UNITED STATES TAX COURT
WASHINGTON, DC 20217

VIVIAN RUESCH,	)	
	)	
Petitioner,	)	**CT**
	)	
v.	)	Docket No. 2177-18 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER OF DISMISSAL

Pending in this case is the Court's September 14, 2018, order to show cause why this case should not be dismissed for lack of jurisdiction and petitioner's November 14, 2018, motion to restrain assessment or collection or to order refund of amount collected.

On May 29, 2017, respondent issued to petitioner Notice CP92, Seizure of your state tax refund and notice of your right to a hearing (notice of levy). The notice of levy indicates that the Internal Revenue Service (IRS) had levied $63 of petitioner's State tax refund and applied it to petitioner's unpaid Federal taxes. The front page of the notice of levy indicates that the amount due immediately was $326.66. The third page of the notice of levy, under "Your billing details", indicates that this $326.66 liability relates to "Form number 1040A" for "Tax period ending December 31, 2010." In response to this notice of levy, on or about June 26, 2017, petitioner mailed to the IRS Form 12153, Request for a Collection Due Process Hearing, indicating the liability at issue as Form 1040, U.S. Individual Income Tax Return, for petitioner's tax year 2010.[1]

On January 31, 2018, petitioner filed her petition in this Court. Attached to the petition is a Letter 3210, Decision Letter on Equivalent Hearing Under Internal

[1]Respondent represents, and petitioner does not dispute, that this liability comprises $152 of self-reported income tax liability from petitioner's 2010 Form 1040, a $135 sec. 6651(a)(1) addition to tax, a $38 sec. 6651(a)(2) addition to tax, and accrued interest. All section references are to the Internal Revenue Code in effect at all relevant times.

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Revenue Code Sections 6320 and/or 6330, which does not ordinarily confer jurisdiction on this Court. See Weiss v. Commissioner, 147 T.C. 179, 188 (2016). The decision letter, dated January 3, 2018, was issued to petitioner with respect to her Form 1040 for the 2010 taxable year. The decision letter states:

> We have determined that the Final Notice -- Notice of Intent to Levy was appropriate under the circumstances; however, it is no longer necessary at this time. Our records show your account has been resolved. Your case will be returned to Compliance with no further enforcement action.

Consistent with the decision letter, the IRS's Form 1040 Account Transcript for petitioner's 2010 taxable year indicates a balance due of $0.

On February 12, 2018, the IRS issued to petitioner a Notice CP15, Notice of Penalty Charge, advising that for tax year 2010 she had been assessed a $10,000 penalty pursuant to section 6038(b) for failure to file Form 5471, Information Return of U.S. Persons with Respect to Certain Foreign Corporations, and/or Form 8865, Return of U.S. Persons with Respect to Certain Foreign Partnerships. The Notice CP15 advised petitioner of various options, including paying the penalty within 10 days and filing a written request to appeal within 30 days. The IRS issued to petitioner a Notice CP504, Notice of Intent to seize (levy) your property or rights to property, dated April 16, 2018, to collect the $10,000 section 6038(b) penalty plus $73.69 of accrued interest. The Notice CP504 states:

> If you don't agree with our intent to levy, you have the right to request an appeal under the Collection Appeals Program. Please call 1-800-829-8374 or send us a Collection Appeal Request (Form 9423) to the address at the top of the notice within 30 days from the date of this notice.

In response to the Notice CP504 on or about May 15, 2018, petitioner submitted to the IRS a Form 9423, Collection Appeal Request, and a Form 12153.

On September 20, 2018, the IRS issued to petitioner a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320 (NFTL), with respect to section 6038(b) penalties assessed for each of petitioner's tax years 2005 through 2010 ($20,000 for 2005, $40,000 for 2006, $40,000 for 2007, $30,000 for 2008, $20,000 for 2009, and $10,000 for 2010). In response, on October 11, 2018,

petitioner submitted Form 12153 accompanied by a Form 12277, Application for Withdrawal of Filed Form 668(Y), Notice of Federal Tax Lien.

On September 14, 2018, the Court ordered the parties to show cause in writing why this case should not be dismissed for lack of jurisdiction on the ground that no notice of determination has been issued to petitioner under sections 6320 and/or 6330.

On October 5, 2018, respondent filed a response to the Court's order to show cause asking the Court to dismiss this case for lack of jurisdiction on the ground that no notice of determination was issued with respect to petitioner's 2010 Form 1040 liability because the underlying Form 12153 was not timely filed with respondent's Appeals Office.

On October 15, 2018, petitioner filed an objection to respondent's response supported by a memorandum of law and a declaration of petitioner's counsel, Valerie Vlasenko. In her objection petitioner argues, among other things, that the Form 12153 for petitioner's 2010 Form 1040 liability was timely filed because it was postmarked within the time prescribed by section 6330 and addressed to the proper "agency, officer, or office".

On October 18, 2018, the Court ordered respondent to file a reply to petitioner's objection and to explain (1) the apparent discrepancy between the $0 balance on petitioner's 2010 Form 1040 Account Transcript and the notice of intent to levy dated April 16, 2018, attempting to collect $10,073.69, and (2) whether this case is moot. The Court's order also invited petitioner to file a response to respondent's reply.

On October 29, 2018, respondent filed a response to the Court's October 18, 2018, order. In his response, respondent concedes that petitioner timely submitted the Form 12153 via facsimile to the Revenue Agent who was examining her 2010 Form 1040 liability. Respondent explains that because the Form 12153 was timely submitted, the decision letter should be treated as a notice of determination for petitioner's 2010 Form 1040 liability. Respondent asserts, however, that this case has been rendered moot by the full payment of petitioner's 2010 Form 1040

liability.[2] Respondent acknowledges that petitioner has requested a collection due process (CDP) hearing with respect to the section 6038(b) penalty for 2010 and "may petition the Tax Court if and when a notice of determination is issued." Respondent represents, and petitioner does not dispute, that no notice of determination has been issued with respect to the proposed collection action relating to the section 6038(b) penalty.

On November 14, 2018, petitioner filed a reply to respondent's response to the Court's October 18, 2018, order. On November 14, 2018, petitioner also filed a motion to restrain assessment or collection or to order refund of amount collected with respect to the section 6038(b) penalty assessed for the 2010 tax year.

On November 27, 2018, respondent filed a response to petitioner's motion to restrain assessment or collection or to order refund of amount collected. On December 14, 2018, petitioner filed a reply to respondent's response.

Discussion

Our jurisdiction in collection review cases depends upon a timely petition with respect to a notice of determination. See sec. 6330(d). Although the parties cannot stipulate to the Court's jurisdiction, they "may agree on the *facts* that determine jurisdiction." Tilden v. Commissioner, 846 F.3d 882, 887 (7th Cir. 2017) rev'g and remanding T.C. Memo. 2015-188; see also Pearson v. Commissioner, 149 T.C. __ (Nov. 29, 2017). Petitioner alleges and respondent concedes that the Form 12153 with respect to petitioner's 2010 Form 1040 liability was timely submitted. Accordingly, we treat the decision letter attached to petitioner's petition as a notice of determination sufficient to invoke our jurisdiction over this case. See Craig v. Commissioner, 119 T.C. 252 (2002).

Nevertheless, even where a valid notice of determination was issued and the taxpayer timely petitioned for review, the Court will dismiss a CDP case as moot if the liability which was the subject of the collection action has already been paid and respondent is no longer pursuing the collection action. Greene-Thapedi v.

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[2]Respondent represents, and petitioner does not meaningfully dispute, that petitioner's 2010 Form 1040 liability was extinguished by carrybacks from tax overpayments petitioner made toward her 2011 and 2012 liabilities and by a $63 levy that respondent made on petitioner's State income tax refund.

Commissioner, 126 T.C. 1, 7 (2006). In the case before us, the liabilities listed in the notice of determination have in fact been satisfied and respondent is no longer pursuing any collection action with respect to those liabilities. Consequently, we conclude that this case is moot.

Petitioner contends that the case is not moot because "there is currently outstanding liability for the 2010 year" as relates to the section 6038(b) penalty. Petitioner further contends that "res judicata precludes respondent's determination and assessment of a section 6038(b) penalty" because, petitioner says, respondent's decision letter constitutes a final determination that petitioner owe no tax, interest, or penalties for 2010.

Respondent counters that the section 6038(b) penalty is separate and distinct from petitioner's 2010 Form 1040 liability. Respondent acknowledges that petitioner has requested a CDP hearing with respect to the section 6038 penalty. Respondent asserts, however, that there has been no determination with respect to the section 6038(b) penalty and that consequently this Court lacks jurisdiction over it in this proceeding and res judicata does not apply.

We agree with respondent. The section 6038(b) penalty is separate and distinct from petitioner's 2010 Form 1040 liability. Section 6038(a)(1) imposes information reporting requirements on any U.S. person, as defined in section 957(c), who controls a foreign corporation or who is treated as a U.S. shareholder of certain controlled foreign corporations. Form 5471 and the accompanying schedules are used to satisfy the section 6038 reporting requirements. The Form 5471 must be filed with the U.S. person's timely filed Federal income tax return. Sec. 1.6038-2(i), Income Tax Regs. When a taxpayer, who was required to do so, fails to complete and file a Form 5471 on time, a fixed penalty of $10,000 per foreign corporation per annual accounting period is imposed. Secs. 6038(b)(1), 6679; see Flume v. Commissioner, T.C. Memo. 2017-21.

In Freije v. Commissioner, 131 T.C. 1 (2008), aff'd, 325 F.App'x 448 (7th Cir. 2009) (Freije II), this Court rejected an argument that, as a matter of res judicata, the outcome in an earlier Tax Court proceeding, addressing the collection of Form 1040 income tax liability arising from certain adjustments (disallowance of claimed estimated tax payments and the disallowance of itemized deductions), barred further collection action for Form 1040 income tax liability arising from different adjustments (disallowance of certain costs reflected on Schedule C, Profit

or Loss From Business, filed as part of the taxpayer's return) for the same taxable year. The Court stated:

> Since in certain circumstances the Commissioner may assess tax more than once for the same tax period, it is quite reasonable that a taxpayer can have a separate opportunity for a hearing regarding each of the distinct assessments. Respondent is properly proceeding here under a new assessment which makes different adjustments than were made under the prior assessment.

Id. at 5; see also Concert Staging Services, Inc. v. Commissioner, T.C. Memo. 2011-231; Graham v. Commissioner, T.C. Memo. 2008-129 ("Petitioner was entitled to a new section 6320 notice and another opportunity to request a collection hearing with respect to the new assessments to the extent they included unpaid taxes that were not listed on the first notice.").

In reaching this conclusion, the Court in Freije II cited favorably sections 301.6320-1(d)(2), Q&A-D1 and 301.6330-1(d)(2), Q&A-D1, Proced. & Admin. Regs., which provides that a taxpayer may receive more than one CDP hearing with respect to the same tax period "where the tax involved is a different type of tax * * * or * * * [a] penalty has been assessed." Petitioner contends that this regulation is invalid and that Freije II is inapposite because it did not address the validity of the regulation. We disagree. The holding in Freije II does not turn on the validity of the regulation but rather on the Court's conclusion that the holding in the earlier case--that there was a procedural flaw in the prior assessment--was inapplicable to the second assessment, which was based on "different adjustments from the first" and for which the IRS had cured the earlier procedural defect.[3] Freije v. Commissioner, 131 T.C. 1. Similarly, in the case before us, respondent is

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[3]The Court in Freije v. Commissioner, 131 T.C. 1 (2008), aff'd, 325 F.App'x 448 (7th Cir. 2009), also observed that a res judicata argument might be "more significant" if a taxpayer was not permitted a second administrative hearing as a result of an additional assessment. But this does not mean that the application of res judicata principles depends upon the availability of a second administrative hearing or the validity of the regulation which affirms the availability of such a hearing. Even if it were to be assumed that the regulation was invalid, this would not necessarily mean that the initial determination was res judicata as to the section 6038(b) penalty.

proceeding under a new assessment with respect to the section 6038(b) penalty which is distinct from the unpaid tax which is the subject of the notice of determination which provides the basis for our jurisdiction in this case.

In fact, the case before us presents an even more doubtful situation than Freije II for applying res judicata principles. As noted, Freije II addressed the application of res judicata principles in a scenario where there had been a previous judicial ruling. By contrast, there has been no previous judicial determination in the case before us. Rather petitioner seeks to invoke the application of res judicata with respect to the IRS Appeals determination. This Court has previously dismissed arguments that res judicata applies to IRS determinations, which are administrative rather than judicial in nature. See Tucker v. Commissioner, 135 T.C. 114, 144-145 (2010); Johnson v. Commissioner, T.C. Memo. 1990-115; Jackson v. Commissioner, T.C. Memo. 1988-143. Petitioner cites, and we have discovered, no case, in this Court or in any other court, reaching a different conclusion.

The Notice CP504 issued to petitioner on April 14, 2018, indicates that she may appeal the notice of intent to levy to the Collection Appeals Program. In response to the Notice CP504 petitioner submitted both a Form 9423 and a Form 12153. Petitioner has similarly requested a second CDP hearing with respect to the section 6038(b) penalty, as it relates to the NFTL for tax years 2005 through 2010.[4] Insofar as the record reveals, respondent has made no determination with regard to either matter. Consequently, we lack jurisdiction over petitioner's challenge to the section 6038(b) penalty.

It follows that we must deny petitioner's motion to restrain assessment or collection or to order refund of amount collected with respect to the section 6038(b) penalty. Our jurisdiction over petitioner's motion arises, if at all, under section 6330(e)(1), which provides:

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[4]In this regard it appears that petitioner has taken inconsistent positions--asserting before the IRS that she is entitled to a separate CDP hearing with respect to the proposed collection actions as relate to the sec. 6038 penalty, while asserting in this proceeding that the statute forecloses the opportunity for a second hearing and that the regulations affirming the hearing opportunity which they themselves have invoked are invalid.

> The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

The unpaid tax and proposed levy to which the notice of determination relates is petitioner's 2010 Form 1040 liability of $326.66. Thus, this Court lacks jurisdiction in this proceeding with respect to the injunctive relief petitioner seeks in her motion as it relates to the section 6038(b) penalty.

Upon due consideration of the foregoing, it is

ORDERED: That the Court's order to show cause dated September 14, 2018, is discharged. It is further

ORDERED: That petitioner's motion to restrain assessment or collection or to order refund of amount collected filed November 14, 2018, is denied. It is further

ORDERED: That, on the Court's own motion, this case is dismissed on the ground of mootness.

(Signed) Michael B. Thornton
Judge

ENTERED: **JAN 30 2019**