the IRS is not bound, by its treatment of an item in a prior audit, to allow the taxpayer the same treatment on a subsequent year's return. See Charlson v. Commissioner, T.C. Memo. 2001-52 ("Respondent is not bound ... to allow the same treatment in a subsequent year, even where similar erroneously reported items were unchallenged in an audit of a prior year"; citing cases). Likewise, a reviewing court would not be bound.

In view of the foregoing, and for the reasons stated in the Commissioner's motion for summary judgment (Doc. 6) and in his reply memorandum (Doc. 10), it is

ORDERED that respondent's motion for summary judgment is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the collection of petitioners' Federal income tax for 2010, 2011, and 2012 as described in the "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code" dated June 28, 2017, except

That, pursuant to the Commissioner's concession, petitioners are not liable for (and the Commissioner may not proceed to collect) the accuracy-related penalties assessed against petitioners for 2010, 2011, and 2012, pursuant to section 6662(a).

(Signed) David Gustafson
Judge

ENTERED: **SEP 06 2018**