

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

ANDREW JOSEPH SCHUMACHER,)
)
 Petitioner,)
)
 v.) Docket No. 26438-17 L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER

This “collection due process” (“CDP”) case is an appeal brought under 26 U.S.C. section 6330(d), seeking our review of a “Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330” dated November 20, 2017, by the Office of Appeals of the Internal Revenue Service (“IRS”). The notice upholds a decision by the agency to file a Notice of Federal Tax Lien (“NFTL”) against petitioner Andrew Joseph Schumacher regarding his unpaid Federal income tax liabilities for the years 2004, 2009, 2013, 2014, and 2015. (By order dated May 31, 2018, we granted respondent’s motion to dismiss on grounds of mootness so much of this case as pertains to tax year 2004.) The case is currently calendared for trial at the Court’s Baltimore trial session that is scheduled to commence on November 5, 2018. On July 25, 2018, the Commissioner filed a motion for summary judgment as well as a declaration by Settlement Officer (“SO”) Carole A. Gioeli in support of that motion. By our order of July 26, 2018, we ordered Mr. Schumacher to respond to the motion by August 23, 2018. As of this date the Court has received no response from him.

Background

The record shows the following facts:

In response to the NFTL, petitioner sent the IRS a Form 12153, “Request for a Collection Due Process Hearing”, dated July 5, 2017, in which he challenged the

NFTL and requested an installment agreement. The Form 12153 includes fields for the name and telephone number of the taxpayer's authorized representative, but Mr. Schumacher left those fields blank. On the same date, Mr. Schumacher also sent the IRS a Form 9423, "Collection Appeal Request", in which he challenged the termination of his prior installment agreement and proposed a new installment agreement. On the Form 9423 petitioner entered "N/A" in the fields for representative's name and phone number.

To commence the CDP hearing process, the SO prepared "an initial contact letter". The file given to SO Gioeli when this case was assigned to her included a previously executed Form 2848, "Power of Attorney and Declaration of Representative" that had named Brad Shriver as Mr. Schumacher's representative; and the SO sent the initial contact letter to both Mr. Schumacher and to Mr. Shriver, his former representative. The initial contact letter scheduled a telephone conference for October 11, 2017, at 1 p.m.

On that date the parties did not confer by telephone. According to SO Gioeli, she called petitioner; he was not available and his telephone message stated that he did not accept blocked calls. SO Gioeli telephoned Mr. Shriver's office and learned that he had left the firm, which no longer represented petitioner. SO Gioeli called a Lauren Russell who, she says, was another listed representative for petitioner. SO Gioeli left a telephone message for Ms. Russell. Petitioner did not respond to either letter.

(Mr. Schumacher's petition gives a different account of October 11, 2017. The petition states: that Mr. Schumacher did not receive any phone calls from the IRS on that day; that (consistent with his Form 12153) he did not have a representative; that he does not know anyone named Lauren Russell; and that "we accept phone calls".)

After failing to reach petitioner, SO Gioeli sent petitioner another letter on October 11, 2017 (sometimes called a "last chance letter"), mentioning among other things her attempt to call Mr. Shriver. The letter stated:

I tried calling you and at the scheduled time but you were not available as your message stated you do not accept blocked calls, and you had not called to indicate that this date and/or time was not convenient. I also called your representative Brad Schriver and was advised he was no longer with the firm and your account has been closed.

Please be advised that we will make a determination in the Collection Due Process hearing you requested by reviewing the Collection administrative file and whatever information you have already provided.

If you would like to provide information for our consideration, please do so within 14 days from the date on this letter.

We will promptly issue you a determination and/or decision letter with our findings.

When Mr. Schumacher did not respond, Appeals issued its Notice of Determination on November 20, 2017, sustaining the lien filing.

Discussion

We may grant summary judgment where there is no genuine issue as to any material fact and a decision may be rendered as a matter of law. Rule 121(a) and (b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). The moving party bears the burden of proving that there is no genuine issue as to any material fact, and factual inferences will be viewed in the manner most favorable to the nonmoving party. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985). Facts are viewed in the light most favorable to the nonmoving party. See Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

We have reviewed respondent's motion, the declaration in support of respondent's motion, and the record in this case. On the record now before us, and drawing inferences as required by Rule 121, there appear to be disputes as to material facts. The Commissioner contends that the SO made a reasonable attempt to reach Mr. Schumacher by one attempt at a phone call; and the record includes no suggestion of a dialing a second time or of making any attempt to unblock the SO's line. The Commissioner also recounts the SO's attempts to call representatives who the SO believed were authorized by petitioner to represent him. But the Form 12153 indicates (and the petition explicitly asserts) that Mr. Schumacher did not have any authorized representatives.

In Appeals' last chance letter, the mention of Mr. Shriver, who was not Mr. Schumacher's representative, may have been confusing to Mr. Schumacher.

Some of the letter's statements--i.e., that "your account has been closed", that "we will make a determination in the Collection Due Process hearing you requested by reviewing ... whatever information you have already provided", and that "[w]e will promptly issue you a determination"--may have seemed to indicate that it was too late for Mr. Schumacher to affect the outcome. We do not find as a fact that the letter had this import, but on this record and in this context, we cannot rule out this possibility.

We cannot say that there is no genuine dispute as to whether Mr. Schumacher had a reasonable opportunity to challenge the NFTL in a CDP hearing.

We will therefore deny the motion for summary judgment. At the Baltimore session beginning November 5, 2018, this case will proceed to trial--unless either party moves to remand the case to IRS Appeals for a supplemental hearing and such a motion is granted. Mr. Schumacher is warned that if he fails to appear for trial on November 5, 2018, he should expect that his case may be dismissed for failure to properly prosecute, under Rule 123(b).

It is therefore

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

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
September 17, 2018