UNITED STATES TAX COURT
WASHINGTON, DC 20217

LAURI DENISE JOHNSON & DAVID MICHAEL ROBERSON,	)	
Petitioners,	)	
v.	)	Docket No. 22224-17 L.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This "collection due process" ("CDP") case is scheduled for trial at the Court's Boston session beginning October 15, 2018. Now before us are two motions:

1. On August 10, 2018, the Commissioner filed a motion for summary judgment (Doc. 6), to which petitioners have filed an opposition (Doc. 14). We will deny the Commissioner's motion and will order the parties to show cause why this case should not be remanded to IRS Appeals for verification under section 6330(c)(1) and for consideration of petitioners' challenges to their underlying liability under section 6330(c)(2)(B). (The Commissioner cites as Exhibits A, B, C, etc., certain documents from the administrative record. We cite them by page numbers that appear in the lower right-hand corner of the documents as attached to the declaration of the Settlement Officer ("SO") who handled this matter when it was before IRS Appeals.)

2. On August 28, 2018, petitioners filed a motion (Doc. 9) for leave to amend their petition. The Commissioner has objected. (Doc. 12.) We will grant petitioners' motion for leave.

SERVED Sep 10 2018

Background

The facts as they currently appear are set out below.

Tax return, audit, and deficiency assessment

Petitioners filed a joint Federal income tax return for 2013 reporting a liability. The IRS examined the return, disallowed itemized deductions, determined a greater liability, and in March 2016 mailed a statutory notice of deficiency ("SNOD") to the petitioners (pages 13-27). Petitioners did not challenge the SNOD by filing in the Tax Court a petition to commence a deficiency case, and the IRS assessed the deficiency.

Notice of levy and CDP request

When petitioners did not fully pay their assessed liability, the IRS issued a notice of proposed levy on January 2, 2017 (pages 29-33). In response to that notice, petitioners timely mailed to the IRS a Form 12153 (pages 8-18), requesting a CDP hearing before IRS Appeals.

CDP hearing

Because SNODs had previously been issued to petitioners, IRS Appeals informed petitioners on June 15, 2017, that Appeals would not entertain any liability challenge during the CDP hearing. (Page 80.) Appeals issued a notice of determination (pages 3-7) dated September 27, 2017, sustaining the proposed levy, and stating (at page 6), "you are precluded from raising the tax liability due to prior opportunity".

Tax Court proceedings

On October 24, 2017, petitioners timely filed a petition in this Court pursuant to section 6330(d), seeking our review of IRS Appeals' determination. Their petition reflects an address in Massachusetts.

On August 10, 2018, the Commissioner filed his motion for summary judgment (Doc. 6). The first paragraph in the "FACTS" section in his motion states--

> 4. Petitioners received a statutory notice of deficiency for taxable year 2013 dated March 28, 2016. Exhibit 1; Rubilotta Declaration, Exhibit D

--and the first paragraph in the "ARGUMENT" section in his motion states--

> 17. Because petitioners had a prior opportunity to dispute their underlying liability pursuant to the notice of deficiency, petitioners were precluded from raising the liability during the CDP hearing. Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E7, 301.63301(e)(3)Q&A-E7.

On August 28, 2018, petitioners submitted a motion for leave to amend their petition (Doc. 9), in which they state: "Petitioners have no knowledge of the Commissioner of the Internal Revenue Service offering IRS Notice CP2319A - Notice of Deficiency. It was never received by petitioners for the tax period ending 12/2013."

To the same effect, petitioners filed on September 8, 2018, an opposition (Doc. 14) to the motion for summary judgment. In that opposition they state: "Petitioners have no record of the receipt of this notice [of deficiency] nor knowledge of the contents of the foregoing document. Petitioners assert that the Internal Revenue Service will be unable to provide substantial proof that a statutory notice of deficiency was correctly served."

Evidence as to petitioners' receipt of the SNOD

We now set out in more detail the information in our record that bears on the question whether petitioners "received" the SNOD.

We first note the anomaly (if not an outright irregularity) that the SNOD is dated "March 28, 2016" but the Form 3877 attesting to its mailing is date-stamped four days earlier--i.e., "MAR 24 2016". This discrepancy does not prove that it was not mailed, but it does not inspire confidence. No certified mail green card bearing a signature of either petitioner appears in our record.

After the tax was assessed and the petitioners received the notice of proposed levy, their Form 12153 submitted on January 17, 2017, stated (at page 10):

> We submitted to an in-person Tax Audit that covered the tax years 2013 and 2014. We have remained in nonstop contact with the local Tax office by phone and in-person to resolve the 2013 and 2014 form1040 tax issues. Our last contact, in late 2016, prior to the Lien Notice was an in-person request to clarify and resolve the procedural and material issues involved in a payment notice citing a payment due resulting from our in-person tax audit. There were no additional 2013 taxes or penalties fixed by the June 22, 2016 in-person audit. To our knowledge, we fully paid all taxes and penalties claimed by the Internal Revenue Service for the 2013 and 2014 tax years determined by our in-person Tax audit.

This narrative reflects apparent ignorance of any SNOD having been issued in March 2016.

The "Case Activity Record Print" maintained by the SO in IRS Appeals includes the following entry for March 30, 2017:

> Tracked certified mail number and found that as of April 16, 2016, the status of the SNOD is still in transit for both taxpayers, therefore, it is determine[d] that the taxpayers did not receive the SNOD. * * * [Page 79; emphasis added.]

However, the SO's entry ten weeks later on June 15, 2017, reflects a forgetting (or, at best, an unexplained correction) of that prior conclusion, since it states:

> Since the taxpayer is precluded from raising the tax liability due to prior opportunity, advised the taxpayer that she may contact me to discuss a collection alternative until the reconsideration return is processed. [Page 79; emphasis added.]

Appeals' notice of determination issued September 27, 2017, included (at pages 5-6) the requisite statement as to "verification" under section 6330(c)(1), but it is very summary and altogether silent about the SNOD:

> The requirements of applicable law or administrative procedures have been met and the actions taken were appropriate under the circumstances.
>
> a. Verification of legal and procedural requirements:

> Appeals has obtained verification from the IRS office collecting the tax that the requirements of any applicable law, regulation or administrative procedure with respect to the proposed levy or NFTL filing have been met. Computer records indicate that the notice and demand, notice of intent to levy and/or notice of federal tax lien filing, and notice of a right to a Collection Due Process hearing were issued.
>
> Assessment was properly made per IRC § 6201 for each tax and period listed on the CDP notice. * * *

Nonetheless, the SO's notice evidently presupposes the IRS's issuance and the taxpayers' receipt of an SNOD, because the notice states (at page 6):

> **Challenges to the Existence of Amount of Liability**
>
> Although you disagree with the liability on your written request for a hearing, you are precluded from raising the tax liability due to prior opportunity.

The Commissioner's recent motion explicitly asserts receipt of the SNOD and cites supposed evidence:

> Petitioners received a statutory notice of deficiency for taxable year 2013 dated March 28, 2016. Exhibit 1; Rubilotta Declaration, Exhibit D.

But the cited "Exhibit 1" is a certified Form 4340 ("Certificate of Assessments, Payments, and Other Specified Matters") on which we can find no entry relating to the receipt of an SNOD (nor even, as far as we can tell, the issuance of an SNOD); and the cited "Exhibit D" is simply the SNOD itself, not any evidence of its receipt.

Discussion

I. The Commissioner's motion for summary judgment

A. Summary judgment procedure

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). A motion for summary judgment can be granted only if the movant submits materials that "show that there is no dispute as to any material fact". Rule 121(b) (sent. 3).

Under Rule 50(a), citing Rules 23(a)(3) and 33(b), an attorney who practices in this Court is responsible for what is asserted in a motion that he signs and files. In the instant motion for summary judgment, filed against self-represented taxpayers, the Commissioner made factual assertions as being not subject to genuine dispute when actually, as it appears to us, those assertions were explicitly disputed in the very documents that the Commissioner attached to his motion.

B. General CDP procedures

1. 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).

2. 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).

In an agency-level CDP hearing (and in the subsequent Tax Court suit), a taxpayer may sometimes challenge the liability asserted against him. 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, a taxpayer who "receives" an SNOD but foregoes the opportunity for a deficiency suit may not thereafter attempt the liability challenge in a CDP hearing before IRS Appeals (or in a CDP case before the Tax Court). But this bar depends on his "receiving" the SNOD.

3. 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 petitioners have done. Pursuant to section 7482(b)(1)(A), in this case an appeal of the Tax Court's decision would evidently be to the U.S. Court of Appeals for the First Circuit, which follows the "record rule", construing section 6330 to limit the scope of the Court's review to evidence in the administrative record developed before the Office of Appeals. See Murphy v. Commissioner, 469 F.3d 27, 31 (1st Cir. 2006), aff'g 125 T.C. 301 (2005). We therefore follow that rule in this case.

C. Analysis

The instructions under which the SO conducted the hearing (see page 52) stated: "The hearing officer is responsible for confirming if taxpayer received the SNOD". In a case like this one, that responsibility is part of the "verification" required by section 6330(c)(1). See Rivas v. Commissioner, T.C. Memo. 2017-56, at *10-11. On the record before us, a genuine dispute certainly exists as to the material fact of petitioners' supposed receipt of the SNOD, and the material fact of

the SO's "verification" of that issue. If we draw all reasonable inferences in petitioners' favor (as Rule 121 requires), then we must conclude, for purposes of the Commissioner's motion, that the Office of Appeals abused its discretion by erroneously advising petitioners that they were not entitled to dispute the liability at issue.

Even if we decline to consider, in connection with the merits of this question, petitioners' recent statements (Docs. 9-10, 14-15) because they are outside the administrative record, we might nonetheless consider those statements in connection with the question whether "the existing administrative record had been inadequate to permit effective judicial review", Murphy, 469 F.3d at 31. Indeed, we cannot tell why the SO concluded that the March 2016 SNOD was "still in transit", but then concluded in June 2017 that "the taxpayer is precluded from raising the tax liability due to prior opportunity", i.e., a preclusion that would have arisen only if they had received the March 2016 SNOD.

Had Appeals advised petitioners that they were entitled to dispute their liability (e.g., to substantiate their entitlement to the itemized deductions at issue), then petitioners might have submitted evidence and proved that their liability is less than the IRS had determine in the SNOD. This option was apparently foreclosed by Appeals' handling of the case--or so it seems when we draw inferences in favor of petitioners for purposes of the Commissioner's motion for summary judgment. We must therefore deny the motion.

II. Petitioners' motion for leave to amend their petition

The amendment that petitioners attempt to make to their petition is to add specific allegations about their non-receipt of the SNOD. Respondent objects (Doc. 12), stating:

> Justice does not ... require [granting leave to amend] in this case, because the new issue proposed by petitioners is addressed in respondent's motion for summary judgment and is therefore already before the Tax Court.
>
> ... [T]his process of filing amended pleadings is unnecessary and wasteful of the court's time, especially as it occurs within a few weeks of the trial calendar and with respondent's dispositive motion already pending before the court.

The Commissioner states no manner in which the amendment would prejudice him or otherwise result in unfairness or inefficiency. We will therefore exercise our discretion to allow the amendment.

In view of the foregoing, it is

ORDERED that petitioner's motion for leave to amend (Doc. 9) is granted and that the Clerk of the Court shall file, as an amendment to the petition, the first page of T.C. Form 2 attached to petitioners' motion as Exhibit A and the immediately following certificate of service, which bears the self-represented petitioners' signatures). It is further

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

ORDERED that, no later than September 21, 2018, each party shall show cause (i.e., shall file with the Court a written explanation) why this case should not be remanded to the IRS Office of Appeals, in order for Appeals to conduct a supplemental hearing at which the Appeals officer would conduct a proper verification under section 6330(c)(1) (which would include verification of receipt of a statutory notice of deficiency) and petitioners would be entitled to challenge the underlying liability under section 6330(c)(2)(B).

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
September 10, 2018