

UNITED STATES TAX COURT
WASHINGTON, DC 20217

LINDA M. JARVIS,)	
)	
Petitioner,)	
)	
v.)	Docket No. 19387-18SL.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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ORDER AND DECISION

This is a collection review case, commenced pursuant to section 6330(d)(1) and Rules 330 through 334, that involves a proposed levy to collect petitioner’s outstanding income tax liability for the taxable (calendar) year 2012.¹ Presently pending before the Court is respondent’s Motion For Summary Judgment, filed March 21, 2019. Respondent has supported his motion by attaching multiple exhibits, including an account transcript for 2012 and the declaration of the Appeals Team Manager who approved respondent’s administrative determination to proceed with the proposed levy.

On April 17, 2019, petitioner filed a Notice Of Objection to respondent’s motion. Petitioner’s Notice Of Objection will be summarized in due course.

Background

Petitioner resided in the State of New York at the time that the petition was filed with the Court.

¹ All section references are to the Internal Revenue Code of 1986, as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure.

A. Petitioner's Tax Liability for 2012

On or about December 8, 2014, respondent sent petitioner a notice of deficiency for the taxable (calendar) 2012 in which he determined a deficiency in income tax and additions to tax ("penalties") for failure to timely file and failure to timely pay. Petitioner responded to the notice of deficiency by timely filing a petition with this Court for redetermination of deficiency and additions to tax, which case was assigned dkt. No. 6938-15.

In due course petitioner's case at dkt. No. 6938-15 was noticed for trial at Hartford, Connecticut, the city requested by petitioner for place of trial, but she did not appear. On May 27, 2016, the Court entered an Order Of Dismissal And Decision, which recited as follows:

This case was called and recalled from the calendar for the Trial Session of the Court at Hartford, Connecticut on May 16, 2016. There was no appearance by or on behalf of petitioner. Counsel for respondent appeared and was heard. At the recall, on May 19, 2016, there was no appearance by or on behalf of petitioner. Counsel for respondent appeared and filed with the Court a Motion to Dismiss for Lack of Prosecution at a Reduced Deficiency. Upon due consideration, and for cause more fully appearing in the transcript of the proceeding, it is

ORDERED that respondent's motion is granted, and this case is dismissed for lack of prosecution. It is further

ORDERED and DECIDED that petitioner is liable for a deficiency in income tax of \$4,489.00 for the taxable year 2012. There are additions to income tax under I.R.C. §§ 6651(a)(1) and 6651(a)(2) due from petitioner in the respective amounts of \$693.23, and \$585.39 for the taxable year 2012.

On July 1 2016, petitioner filed both a Motion To Vacate Or Revise Pursuant To Rule 162 and a Motion For Reconsideration Of Findings Or Opinion Pursuant To Rule 161. The Court denied petitioner's two motions on July 28, 2016.

On October 31, 2016, petitioner filed a Notice Of Appeal and paid the filing fee. She did not, however, post bond to stay assessment and collection.²

On October 16, 2018, the Court of Appeals for the Second Circuit issued its mandate in the form of a 3-page Summary Order, the last sentence of which stated as follows:

We have reviewed all of the arguments raised by petitioner on appeal and find them to be without merit. For the foregoing reasons, the decision of the Tax Court is **AFFIRMED**. [Emphasis in the original.]

Petitioner did not seek further review by filing, for example, either a motion for en banc review or a petition for certiorari, so in due case her case at dkt. No. 6938-15 became final pursuant to section 7481(a)(2)(A).

² Sec. 7485 deals with bond to stay assessment and collection. As relevant to the present case, subsection (a) provides as follows:

(a) **Upon notice of appeal.**--Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, the review under section 7483 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a notice of appeal in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer--

- (1) on or before the time his notice of appeal is filed has filed with the Tax Court a bond in a sum fixed by the Tax Court not exceeding double the amount of the portion of the deficiency in respect of which the notice of appeal is filed, and with surety approved by the Tax Court, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or
- (2) has filed a jeopardy bond under the income or estate tax laws.

[Emphasis added.]

B. Proposed Levy and Administrative Hearing

As previously stated, petitioner did not post bond to stay assessment and collection when she appealed the dismissal of her case at dkt. No. 6938-15. Accordingly, neither assessment nor collection was barred pending petitioner's appeal to the Court of Appeals.

On November 28, 2016, respondent assessed income tax and penalties (i.e., additions to tax) for 2012 in the following amounts:

income tax	\$4,489.00
penalty for late filing	693.23
penalty for late payment	585.39

The amounts of the assessments for tax and penalties were consistent with the Court's May 27, 2016 Order Of Dismissal And Decision.³

Despite notice and demand for payment, see sec. 6303, petitioner did not pay the outstanding liability.

On September 11, 2017, respondent sent petitioner Notice CP90, Intent To Seize Your Assets And Notice Of Your Right To A Hearing in respect of her unpaid liability for 2012. See sec. 6330(a). In response petitioner filed a Request For A Collection Due Process Or Equivalent Hearing (Form 12153). In such request petitioner did not request a collection alternative but rather only challenged the existence or amount of her underlying liability for 2012, pointing out that she had appealed this Court's May 27, 2016 Order Of Dismissal And Decision to the Court of Appeals for the Second Circuit, where the matter was then pending.

On August 28, 2018, respondent's Appeals Office issued a Notice Of Determination Concerning Collection Action(s) sustaining the proposed levy. The Attachment by the Appeals settlement officer that accompanied the notice of determination stated, in part, as follows:

³ Respondent also assessed interest on November 28, 2016. The Court's May 27, 2016 Order Of Dismissal And Decision did not include interest, but this was because in an action for redetermination the Court lacks jurisdiction over interest. Nevertheless, interest on a deficiency in tax is provided by law, and respondent is authorized to assess it at the appropriate time. See secs. 6601(a), (e)(1).

Collection Alternatives Requested

You offered no alternatives to collection.

Challenges to the Liability

You disagree with your liability because when you requested the hearing your issue was currently in the U.S. Court of Appeals for the Second Circuit. You believe that the CP90 Notice was issued in error as collection should be suspended while your case is in the circuit court.

Appeals explained in the initial contact letter that collection is not suspended while a taxpayer has an IRS collection issue in Circuit Court unless a bond is posted, there is no record of a posted bond.

You raised no other issues.

[Emphasis added.]

C. Judicial Proceeding

In response to the notice of determination petitioner timely filed a petition with this Court on October 1, 2018, commencing the present case. Secs. 6330(d)(1), 7502, 7503. Petitioner in her petition seeks to revisit the dismissal of her prior case at dkt. 6938-15 and argues further that “the filing of my Tax Court petition [at dkt. No. 6938-15] placed a hold on all collection activities until a final and unappealable determination is made concerning whether any tax is actually owed.”

As previously stated, on October 16, 2018, shortly after petitioner had filed her petition with this Court commencing the present case, the Court of Appeals for the Second Circuit issued its mandate affirming this Court in the case at dkt. No. 6938-15.

On March 21, 2019, respondent filed his Motion For Summary Judgment asking for a summary adjudication in his favor based on section 6330(c)(2)(B). On April 17, 2019, petitioner filed a Notice Of Objection to respondent’s motion. In her Notice Of Objection petitioner continues to argue that this Court erred in dismissing per prior case at dkt. No. 6938-15 and that, as a consequence, she should be permitted to challenge the existence or amount of her outstanding liability for 2012, which she then attempts to do.

Discussion

A. Summary Judgment

The purpose of summary judgment is to expedite litigation and avoid costly, time-consuming, and unnecessary trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Under Rule 121(b) the Court may grant summary judgment when there is no genuine issue or dispute as to any material fact and a decision may be rendered as a matter of law for the moving party. Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). In deciding whether to grant summary judgment, the Court construes factual materials and inferences drawn from them in the light most favorable to the nonmoving party. However, the nonmoving party may not rest on the mere allegations or denials of such party's pleadings but must instead must set forth specific facts showing that there is a genuine issue or dispute for trial. Rule 121(d); see Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

B. Standard of Review

Pursuant to section 6330(d)(1), the Court has jurisdiction to review the determination of the Commissioner's Appeals Office. See Murphy v. Commissioner, 125 T.C. 301, 308 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006). Where the validity of the underlying tax liability is properly at issue, the Court reviews the determination regarding the underlying tax liability de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). The Court reviews all other determinations for abuse of discretion. Sego v. Commissioner, 114 T.C. at 610; Goza v. Commissioner, 114 T.C. at 182.

C. Underlying Liability

A taxpayer may challenge the existence or amount of the taxpayer's underlying tax liability only if the taxpayer did not receive a notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability. Sec. 6330(c)(2)(B). In a case such as the present one, the taxpayer's underlying tax liability includes the deficiency in income tax, additions to tax such as penalties for failure to timely file and failure to timely pay, and statutory interest. Katz v. Commissioner, 115 T.C. 329, 339 (2000).

In the present case petitioner received a notice of deficiency for 2012, and she challenged such notice by filing a petition for determination with this Court at dkt. No. 6938-15. After her case was dismissed by this Court, petitioner appealed to the Court of Appeals for the Second Circuit. Ultimately, the Court of Appeals affirmed this Court. When petitioner did not seek further review, this Court's Order Of Dismissal And Decision became final.

Given that petitioner received a notice of deficiency for 2012 and sought to, and did in fact, challenge it in this Court at dkt. No. 6938-15, she is statutorily barred by section 6330(c)(2)(B) from challenging the existence or amount of her liability for 2012 in the present collection case.

Further, respondent did not prematurely assess the deficiency, additions to tax (i.e., penalties), and statutory interest for 2012 because petitioner failed to post a bond to stay assessment and collection. See sec. 7485(a), quoted in relevant part in n.2, supra.

D. Collection Alternatives

Petitioner did not request, much less seek to demonstrate her entitlement to, a collection alternative during the administrative proceeding. Accordingly, there is nothing for the Court to review in that regard.

Conclusion

Drawing all factual inferences against respondent, the Court concludes that there is no genuine issue or dispute of material fact in this case, that respondent's determination to proceed with collection was not an abuse of discretion, and that respondent is entitled to judgment as a matter of law.

In view of the foregoing, it is hereby

ORDERED that this case is stricken from the Court's May 20, 2019 Albany, New York trial calendar. It is further

ORDERED that respondent's Motion For Summary Judgment, filed March 21, 2019, is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the proposed collection action (levy) in respect of petitioner's outstanding income tax liability for the taxable (calendar) year 2012, as determined by respondent's Appeals Office in its Notice Of Determination Concerning Collection Action(s) dated August 28, 2018, upon which notice this case is based.

Notwithstanding the December 18, 2018 trial notice and the April 5, 2019 reminder notice, petitioner is advised that she need not appear in court on May 20, 2019, in Albany, New York because this case is being stricken from the calendar for that session and will not be called at that time because of the action taken by the Court in this Order And Decision.

(Signed) Robert N. Armen
Special Trial Judge

Entered: **APR 22 2019**