UNITED STATES TAX COURT
WASHINGTON, DC 20217

NAPOLEON V. IRABAGON & ZOSIMA IRABAGON,	)	
Petitioners,	)	
v.	)	Docket No. 1594-16 L.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

ORDER AND DECISION

This matter is before the Court to decide on respondent's motion for summary judgment, filed December 20, 2016, pursuant to Rule 121.[1] Respondent contends that no genuine dispute exists as to any material fact and that the subject determination, which did not approve a notice of intent to levy with respect to petitioners' unpaid Federal income tax liabilities for the 2010 and 2011 taxable years because they had entered into an installment agreement, should be sustained.

By Order dated December 21, 2016, the Court ordered petitioners to file a response to respondent's motion no later than January 23, 2017. On January 23, 2017, petitioners timely filed a response to respondent's motion.

Background

Petitioners filed Forms 1040, Individual Income Tax Return, for the 2010 and 2011 taxable years. Respondent selected both returns for examination. Following an examination of these returns respondent determined deficiencies in petitioners' Federal income tax of $13,189 and $17,493 and accuracy-related

[1]Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect at all relevant times. Some monetary amounts are rounded to the nearest dollar.

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penalties pursuant to section 6662(a) of $2,638 and $3,499, for 2010 and 2011, respectively. The notice of deficiency mailed to petitioners, dated March 6, 2013, reflected those determinations. Petitioners timely petitioned this Court for redetermination of the deficiencies and the penalties. See Irabagon v. Commissioner, Dkt. No. 13790-13. The Court dismissed that case for lack of jurisdiction on January 31, 2014, on the ground that petitioners failed to pay the filing fee despite an order of the Court directing them to do so.

On November 13, 2014, after assessment and notice and demand for payment of petitioners' 2010 and 2011 unpaid liabilities, the Internal Revenue Service (IRS) sent them a Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing (levy notice). The levy notice advised petitioners that the IRS intended to levy to collect their 2010 and 2011 outstanding liabilities which, through the date of the levy notice, totaled $40,162, and that they had a right to a hearing to appeal the proposed collection action.

In response to the levy notice, petitioners timely submitted Form 12153, Request for a Collection Due Process or Equivalent Hearing (CDP hearing request). As the reason for their disagreement with the levy notice they stated in their CDP hearing request that "I was never given the opportunity to show all my proves [sic]". They did not request any collection alternative but they did check the boxes for lien discharge and lien withdrawal, stating "[w]e do not owe for the taxable years 2011 and 2010[.] [W]e have all the corresponding proves [sic]".

Petitioners' CDP hearing request was assigned to Settlement Officer (SO) Lusik Boyadzhiyan of the IRS Office of Appeals (Appeals). On August 3, 2015, SO Boyadzhiyan sent petitioners a letter acknowledging Appeals' receipt of their CDP hearing request and scheduling a face-to-face hearing with them on September 3, 2015. She also outlined the issues she had to consider during the hearing and informed petitioners that in order for her to consider collection alternatives they must submit to her certain information, including a completed Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals. Finally, she advised petitioners that they would not be able to dispute their underlying liabilities for 2010 and 2011 in the hearing because they had a prior chance to do so.

After several telephone conversations, a face-to-face hearing was held on October 20, 2015. During the hearing SO Boyadzhiyan gave petitioners copies of all of the IRS correspondence that had been mailed to them during the examination and the audit reconsideration they had requested. She reiterated to petitioners that

they could not raise their underlying liabilities for 2010 and 2011 because they had had an opportunity to dispute those liabilities in the Tax Court. She showed them the notice of deficiency for 2010 and 2011 that had previously been issued to them.

During the hearing petitioners provided to SO Boyadzhiyan a partially completed Form 433-A. SO Boyadzhiyan explained their collection alternative options and offered them a streamlined installment agreement. SO Boyadzhiyan gave them until October 24, 2015, to accept the agreement. On October 26, 2015, Mr. Irabagon called SO Boyadzhiyan to accept the agreement.

On October 27, 2015, SO Boyadzhiyan mailed petitioners (1) Form 433-D, Installment Agreement, and (2) Form 12257, Summary Notice of Determination, Waiver of Right to Judicial Review of a Collection Due Process Determination, Waiver of Suspension of Levy Action, and Waiver of Periods of Limitation in Section 6330(e)(1) (waiver agreement). The Form 433-D reflected that petitioners' outstanding liabilities for 2010 and 2011 totaled $39,037 as of October 27, 2015, and that they agreed to make payments of $543 on the 5th of each month, beginning on December 5, 2015.

On November 5, 2015, SO Boyadzhiyan received the executed Form 433-D from petitioners. That same day SO Boyadzhiyan had a telephone conversation with Mr. Irabagon, during which he stated that petitioners would not sign the waiver agreement but still desired the installment agreement.

SO Boyadzhiyan and Mr. Irabagon had another telephone conversation on November 20, 2015. During this conversation SO Boyadzhiyan informed Mr. Irabagon that IRS guidelines advised that petitioners' installment agreement should be established as a direct deposit installment agreement (DDIA) rather than a streamlined installment agreement, and with a later initial payment date. That same day she then mailed petitioners a new Form 433-D. This agreement reflected a DDIA with an initial payment date of March 5, 2016; all other terms remained the same as the prior Form 433-D. Petitioners executed and returned this agreement, which SO Boyadzhiyan received on December 9, 2015.

SO Boyadzhiyan determined that the proposed levy should not be sustained because petitioners had entered into an installment agreement. On December 21, 2015, Appeals sent petitioners duplicate notices of determination to that effect. A summary detailing the matters considered by Appeals was attached to the notices of determination and included the following explanations:

SUMMARY AND RECOMMENDATION

Appeals has verified that applicable laws and administrative procedures have been met, has considered the issues raised, and has balanced the proposed collection action with the legitimate concerns that such action be no more intrusive than necessary as required by section 6330(c)(3). The taxpayers have represented to Appeals that they agree with the recommendation as described below. The recommendation balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary.

The determination of Appeals is: the proposed levy action is not appropriate at this time; the taxpayers agreed to a streamline[d] installment agreement of $543.00 a month starting March 5, 2016. The applicable failure-to-pay penalty and interest shall continue to accrue on the unpaid portion of the tax liabilities. Collection may resume if the taxpayer defaults on the installment agreement.

The taxpayer cannot raise the liability issue in the current CDP Hearing Request; the taxpayer had a prior opportunity to dispute the assessed liability in the tax court.

The taxpayer did not raise any other issues.

On January 19, 2016, petitioners, while residing in California, timely filed a petition with this Court for review of the notices of determination. In their petition, just like in their CDP hearing request, they seek to challenge their underlying liabilities for 2010 and 2011.

Discussion

The purpose of summary judgment is to expedite litigation and avoid unnecessary and expensive trials. Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted where the moving party shows through "the pleadings * * * and any other acceptable materials, together with the affidavits or declarations, if any, * * * that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b); see also Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). The burden is on the moving party to

demonstrate that there is no genuine dispute as to any material fact; consequently, factual inferences will be viewed in a light most favorable to the party opposing summary judgment. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985); Jacklin v. Commissioner, 79 T.C. 340, 344 (1982). The nonmoving party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d); Sundstrand Corp. v. Commissioner, 98 T.C. at 520. Petitioners have failed to demonstrate that there is a dispute as to any material fact. Consequently, a decision may be rendered as a matter of law.

Under section 6331(a), if any person liable to pay any tax neglects or refuses to do so after notice and demand, the Commissioner is authorized to collect the unpaid amount by way of a levy upon all property belonging to such a person upon which there is a lien. Pursuant to section 6330(a), the Commissioner must provide the person with written notice of an opportunity for an administrative hearing to review the proposed levy.

If an administrative hearing is requested in a levy case, the hearing is to be conducted by Appeals. Sec. 6330(b)(1). At the hearing, the taxpayer may raise any relevant issue including spousal defenses, challenges to the appropriateness of the collection action, and collection alternatives. Sec. 6330(c)(2)(A). A taxpayer may contest the existence or amount of the underlying tax liability at the hearing if the taxpayer did not receive a notice of deficiency with respect to the liability or did not otherwise have an earlier opportunity to dispute the tax liability. Sec. 6330(c)(2)(B), sec. 301.6330-1(e)(3) Q&A-E2, Proced. & Admin. Regs.; Kuykendall v. Commissioner, 129 T.C. 77, 80 (2007); Shere v. Commissioner, T.C. Memo. 2008-8, slip op. at 10. Following the hearing the Appeals officer must determine among other things whether the proposed collection action is appropriate. In reaching the determination the Appeals officer must take into consideration: (1) whether the requirements of applicable law and administrative procedure have been met, (2) all relevant issues raised by the taxpayer, and (3) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that collection be no more intrusive than necessary. Sec. 6330(c)(3); see also Lunsford v. Commissioner, 117 T.C. 183, 184 (2001).

Section 6330(d)(1) grants this Court jurisdiction to review the determination made by Appeals in a levy case. Where the underlying liability is properly at issue, the Court reviews any determination regarding the underlying liability de novo. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Where the

underlying liability is not properly at issue, we review Appeals' determination for abuse of discretion; that is whether the determination was arbitrary, capricious, or without a sound basis in fact or law. Hoyle v. Commissioner, 131 T.C. 197, 200 (2008); Murphy v. Commissioner, 125 T.C. 301, 308 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Goza v. Commissioner, 114 T.C. at 182.

Petitioners' complaint throughout the CDP hearing process was directed only towards their underlying liabilities for 2010 and 2011. And now before this Court, they continue to do the same. However, the law is clear: if a taxpayer received a notice of deficiency with respect to the underlying liability, he may not contest the liability in a CDP hearing (or thereafter in this Court). See sec. 6330(c)(2)(B); sec. 301.6330-1(e)(3) Q&A-E2, Proced. & Admin. Regs.; Kuykendall v. Commissioner, 129 T.C. at 80; Shere v. Commissioner, slip op. at 10. The undisputed facts confirm that petitioners received a notice of deficiency for 2010 and 2011. They then timely petitioned this Court but never paid the required filing fee. The resulting case was dismissed for lack of jurisdiction because they failed to comply with the Court's order to pay the filing fee. Thus, their underlying liabilities for 2010 and 2011 are not at issue and we will review Appeals' determination for abuse of discretion only.

On the basis of our review of the record, we find that SO Boyadzhiyan considered all of the requisite factors under section 6330(c)(3) when making her determination. Indeed, petitioners do not contend otherwise and that thus the determination was arbitrary, capricious, or without a sound basis in fact or law. In this regard, we note that SO Boyadzhiyan determined that the proposed levy should not be sustained because petitioners agreed to an installment agreement.

Petitioners have not given a sufficient basis to deny summary adjudication in respondent's favor pursuant to Rule 121. Respondent having shown that there is no genuine dispute of material fact and that he is entitled to judgment as a matter of law, we will grant his motion for summary judgment. With regard to their outstanding liabilities for 2010 and 2011, petitioners should note that they may pursue and discuss with the IRS revised or alternative collection options should their financial situation change.

Premises considered, it is hereby

ORDERED that respondent's motion for summary judgment, filed December 20, 2016, is granted. It is further

ORDERED AND DECIDED that the Notices of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated December 21, 2015, upon which this case is based, are sustained.

(Signed) Tamara W. Ashford
Judge

ENTERED: **NOV 19 2018**