

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

NORTHSIDE CARTING, INC.,)	
)	
Petitioner,)	CT
)	
v.)	Docket No. 1117-18 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case is scheduled to be called for trial at the Court’s session in Boston beginning October 15, 2018. Now before the Court is the Commissioner’s motion for summary judgment. We will deny the motion.

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 December 20, 2017, by the Office of Appeals (“Appeals”) of the Internal Revenue Service (“IRS”). The notice upholds a decision by the agency to file a Notice of Federal Tax Lien (“NFTL”) and to issue a Notice of Intent to Levy against petitioner Northside Carting, Inc., regarding its unpaid Federal employment tax liabilities for calendar quarters ending September 30 and December 31, 2015, and June 30, 2016. On August 7, 2018, the Commissioner filed a motion for summary judgment (Doc. 8) as well as a declaration by Settlement Officer (“SO”) David R. Fuller (Doc. 9) in support of that motion. By our order of August 8, 2018 (Doc. 10), we ordered Northside to respond to the motion by August 31, 2018. As of this date the Court has received no response from Northside.

We will nonetheless deny the Commissioner’s motion for summary judgment. The gist of that motion (summarized at 7) is that Northside asked to enter into an Offer-in-Compromise or an Installment Agreement with Appeals but never fully complied with Appeals’ request for information and documentation that

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would have been necessary to support a collection alternative. This is indeed a possible justification for Appeals (and the Court) to sustain a collection determination. The alleged facts about the CDP process that the Commissioner states to support that argument conclude as follows (at 5-6, emphasis added):

20. On July 13, 2017, SO Fuller discussed the case with Mr. McCoy [Northside's representative] and SO Fuller explained that Mr. Thomson [Northside's officer] did not provide all of the requested information and documentation. Mr. McCoy wanted to renegotiate a collection alternative. SO Fuller continued to request the necessary information and documentation that is necessary to consider an installment agreement. McCoy failed to provide what was requested. Declaration Exhibit B.

21. As such, SO Fuller had no choice but to uphold the collection action. Declaration Exhibits A and B.

This is, the motion suggests that an unanswered July 13 request made to Mr. McCoy was the end of the story.

But the documents that the Commissioner submitted with his motion appear to show otherwise. The Notice of Determination itself recounts events after July 13, 2017 (emphasis added):

On 08/07/2017, the settlement officer received a fax with part of the requested information. The corporation requested an installment agreement of \$400,000 down and then \$10,000 a month. The pending installment agreement indicator was not input because the corporation was not current with their filing requirements.

On 08/07/2017, the settlement officer called and spoke with the power of attorney. He requested further documentation to support the collection information statement.

On 08/17/2017, the settlement officer received a fax with part of the requested information.

On 10/25/2017, the settlement officer requested more documentation from the power of attorney. He provided a deadline of 11/09/2017.

On 11/09/2017, Mr. McCoy called the settlement officer and requested a 1 week extension. Appeals agreed.

No further contact or correspondence has been received from either you or your representative.

Thus, Northside provided more information to Appeals on August 7 and August 17, 2017. Of course, “more information” might not have been enough information to warrant a collection alternative. But we cannot tell. It seems that neither Appeals’ Notice of Determination nor the Commissioner’s motion for summary judgment itemizes what information was requested but never provided. We are unable to review Appeals’ judgment that Northside failed to provide relevant information.

The SO’s “Case Activity Record Print” that the Commissioner filed as Exhibit B does provide somewhat more detail about the SO’s correspondence with Mr. McCoy. But when we study that document to learn more, we think we see an intention to sustain the collection action because Northside was “Not Current with filing or paying requirements” (Ex. B at 12/11/2017)--a point also made in the Notice of Determination--but the motion for summary judgment is silent on that point.

We therefore do not grant the motion for summary judgment. At the Boston session beginning October 15, 2018, this case will be called for trial. However, 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 IRS 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, and under that rule the parties might proceed simply by offering into evidence the agency-level administrative record. It may be that the administrative record viewed in its entirety (or considered with attention to details to which the Commissioner’s motion did not point us) will enable us to review Appeals’ judgment that Northside failed to provide relevant information. But if instead “the existing administrative record [is] inadequate to permit effective judicial review”, Murphy, 469 F.3d at 31, then we might conclude that a remand for a supplemental hearing would be appropriate, or might conclude simply that the Notice of Determination cannot be sustained.

Northside is warned that if it fails to appear on November 5, 2018, it should expect that its case may be dismissed for failure to properly prosecute, under Rule 123(b).

It is therefore

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

(Signed) David Gustafson
Judge

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