UNITED STATES TAX COURT
WASHINGTON, DC 20217

BARRY J. SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 14578-18SL.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER AND DECISION

This matter is before the Court on respondent's Motion For Summary Judgment, filed November 8, 2018, and supplemented February 15, 2019. Respondent seeks to sustain a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 dated June 26, 2018, upholding a proposed levy action for the taxable (calendar) years 2011, 2012, and 2013.[1]

There are no genuine issues of material fact in this case, and the Court concludes that respondent is entitled to judgment as a matter of law as provided herein.

Petitioner resided in the State of Tennessee at the time that the petition in this case was filed with the Court.

A. Background

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

Petitioner filed Federal income tax returns for 2011, 2012, and 2013 but failed to pay the balances due. The returns were filed in late October or early November 2017, at which time petitioner was apparently working with IRS

[1] Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended. Rule references are to the Tax Court Rules of Practice and Procedure.

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Examination Division personnel. Internal Revenue Service records indicate that the submissions included returns for 2005 through 2015, all with balances owing. With respect to the 2011 through 2013 years in issue, respondent assessed the reported tax liabilities, as well as related statutory additions to tax and interest, and sent notices of balance due to petitioner. Amounts, however, remained unpaid.

On January 10, 2018, respondent issued to petitioner a Final Notice - Notice Of Intent To Levy And Notice Of Your Right To A Hearing for 2011, 2012, and 2013, reflecting an unpaid balance of $22,260.51. Petitioner responded with a timely Form 12153, Request For A Collection Due Process Or Equivalent Hearing, in which he disputed the levy action and expressed interest in a collection alternative in the form of an offer-in-compromise, along with selecting the box for "I Cannot Pay Balance".

Subsequently, a Settlement Officer (SO) of the IRS Office of Appeals sent to petitioner a letter dated April 5, 2018, scheduling a telephone hearing for May 9, 2018, and, to the extent that petitioner wished the SO to consider collection alternatives, requesting financial information including a Form 433-A, Collection Information Statement For Wage Earners And Self-Employed Individuals, with supporting attachments documenting income, expenses, assets, etc.; a signed tax return for 2016; and proof that estimated tax payments had been paid in full for the year to date. The letter generally requested that such items be provided within 14 days, with the exception of the tax return, for which 21 days was allotted.

On April 19, 2019, petitioner's representative called the SO and requested additional time to gather the financial materials, and the SO agreed that the items could be provided by May 4, 2018. When the SO attempted to call the representative on May 9, 2018, for the scheduled telephone conference, there was no answer. A voicemail was left, advising that no information had been received and that a notice of determination would be issued sustaining the proposed levy action. Later that day, the representative called back, explaining that his paralegal had been out. The representative indicated that he planned to speak with petitioner the following day and hoped promptly to get back to the SO with requisite information. However, nothing further was hear from petitioner or his representative, nor were any materials received for consideration.

At that juncture, the SO through review of files and transcripts had verified that requirements of applicable law and administrative procedure had been met by verifying the timeliness of assessment of amounts in dispute and verifying that appropriate collection notices had been sent to petitioner. The SO balanced the

need for efficient collection of taxes with the legitimate concern of petitioner that any collection be no more intrusive than necessary by finding that no alternative collection action would be available or proper at that time given petitioner's declination to challenge the underlying liabilities and failure to submit financial information that might establish the propriety of an alternative.

On June 26, 2018, respondent issued to petitioner the aforementioned Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, sustaining the proposed levy action for 2011, 2012, and 2013.

On July 25, 2018, petitioner filed the petition commencing this case. In that document, petitioner expressed disagreement with the notice of determination. He noted financial hardship, a belief that he had filed all delinquent returns (focusing particularly on 2016), and a desire to pursue a collection alternative.

After the case was at issue, respondent filed on November 6, 2018, the Motion For Summary Judgment that is presently before the Court, together with a supporting declaration by the SO. By Order dated November 13, 2018, petitioner was directed to file an objection, if any, to respondent's motion on or before December 4, 2018.[2] To date, nothing has been received from petitioner. Most recently, respondent supplemented his motion on February 15, 2019, by providing copies of pertinent transcripts of account.

B. Discussion

1. 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 disputes or issues of material fact. Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

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[2] Notably, the Court's November 13, 2018 Order concluded with the following warning:

> Failure to comply with this Order may result in the granting of respondent's motion for summary judgment, and a decision, if appropriate, may be entered against petitioner. See Rule 121(b), Tax Court Rules of Practice and Procedure.

Respondent, as the moving party, bears the burden of proving that no genuine dispute or issue exists as to any material fact and that respondent is entitled to judgment as a matter of law. FPL Group, 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 529. In deciding whether to grant summary judgment, the factual materials and the inferences drawn from them must be considered in the light most favorable to the nonmoving party. FPL Group, Inc. v. Commissioner, 115 T.C. 559; Bond v. Commissioner, 100 T.C. at 36; Naftel v. Commissioner, 85 T.C. at 529. The party opposing summary judgment must set forth specific facts which show that a question of genuine material fact exists and may not rely merely on allegations or denials in the pleadings. Rule 121(d); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Grant Creek Water Works, Ltd. v. Commissioner, 91 T.C. 322, 325 (1988); King v. Commissioner, 87 T.C. 1213, 1217 (1986); Shepherd v. Commissioner, T.C. Memo. 1997-555. When the moving party has carried its burden, however, the party opposing the summary judgment motion must do more than simply show that "there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but * * * must set forth specific facts showing there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). 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. at 587.

Under Rule 121(d), if the adverse party does not respond to the motion for summary judgment, then this Court may enter a decision where appropriate against that party. See King v. Commissioner, 87 T.C. at 1217; Shepherd v. Commissioner, T.C. Memo. 1997-555. Petitioner has not responded to the motion for summary judgment. The Court could grant respondent's motion on that ground alone. However, even if the Court did not rely on that basis, the record in this matter shows that respondent is entitled to summary judgment on the merits of the case.

2. Hearings Under Section 6330

Section 6331(a) authorizes the Secretary to levy upon property and property rights of a taxpayer liable for taxes who fails to pay those taxes within 10 days after a notice and demand for payment is made. Section 6331(d) provides that the levy authorized in section 6331(a) may be made with respect to "unpaid tax" only if the Secretary has given written notice to the taxpayer 30 days before the levy.

Section 6330(a) requires the Secretary to send a written notice to the taxpayer of the amount of the unpaid tax and of the taxpayer's right to a section 6330 hearing at least 30 days before the levy is begun.

If a section 6320 or 6330 hearing is requested, the hearing is to be conducted by the IRS Office of Appeals, and, at the hearing, the officer conducting the conference must verify that the requirements of any applicable law or administrative procedure have been met. Sec. 6330(b)(1), (c)(1). The taxpayer may raise at the hearing "any relevant issue relating to the unpaid tax or the proposed levy". Sec. 6330(c)(2)(A). The taxpayer may also raise challenges to the existence or amount of the underlying tax liability at a hearing if the taxpayer did not receive a statutory notice of deficiency with respect to the underlying tax liability or did not otherwise have an opportunity to dispute that liability. Sec. 6330(c)(2)(B); see Montgomery v. Commissioner, 122 T.C. 1 (2004).

This Court has jurisdiction under section 6330 to review the Commissioner's administrative determinations. Sec. 6330(d); see Iannone v. Commissioner, 122 T.C. 287, 290 (2004). Where the underlying tax liability is properly at issue, the Court reviews the determination de novo. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Where the underlying tax liability is not at issue, the Court reviews the determination for abuse of discretion. Id. at 182.

a. Underlying Tax Liability

The record in this proceeding indicates that throughout the administrative process petitioner has at no time sought to challenge the underlying tax liabilities for 2011 through 2013. The general rule in this Court is that, on appeal of a collection determination, the Court will limit its review to those issues properly raised during the collection hearing. Giamelli v. Commissioner, 129 T.C. 107, 114-115 (2007); Magana v. Commissioner, 118 T.C. 488, 493 (2002). See also Rule 331(b)(4) (advising that any issue not raised in the petition shall be deemed conceded).

Accordingly, the Court will not consider any adjustment to the amount of the underlying 2011, 2012, and 2013 liabilities and will review respondent's determination for abuse of discretion. Goza v. Commissioner, 114 T.C. at 182. 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).

b. Spousal Defenses and Challenges to the Appropriateness of Collection Actions

Similarly, petitioner has not at any time raised spousal defenses or challenges to the appropriateness of collection actions. Thus, the Court does not consider those matters here. See Giamelli v. Commissioner, 129 T.C. at 114-115; Magana v. Commissioner, 118 T.C. 493); see also Rule 331(b)(4).

c. Collection Alternatives

During the collection proceeding, and insofar as might concern any collection alternative, petitioner's initial hearing request indicated interest in an offer-in-compromise and noted an inability to pay, which can signal a need for currently not collectible status. The petition in this case also generally reprised a desire for a collection alternative.

Both installment agreements and offers-in-compromise are forms of collection alternative. As a prerequisite for consideration or approval by the IRS of such types of collection alternatives, or of the administrative relief afforded by currently not collectible status, it is generally incumbent on the taxpayer to provide requested financial information, for example 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.

Here, the record reflects that petitioner failed during the pendency of the administrative hearing process to submit requested financial materials that could establish qualification for a collection alternative. Conversely, it is clear that the

SO provided ample warning, instruction, and opportunity for petitioner to remedy the situation, so as to satisfy the conditions and open the door for alternatives. Case law highlights the lack of abuse in analogous scenarios. See, e.g., Murphy v. Commissioner, 125 T.C. at 315 ("An appeals officer does not abuse her discretion when she fails to take into account information that she requested and that was not provided in a reasonable time."); Dinino v. Commissioner, T.C. Memo. 2009-284 (noting consistency with IRS guidelines stating that, for purposes of good case management, no more than 14 days should be allowed for submission of financial information); Gazi v. Commissioner, T.C. Memo. 2007-342 ("There is no requirement that the Commissioner wait a certain amount of time before making a determination as to a proposed levy."); see also sec. 301.6330-1(e)(3), Q & A–E9, Proced. & Admin. Regs.

In sum then, precedent establishes that it is not an abuse of discretion for the IRS Office of Appeals to reject collection alternatives and sustain proposed collection action on the basis of the failure of taxpayers to submit requested financial information establishing qualification or to achieve current compliance with filing obligations. See, e.g., Giamelli v. Commissioner, 129 T.C. at 115-116; Taylor v. Commissioner, T.C. Memo. 2009-27; Roman v. Commissioner, T.C. Memo. 2004-20.

d. Verification of Procedures

It is well settled that no particular form of verification is required; that no particular document need be provided to taxpayers at a hearing conducted under section 6330; and that Forms 4340, Certificate Of Assessments, Payments, And Other Specified Matters, and transcripts of account may be used to satisfy the requirements of section 6330(c)(1). Roberts v. Commissioner, 118 T.C. 365, 371 n.10 (2002), aff'd, 329 F.3d 1224 (11th Cir. 2003); Nestor v. Commissioner, 118 T.C. 162, 166 (2002); Lunsford v. Commissioner, 117 T.C. 183 (2001). The transcripts and materials that are referenced in and/or attached as exhibits to respondent's Motion For Summary Judgment and accompanying declaration, along with the statements of the SO in such declaration and related materials, show that required assessment and collection procedures were followed.

The Court concludes that there are no genuine issues of material fact for trial and that respondent's determination to proceed with collection was not an abuse of discretion.

C. Conclusion

Drawing all factual inferences against respondent, the Court concludes that there are no genuine issues of material fact in this case and that respondent is entitled to judgment as a matter of law.

Premises considered, it is

ORDERED that respondent's Motion For Summary Judgment, filed November 8, 2018, and supplemented February 15, 2019, is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the proposed collection action (levy) for the taxable (calendar) years 2011, 2012, and 2013, as determined in the notice of determination dated June 26, 2018, upon which notice this case is based.

(Signed) Robert N. Armen
Special Trial Judge

ENTERED: **FEB 22 2019**