UNITED STATES TAX COURT
WASHINGTON, DC 20217

JEFFREY P. HEIST,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 8724-18 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER AND DECISION

This collection review case is before the Court on respondent's Motion For Summary Judgment, filed October 18, 2018, pursuant to Rule 121.[1] Respondent contends that the Court should affirm a determination of the IRS Office of Appeals (Appeals Office) sustaining collection action against petitioner in respect of his outstanding liability for frivolous return penalties assessed against him pursuant to section 6702 for 2013, 2014, and 2015 (collectively, the years in issue).

On November 18, 2018, petitioner filed an Opposition to respondent's motion, objecting to its granting and arguing that the amended returns (Forms 1040X) that he submitted for the years in issue were not frivolous.

Background

The record establishes and/or the parties do not dispute the following facts:

During the years in issue petitioner owned and operated US Alarm Systems, an alarm system installation and servicing business. For 2013 and 2014 petitioner conducted his business as a sole proprietor and utilized a Schedule C ("Profit or Loss From Business") to report his proprietorship income. For 2015 petitioner conducted his business through an S corporation and utilized Part II ("Income or Loss From Partnerships and S Corporations") of Schedule E ("Supplemental

[1] Rule references are to the Tax Court Rules of Practice and Procedure. Section references are to the Internal Revenue Code, as amended.

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Income and Loss") to report his S corporation income. Petitioner had no other source of income than his alarm system business during the years in issue.

For the years in issue, petitioner's customers typically utilized information returns (Forms 1099-MISC, "Miscellaneous Income") to report payments of income made by them to petitioner's alarm system business.

On September 1, 2016, petitioner filed an income tax return (Form 1040) for each of the years in issue. Those returns, which petitioner signed, were prepared by a CPA. On the returns petitioner reported either net profit (on Schedule C) or S corporation income (on Part II of Schedule E), as well as tax and penalty, as follows:

Year	Net Profit/ S Corporation Income	Tax*
2013	$52,647	$10,776
2014	48,894	10,020
2015	39,876	2,300

* including self-reported estimated tax penalty of $156, $171, and $31 for 2013, 2014, and 2015, respectively. See sec. 6654.

Petitioner did not make estimated tax payments for any of the years in issue, nor did he claim any other payment as an offset against the tax (and penalty) that he reported on his returns for those years. Further, petitioner did not accompany any of his returns with payment to satisfy the reported liabilities.

Respondent assessed the tax and penalty reported by petitioner on each of his income tax returns for the years in issue. Amounts owing, however, went unsatisfied. Accordingly, in March 2017 respondent sent petitioner both a final notice of intent to levy and a notice of lien filing. Apparently in response to those notices, petitioner submitted to the IRS on April 27, 2017, a Form 1040X, Amended U.S. Individual Income Tax Return, for each of the years in issue.

On the Forms 1040X petitioner reduced to zero both Schedule C net profit and S corporation income, as well as tax and penalty that he had previously reported on his original income tax returns for the years in issue. In support of his reporting, petitioner attached to the Forms 1040X so-called "corrected" Forms

1099-MISC, which he himself had prepared, that purported to "correct" to zero the amounts of income paid by the customers of his alarm system business.

On his Forms 1040X for 2013 and 2014 petitioner offered the following explanation for submitting the amended returns:

> [The entries on Form 1040X zeroing out both income and tax are] based on corrections to erroneous information returns which constitute bad "PAYER" data. Please refer to the * * * corrected Form[s] 1099-MISC provided. Jeffrey P. Heist and US Alarm Systems performed no "trade or business" activities as defined in USC Title 26 Section 7701(a)(26).[*] Therefore no "trade or business" income was produced as erroneously reported on Schedule C and Schedule SE ["Self-Employment Tax"] by tax preparer. Lines * * * changed due to the fact that no "tade [sic] or business" income activities occured [sic]. * * *
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> [* Sec. 7701 is a general definitional section for Title 26 of the United States Code (the Internal Revenue Code). Subsec. (a)(26) defines "trade or business" to include the performance of the functions of a public office. The argument that a "trade or business" includes *only* a public office is baseless and frivolous. E.g., Hill v. Commissioner, T.C. Memo. 2013-265 and T.C. Memo. 2013-264; Slingsby v. Commissioner, T.C. Memo. 2011-3.]

Petitioner attached multiple so-called "corrected" Forms 1040-MISC to each of his amended returns for 2013 (9 such "corrected" forms) and 2014 (7 such "corrected" forms).

On his Form 1040X for 2015 petitioner offered the following explanation for submitting the amended return:

> [The entries on Form 1040X zeroing out both income and tax are] based on US Alarm Systems being a private sector company that performed no "trade or business" activities as defined in USC Title 26 Section 7701(a)(26). Therefore no "trade or business income was produced as erroneously reported on Schedule C and Schedule SE by tax preparer. Lines * * * changed due to the fact that no "tade" [sic] or business activities occured [sic]. * * *

Petitioner attached eight so-called "corrected" Forms 1040-MISC to his amended return for 2015.

On each of the aforementioned 24 "corrected" Forms1099-MISC for the years in issue (i.e., 9 such forms for 2013, 7 for 2014, and 8 for 2015), petitioner wrote as follows:

> This corrected Form 1099-MISC is submitted to rebut a document known to have been submitted by the party identified above as "PAYER" which erroneously alledges [sic] a payment to the party identified above as the "RECIPIENT" [i.e., petitioner individually or his S corporation] of "gains, profit or income" made in the course of a "trade or business". Under penalty of perjury, I declare that I have examined this statement and to the best of my knowledge and belief, it is true, correct and complete.
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> /s/ Jeffrey P. Heist Date: April 15, 2017

Deeming them frivolous and therefore invalid, the IRS did not process the amended returns for the years in issue. In addition, on September 8, 2017, an IRS employee proposed assessing frivolous return penalties under section 6702(a) against petitioner for submitting the Forms 1040X. On September 14, 2017, the employee's supervisor approved such proposal. A Form 8278 ("Assessment and Abatement of Miscellaneous Civil Penalties") for each of the years in issue was executed and used for these purposes.

On October 9, 2017, respondent assessed against petitioner frivolous return penalties under section 6702(a) based on the Forms1040X for the years in issue. On that same date respondent sent petitioner notice and demand for payment pursuant to section 6303.

On November 3, 2017, the Internal Revenue Service sent petitioner Letter 1058, Final Notice Of Intent To Levy And Notice Of Your Right To A Hearing, with respect to petitioner's outstanding liability for the frivolous return penalties for the years in issue. Less than two weeks later respondent sent petitioner Letter 3172, Notice Of Federal Tax Lien Filing And Your Right To A Hearing Under IRC 6320, concerning the filing of a notice of Federal tax lien with respect to the same outstanding liability.

On November 16, 2017, petitioner submitted to the IRS a Form 12153, Request For A Collection Due Process Or Equivalent Hearing, requesting a hearing as to both the proposed levy and the lien filing with respect to his liability for the frivolous return penalties for the years in issue. Petitioner attached to the form a statement for the "Reason for dispute", the crux of which was reflected in the last paragraph of such statement:

> The amended returns that I submitted for processing * * * take none of the 46 positions listed in the Secretary's Notice 2010-33. I submitted simple arithmetic and sworn rebuttals to erroneous information returns and bad "payer" data sent to IRS by those I contracted with for the years in question. I made no claims for refund, overpayment or credit. I simply require the record be corrected.

Petitioner's request for a hearing was assigned to Settlement Officer Gail Dickerson (hereinafter, the SO) in respondent's Appeals Office in Atlanta, Georgia. In her letter dated February 12, 2018, to petitioner, the SO scheduled a telephone hearing for March 28, 2018, and advised about the administrative hearing process.

The telephone hearing took place as scheduled on March 28, 2018. During the hearing, as throughout the entire administrative process, petitioner argued only that he did not submit any frivolous return that would justify the assessment of any penalty against him. Notably, petitioner did not request a collection alternative or otherwise provide documentation in support of a collection alternative, nor did he argue that the Federal tax lien should be withdrawn pursuant to section 6323(j).

On April 25, 2018, respondent issued a Notice of Determination Concerning Collection(s) Under Section 6320 and/or 6330 sustaining collection action.

In response to the notice of determination petitioner filed a petition with the Court on May 7, 2018. In his petition, petitioner reprises the argument that his

amended returns for the years in issue were not frivolous "as the conditions required for a determination of frivolous [sic] at 26 USC 6702 are not met" and because he "had no 'trade or business' activities * * * to report [income for the years in issue]."

After the case was at issue, respondent filed his Motion For Summary Judgment on October 18, 2018. Thereafter, petitioner filed an Opposition on November 18, 2018, objecting to the granting of respondent's motion and arguing, in substance, that petitioner's "private business activities" do not constitute "taxable activities by way of 'trade or business' activities as defined at 26 U.S. Code Sec. 7701(a)(26) of the Internal Revenue Code."

Discussion

A. Summary Judgment

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 upon 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 issues or disputes of material fact. Naftel v. Commissioner, 85 T.C. 527, 529 (1985). Where the record viewed as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no "genuine issue for trial". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The party moving for summary judgment bears the burden of proving that there is no genuine issue or dispute of material fact, and factual inferences will be read in the manner most favorable to the party opposing summary judgment. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985).

B. General Principles Regarding Review of IRS Collection Actions

Section 6321 imposes a lien in favor of the United States upon all property and rights to property of a taxpayer where there exists a failure to pay a liability after notice and demand for payment. The lien generally arises at the time assessment is made. Sec. 6322. However, section 6323 provides that such lien shall not be valid against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until the Commissioner files a notice of lien with the appropriate public official. Section 6320 then sets forth procedures applicable to afford protections for taxpayers in lien situations.

Section 6320(a) establishes the requirement that the Commissioner notify in writing the person described in section 6321 of the filing of a notice of lien under section 6323 and advise the person of the opportunity for administrative review of the matter. Section 6320(b) and (c) grants a person who so requests the right to a hearing before the IRS Appeals Office, which hearing is generally to be conducted in accordance with the procedures described in section 6330(c), (d), and (e).

Similarly, section 6331(a) provides that if any person neglects or refuses to pay a liability after notice and demand for payment, the Commissioner may collect such liability by levy on the person's property or rights to property. Under section 6330, the Commissioner cannot proceed with collection by levy until the person has been given notice of the proposed levy and the opportunity for review in the form of a hearing before the IRS Appeals Office consistent with the procedures described therein.

If after seeking review by the IRS Appeals Office the person is dissatisfied, such person may seek judicial review of the administrative determination. Sec. 6330(d)(1); see Davis v. Commissioner, 115 T.C. 35, 37 (2000); Goza v. Commissioner, 114 T.C. 176, 179 (2000).

When judicial review is sought, the Court will review a person's liability de novo to the extent that the existence or the amount of the liability is properly at issue. See Sego v. Commissioner, 114 T.C. 604, 609-610 (2000). A person's liability may be at issue if the person did not receive a statutory notice of deficiency for such liability or the person did not otherwise have an opportunity to dispute such liability. Sec. 6330(c)(2)(B). In all other regards, the Court will review the Commissioner's administrative determination for abuse of discretion. See Sego v. Commissioner, 114 T.C. at 609-610.

Because petitioner was not issued a notice of deficiency and did not have a prior opportunity to dispute the frivolous return penalties assessed against him for the years in issue, petitioner was entitled to challenge the underlying liability in his administrative hearing, and he may now contest that liability before the Court in the instant proceeding. See Hill v. Commissioner, T.C. Memo. 2014-134. Accordingly, the Court reviews de novo petitioner's liability for the frivolous return penalties under section 6702. Otherwise the Court reviews for abuse of discretion the determination of the Appeals Office sustaining the collection action.

C. Frivolous Return Penalty Under Section 6702

Under section 6702, a civil penalty of $5,000 may be assessed against a taxpayer if: (1) the taxpayer files a document that purports to be an income tax return; (2) the purported return lacks the information needed to judge the substantial correctness of the self-assessment or contains information that on its face indicates that the self-assessment is substantially incorrect; and (3) the defect is based on a position that the Commissioner has identified as frivolous or reflects a desire to delay or impede the administration of Federal tax laws. The section 6702 penalty applies to all returns, including amended returns, Osband v. Commissioner, T.C. Memo. 2013-188, at *17, and the Commissioner bears the burden of proof that the taxpayer is liable for the penalty, sec. 6703(a).

Petitioner submitted Forms 1040X for the years in issue that contained information on its face indicating that the purported self-assessment was incorrect and that espoused a position that the Commissioner had identified as frivolous. On substantially identical facts, the Court has held that the Commissioner correctly assessed the frivolous return penalty under section 6702(a). See Hill v. Commissioner, T.C. Memo. 2014-134; Blaga v. Commissioner, 2010-170; see also Notice 2010-33, 2010-17 I.R.B. 609, at part (III)(1)(e), listing as frivolous the position that a taxpayer has the option under law to file a document or set of documents in lieu of a return or elect to file a return reporting zero taxable income and zero tax liability even if the taxpayer received taxable income during the taxable period for which the return is filed, or similar arguments described as frivolous in Rev. Proc. 2004-34, 2004-1 C.B. 619, discussing the "zero return position".

In sum, the record establishes that the amended returns that petitioner submitted satisfy the requirements for imposing the frivolous return penalty under section 6702. Accordingly, the Court holds that petitioner is liable under such section for a $5,000 penalty for each of the years in issue.

D. Other Matters

The record establishes that the SO, utilizing IRS transcripts and other materials available to her, verified that requirements of applicable law and administrative procedure were satisfied. The SO also balanced the need for the efficient collection of amounts owed with legitimate concerns that collection action be no more intrusive than necessary. Further, because petitioner never raised any issue regarding collection alternatives or withdrawal of the Federal tax lien

pursuant to section 6323(j), the SO had no reason to consider those matters. In short, there was no abuse of discretion by the SO.

In view of the foregoing, the Court concludes that there are no genuine issues or disputes of material fact and that the determination of respondent's Appeals Office sustaining collection was not an abuse of discretion.

E. Advisory Regarding Another Penalty

Finally, the Court needs to advise petitioner about section 6673(a)(1). That section authorizes the Court to impose on a taxpayer a penalty not to exceed $25,000 whenever it appears that proceedings have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceeding is frivolous or groundless. See Crain v. Commissioner, 737 F.2d 1417 (5th Cir. 1984). Although respondent does not seek, and the Court has decided not to impose sua sponte, such a penalty in this case, petitioner is warned that the Court may not be so forgiving if he returns to the Court in the future and continues to advances frivolous and groundless arguments. See Pierson v. Commissioner, 115 T.C. 576, 581 (2000).

Conclusion

Premises considered, it is hereby

ORDERED that respondent's Motion for Summary Judgment, filed October 18, 2018, is granted. It is further

ORDERED AND DECIDED that the Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 dated April 25, 2018, upon which notice this case is based, is sustained, and respondent may proceed with collection action in respect of petitioner's outstanding liability for frivolous return penalties under section 6702 for 2013, 2014, and 2015.

(Signed) Robert N. Armen
Special Trial Judge

ENTERED: **FEB 21 2019**