

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

DANA ANN CHESHER,)	
)	
Petitioner,)	
)	
v.)	Docket No. 19154-16SL.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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ORDER AND DECISION

This is a collection review case filed pursuant to sections 6330(d)(1) and 7463¹ involving a proposed levy to collect petitioner’s outstanding tax liabilities for the taxable (calendar) years 2007 and 2008. Presently pending before the Court is respondent’s Motion For Summary Judgement, filed February 12, 2018, as supplemented by respondent’s First and Second Supplement, filed July 2, 2018, and September 25, 2018, respectively. Also on February 12, 2018, respondent filed the Declaration Of [Appeals Officer] Simarjit Singh in support of his motion. Thereafter, by Order dated February 13, 2018, the Court directed petitioner to file a response, if any, to respondent’s motion on or before March 6, 2018. In order to assist petitioner in the preparation of a response, the Court attached to its Order a copy of Q&As that the Court has prepared on the subject “What is a motion for summary judgment? How should I respond to one?” Also in its Order the Court expressly warned petitioner that failure to comply with the Order might result in

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended. All Rule references are to the Tax Court Rules of Practice and Procedure.

the granting of respondent's motion and the entering of a decision, if appropriate, against petitioner. However, no response has been received from petitioner.²

The Court also ordered petitioner to respond to the Court's Order dated June 25, 2018, Order, and state whether petitioner has in fact filed Federal income tax returns for 2007, 2008, and 2014. The Court also directed petitioner to attach as exhibits to such response a copy of each return and expressly warned petitioner that "[i]n absence of a timely and responsive response to [the Court's Order], the Court will presume that petitioner has filed no return for any of the years 2007, 2008, 2014 if respondent's records confirm that matter." Again, no response was received from petitioner.

Background

Petitioner did not timely file income tax returns for 2007 and 2008. Accordingly, respondent invoked substitute-for-return procedures pursuant to section 6020(b) and sent petitioner separate notices of deficiency dated January 10, 2011, to petitioner's last known address in Mercer, Tennessee for those years. It would appear that the notices were returned to respondent by the Postal Service as either unclaimed or refused. Not surprisingly, no action for redetermination was commenced in this Court.

In due course respondent assessed the determined deficiencies, together with applicable additions to tax (so-called penalties) and statutory interest, and sent notice and demand for payment to petitioner. After the amounts owing went unpaid, respondent sent to petitioner at her Jackson, Tennessee address a notice of intent to levy dated December 22, 2015, relating to the 2007 and 2008 liabilities. In response and on or about January 25, 2016, petitioner timely filed Form 12153, Request For A Collection Due Process Or Equivalent Hearing. On petitioner's Form 12153, petitioner checked the box requesting a collection due process hearing relating to a "Filed Notice of Federal Tax Lien" and "Proposed Levy or Action". She also requested consideration of a collection alternative and stated that "[t]his is my first notice of this amount due. I was married but separated during these years, and I do not yet know details of the amounts due." On her Form 12153 petitioner did not check the box for "Innocent Spouse Relief" but she did write "Maybe ?" opposite the printed words on the form preceding that box.

² By failing to respond to respondent's motion, petitioner waives her right to contest it. See Rule 121(d); Lunsford v. Commissioner, 117 T.C. 183, 187 (2001). Nevertheless, the Court shall proceed to review the motion on its merits.

However, petitioner never submitted Form 8857 (“Request For Innocent Spouse Relief”), nor did she otherwise pursue the matter during the administrative proceeding. Petitioner’s case was forward to the Appeals Office, and respondent informed her that her request for lien review relating to 2007 and 2008 was premature

On May 10, 2016, respondent sent petitioner a letter scheduling a telephone conference for June 15, 2016, and informing petitioner that the following information must be provided in order for respondent to consider collection alternatives: A completed Form 433-A, Collection Information Statement For Individuals; and signed tax returns for 2010, 2011, 2014, and 2015. Respondent’s May 10, 2016 letter also provided that petitioner could not raise the 2007 and 2008 liabilities if she had a prior opportunity to dispute those liabilities.

The Case Activity Record provides that, as of June 15, 2016, petitioner was not required to file Federal income tax returns for 2010 and 2011 per the IAT tool, had filed her 2015 Federal income tax return, and had not yet filed her 2014 Federal income tax return.³ On June 15, 2016, petitioner stated during her collection due process hearing that “[she] did not agree with balance due owed and wished to file [her] own tax returns” for 2007 and 2008. The Appeals Officer requested petitioner provide, by June 29, 2016, proof of residence for January 2011, financial information, and proof of compliance with her tax obligations. Also during the collection due process hearing, petitioner indicated that she could make a \$200 payment and the Appeals Officer advised that “\$200 should be sufficient, [and they] might not need financial documents.”

As of July 21, 2016, petitioner failed to provide her 2014 Federal income tax return and the documents required to show she could dispute the liability. The administrative proceeding culminated in the issuance of a Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 Of the Internal Revenue Code, dated July 28, 2016, that sustained the proposed levy. In response, petitioner timely filed a petition with this Court on August 30, 2016, to commence the present proceeding. Petitioner stated in her petition that “[she] was experienc[ing] a delay in retrieving the necessary records to complete returns for the required years”, “[she was] forwarding those completed returns separately to

³ Respondent’s worksheet to determine whether petitioner had a filing requirement for 2014 stated that tax due for that year (after withholding credits of \$3,212) was \$58 and that petitioner met the “stop filer criteria”. Petitioner’s 2014 Account Transcript reflects a zero account balance as of December 25, 2017, but indicates that no tax return was filed.

the IRS”, and “upon processing of these returns, payment will be made without need of levy.”

On August 9, 2017, respondent filed a Motion To Remand, which the Court granted by Order dated September 8, 2017, after petitioner failed to respond. A supplemental collection due process hearing was conducted on December 1, 2017, pursuant to the Court’s Order. In a Status Report filed January 2, 2018, respondent advised the Court that, inter alia, “[p]etitioner did not answer the phone at the scheduled conference time, did not contact the settlement officer to discuss her case, and did not provide income tax returns as requested.” Respondent attached to his Status Report as an exhibit a copy of a Supplemental Notice Of Determination Concerning Collection Action(s) Under Section 6320 And/Or 6330, dated December 15, 2017. The Summary Of Determination includes the following statements:

You didn’t provide the requested tax returns to replace the IRS Substitute Tax Return (SFR) and you are not in compliance to qualify for collection alternatives. The Notice of Intent to Levy is sustained.

Respondent’s Motion For Summary Judgment then followed on February 12, 2018. As mentioned above, petitioner failed to respond to respondent’s motion. The Court directed respondent to supplement his motion by Orders dated June 25 and July 5, 2018. Respondent filed his First and Second Supplement to his motion on July 2 and September 25, 2018, respectively.

Petitioner’s Account Transcripts for 2007 and 2008 indicate that tax returns were “secured” by respondent on May 19, 2011. A Federal income tax return relating to 2014 was not filed according to petitioner’s 2014 Account Transcript. In respondent’s Second Supplement, respondent explained that the certified account transcript for 2007 does not indicate that petitioner filed a 2007 and 2008 Federal income tax return. Respondent further explained that the 2007 and 2008 certified transcripts contain notations dated May 17, 2011, which indicate that the statutory notice of deficiency was closed and tax was assessed on June 6, 2011. Respondent represents that the assessment amounts match the tax shown on the notice of deficiency based on the SFR for both years.

Discussion

Summary judgment serves to “expedite litigation and avoid unnecessary and expensive trials.” Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Either party may move for summary judgment on all or any part of the legal issues in controversy. Rule 121(a). The Court may grant summary judgment only if there are no genuine disputes or issues of material fact. Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

The moving party, here respondent, bears the burden of proving that no genuine dispute or issue exists as to any material fact and that such party is entitled to judgment as a matter of law. FPL Grp., Inc. v. Commissioner, 115 T.C. 554, 559 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, 85 T.C. at 528-529. Under Rule 121(d), if the adverse party does not respond to the motion for summary judgment, then the Court may enter a decision where appropriate against that party. See King v. Commissioner, 87 T.C. 1213, 1217 (1986); Shepherd v. Commissioner, T.C. Memo. 1997-555. In the present case petitioner has not responded to respondent’s Motion For Summary Judgment or his first and second supplements. The Court could grant respondent’s motion on that ground, but the record supports a substantive decision on the merits.

Petitioner appeared to express interest in filing delinquent returns for 2007 and 2008 in an effort to challenge the existence or amount of the underlying liabilities based on respondent’s substitute-for-return approach embodied in the notices of deficiency. However, the record demonstrates that petitioner never filed delinquent returns during either the administrative proceeding that preceded the issuance of the July 28, 2016 Notice Of Determination or the supplemental administrative proceeding that followed the remand of this case to respondent’s Appeals Office on September 8, 2017 (collectively, the administrative proceeding). Further, the record demonstrates that during the administrative proceeding petitioner never presented the Appeals Office with either documentation or other information sufficient to challenge the existence or amount of the underlying liabilities. In this regard the law is clear that a taxpayer may not challenge the underlying liabilities in a judicial proceeding, such as the present one, if the taxpayer failed to properly present the Appeals Office with relevant documentation or other information during the administrative proceeding. Secs. 301.6320-1(f)(2), Q&A-F3, and 301.6330-1(f)(2), Q&A-F3, Proced. & Admin. Regs.; Giamelli v. Commissioner, 129 T.C. 107, 114-115 (2007); Magana v. Commissioner, 118 T.C. 488, 493 (2002); Gentile v. Commissioner, T.C. Memo. 2013-175.

In view of the foregoing, the Court will not consider any challenge to the existence or amount of petitioner's liabilities for 2007 and 2008.⁴ Rather, the Court will review instead respondent's determination for abuse of discretion. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Whether an abuse of discretion has occurred depends on whether the exercise of discretion is without reasonable basis in fact or law. Freije v. Commissioner, 125 T.C. 14, 23 (2005); Ansley-Sheppard-Burgess Co. v. Commissioner, 104 T.C. 367, 371 (1995).

On her Form 12153 petitioner expressed interest in a collection alternative. As a prerequisite for consideration or approval by the IRS of a collection alternative, such as an installment agreement or an offer-in-compromise or of the administrative relief afforded by currently not collectible status, it is generally incumbent upon the taxpayer to provide requested financial information in order to permit evaluation of ability to pay. See, e.g., secs. 6159, 7122; Kindred v. Commissioner, 454 F.3d 688, 697 (7th Cir. 2006); Olsen v. United States, 414 F.3d 144, 151 (1st Cir. 2005); Murphy v. Commissioner, 125 T.C. 301, 315 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006); Wright v. Commissioner, T.C. Memo. 2012-24. Similarly, IRS guidelines with respect to collection alternatives direct that the taxpayer must be in current compliance with filing and estimated payment obligations. E.g., McLaine v. Commissioner, 138 T.C. 228, 243 (2012); Giamelli v. Commissioner, 129 T.C. at 115-116; Taylor v. Commissioner, T.C. Memo. 2009-27. Moreover, it is not an abuse of discretion for the IRS Office of Appeals to decline to consider an installment agreement or offer in compromise where no specific collection alternative proposal is ever placed before the reviewing officer. See, e.g., Kindred v. Commissioner, 454 F.3d at 696; Kendricks v. Commissioner, 124 T.C. 69, 79 (2005). Stated otherwise, it is the obligation of the taxpayer, not the reviewing officer, to start negotiations regarding a collection alternative by making in the first instance a specific proposal.

In the present case the Appeals officer informed petitioner that she needed to provide certain information in order for the Appeals officer to consider a collection alternative. Here, the record demonstrates that petitioner had sufficient income to be obliged to file an income tax return for 2014, but failed to do so; further, petitioner did not provide the requested additional information.

⁴ The Appeals officer's Case Activity Record includes an entry for the date of the telephone conference (i.e., June 15, 2016) that petitioner agreed that the amount of her income, as determined in each notice of deficiency, is correct.

On her Form 12153 petitioner did not check the box for “Innocent Spouse Relief” but she did write “Maybe ?” opposite the printed words on the form preceding that box. However, petitioner never submitted Form 8857 (“Request For Innocent Spouse Relief”), nor did she otherwise pursue the matter during the administrative proceeding. Accordingly, such matter need not be considered further. See Giamelli v. Commissioner, 129 T.C. at 114-115; Magana v. Commissioner, 118 T.C. at 493.

Finally, the petition includes an allegation that “I am forwarding those completed returns separately to the IRS”, although the petition is unclear as to which returns petitioner was referring. Regardless, as the discussion above should make clear, the touchstone for decision on the motion before the Court is petitioner’s failure to comply with respondent’s request for information, including the filing of petitioner’s 2014 Federal income tax return.

In view of the foregoing, it is hereby

ORDERED that respondent’s Motion For Summary Judgment, filed February 12, 2018, and supplement July 2, 2018, and September 25, 2018, is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the proposed collection action (levy) in respect of petitioner’s outstanding income tax liabilities for the calendar years 2007 and 2008, as determined by respondent’s Appeals Office in its Notice Of Determination dated July 28, 2016, and in its Supplemental Notice Of Determination dated December 15, 2017, upon which notices this case is based.

(Signed) Robert N. Armen
Special Trial Judge

Entered: **OCT 17 2018**