

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

JASON E. SHEPHERD,)	
)	
Petitioner,)	
)	
v.)	Docket No. 19146-18 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

On September 27, 2018, petitioner filed a petition to review the Internal Revenue Service’s (IRS) Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330¹ (notice of determination), which sustained the filing of a Notice of Federal Tax Lien.

On March 18, 2019, respondent filed a Motion for Summary Judgment (motion) pursuant to Rule 121 supported by two declarations and Exhibits 1.A and 2.B. The first declaration was submitted by C. Curry, an Appeals Officer with the Internal Revenue Service (IRS) Office of Appeals (Appeals Office). Appeals Officer Curry had conducted petitioner’s requested collection due process (CDP) hearing.

The second declaration was submitted by Tammy Russell, an IRS Revenue Officer. Ms. Russell had been assigned to collect unpaid employment taxes of Advanced Care Ambulance Service (ACAS) and determined that petitioner was liable for trust fund penalties with respect to ACAS’ unpaid employment taxes for the tax periods 09/2010, 12/2010, 03/2011, 06/2011, 09/2011, and 12/2011 (collectively, tax periods at issue). Respondent contends that he is entitled to judgment as a matter of law sustaining the notice of determination.

¹Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended, in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

By Order dated March 20, 2019, the Court directed petitioner to file a response to respondent's motion. On April 11, 2019, petitioner filed a response to the motion. Petitioner opposes the motion by asserting challenges to material facts.

By Order dated April 16, 2019, respondent's motion was assigned to the undersigned for disposition. Upon review of the record on respondent's motion, the Court concludes that there are genuine issues of material fact. The Court will deny respondent's motion without prejudice.

The Court may grant summary judgment only if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. See Rule 121(b); Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

Among other things, there is a genuine dispute as to whether trust fund penalties for the tax periods at issue were properly assessed against petitioner. Sec. 6672(b); see Mason v. Commissioner, 132 T.C. 301, 322 (2009) (noting that generally before a trust fund penalty may be assessed, a Letter 1153 must (1) either be personally served on the responsible person, or (2) sent by certified mail to that responsible person's last known address); Hickey v. Commissioner, T.C. Memo. 2009-2, at *5; see also, Lee v. Commissioner, 144 T.C. 40, 49-50 (2015) (denying the Commissioner's motion for summary judgment because of a factual issue related to receipt by the taxpayer of Letter 1153 regarding notification of trust fund recovery penalties); Hoyle v. Commissioner, 131 T.C. 197, 200-203 (2008).

Section 6330(c)(1) requires the settlement officer conducting the CDP hearing to "obtain verification * * * that the requirements of any applicable law or administrative procedure have been met." See sec. 6320(c). The record on respondent's motion does not contain a copy of the Letter 1153 and proof that it was either personally served on the petitioner or sent by certified mail to his last known address. Therefore, on the record on the motion respondent has not proven that Appeals Officer Curry verified that all applicable laws or administrative procedures were met concerning the assessment of the section 6672 penalties for the tax periods at issue.

Drawing all factual inferences against respondent as the moving party, the Court concludes that respondent has not established (1) that there is no genuine dispute as to any material fact and (2) that a decision may be entered in his favor as a matter of law. See sec. 6672(b); Rule 121(b).

Premises considered, it is hereby

ORDERED that respondent's Motion for Summary Judgment, filed March 18, 2019, is denied without prejudice.

(Signed) Diana L. Leyden
Special Trial Judge

Dated: Washington, D.C.
April 18, 2019