

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

JUDITH LEE ALSTON,)
)
 Petitioner,)
)
 v.) Docket No. 10936-18 L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER

This is a “collection due process” (“CDP”) case in which the petitioner, Judith Lee Alston, is self-represented. The case is scheduled for trial at a session beginning April 1, 2019, but the Commissioner has filed a motion for summary judgment (Doc. 6), the gist of which is that there are no disputed facts that require a trial, and that on the basis of the undisputed facts, the Commissioner is entitled to prevail. We will deny the motion without prejudice.

Summary judgment is sometimes appropriate in the Tax Court (see Rule 121), as it is in the Federal district courts (see Fed. R. Civ. P. 56). In particular, summary judgment is sometimes appropriate in CDP cases, and many such cases are efficiently resolved by summary judgment. However, the majority of Tax Court petitioners are self-represented, and most of them do not yet understand summary judgment procedure and do not yet know what their obligations are as non-movants under Rule 121. Having never seen the petitioner in open court, the Court usually does not yet know the background, education, and experience of the petitioner at the time the Commissioner files a motion for summary judgment. In order for the Court to be sure that the use of summary judgment procedures is fair to the self-represented petitioner, we need to be confident that the petitioner can be enabled to respond appropriately. The undersigned judge usually attempts to accomplish that goal by issuing an order that explains the summary judgment process and directs the self-represented non-movant to make a filing that responds

to the facts (in paragraphs such-and such) and to the legal argument (in paragraphs so-and-so). This system accomplishes the goal only imperfectly; and we would be pleased to learn of better ways of accomplishing that goal; but that is our goal.

In some respects, the Commissioner's motion filed in this case is well oriented toward that goal: First, the motion is filed well in advance of the trial session (i.e., earlier than Rule 121(a) requires), so as to maximize the possibility that we could rule on the motion before the parties have spent too much time and expense on trial preparation. Second, the motion consists of discreet, separately numbered paragraphs, so that the Court could order petitioner to refer to the Commissioner's assertions by paragraph number, and so that we can more easily discern disputes. Third, the factual assertions in the motion are, in compliance with Rule 121(b), supported by citations to declarations and exhibits filed with the motion; and those supporting documents seem to contain appropriate materials from the administrative record. Fourth, the motion reflects an outline with explicit captions, so that the specific subject of a given section can be easily seen. This is all to the good (and the fourth characteristic is especially helpful). Part I, for example, sets forth seven discreet factual assertions, supported by citations to evidence, that lead to the Commissioner's contention that 2011 income tax has been assessed and remains unpaid.

However, the 89-paragraph motion thereafter gives what appears to us to be a blend of (a) factual assertions, (b) factual rebuttal of anticipated possible counter-assertions, and (c) legal argument. We think that it would be difficult for a non-lawyer to respond effectively to this motion, and that this motion may not be likely to result in clarity about the parties' actual disputes. For example, after the fact-intensive part I, part II (paras. 13-17) consists entirely of legal argument. The caption of part IV of the motion indicates that it sets out to show the fact that the petitioner spoke with the Settlement Officer during a CDP conference. That fact is indeed pertinent to this case and to the Commissioner's motion. However, part IV begins by noting that petitioner has said otherwise (para. 54), then describes counsel's process of trying to learn petitioner's actual contentions (paras. 55-57), then shows what the contents of the administrative record reveal (para. 58), then further elaborates on counsel's communications with the petitioner (59-61), and then concludes with the assertion that the telephone conference took place (para. 62).

We think that the convention of presenting in a motion first the factual background (as succinctly as possible) and then the legal arguments is especially appropriate in a case like this one. We think it is helpful when (after a short

preamble) a motion for summary judgment filed against a self-represented petitioner begins with a factual section that consists of, if possible, no more than a couple dozen simple and direct factual assertions. We can then point the petitioner to those factual assertions, instruct her to respond, and learn whether there is any “genuine dispute as to any material fact”. Rule 121(b). Where, from knowledge of the case and of the petitioner, counsel anticipates the possible raising of non-“genuine” factual disputes, it may well be appropriate to address those--but presumably as legal argument (i.e., arguing that as a matter of law petitioner fails to raise a “genuine dispute”) in the later section of the brief devoted to legal argument. Of course, a movant may also later file a reply to the non-movant’s response, and the reply may be the most efficient occasion to address such issues.

We acknowledge that it is not the Court’s responsibility or role to instruct counsel how to prepare filings. But we do have the responsibility of assuring a process that is understandable and fair to the self-represented petitioner. We do not know how to assure such fairness in an order directing petitioner to respond to the instant motion. It is therefore

ORDERED that the Commissioner’s motion for summary judgment is denied without prejudice to the filing of a motion within the time period permitted by Rule 121(a). If the Commissioner does file another motion that depends entirely on the same materials that he submitted with the instant motion (i.e., Docs. 7-8), then he need not resubmit those materials but may cite them as they currently appear in the record. It is further

ORDERED that, because we have denied the motion, Ms. Alston should not file a response at this time. However, we suggest that she read the Commissioner’s motion and attempt to learn the Commissioner’s position, because she will want to be able to address it, either in response to a subsequent motion (if the Commissioner files one) or at trial (if he does not).

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
December 21, 2018