UNITED STATES TAX COURT
WASHINGTON, DC 20217

SCOTT DANIEL WILSON & SARAH MARGARET WILSON,	)	
Petitioners,	)	
v.	)	Docket No. 25218-18SL.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER AND DECISION

This is a collection review case involving a proposed levy to collect petitioners' outstanding income tax liability for the taxable (calendar) year 2014. Presently pending before the Court is respondent's Motion For Summary Judgment, filed April 30, 2019, and supplemented June 10, 2019.

The same day as the filing of respondent's aforementioned motion, the Court served an Order directing petitioners to file a response, if any, to the motion. To assist petitioners in that regard, the Court attached to its Order a copy of Q&As that the Court has prepared on the subject "What is a motion for summary judgment? How should I respond to one?" On May 21, 2019, the Court received and filed a letter dated May 19, 2019, from petitioners asking that respondent's motion be denied but not providing any substantive rationale in support of such request.

Background

Petitioners resided in the State of Iowa at the time that their petition was filed with the Court.

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Pursuant to an extension of time to file, petitioners filed an income tax return for 2014 on October 15, 2015. On their return petitioners reported a tax liability of $21,291 and claimed withholding of $5,823, leaving an unpaid balance of $15,468.

On November 23, 2015, respondent assessed the income tax reported by petitioners, together with (1) an addition to tax ("penalty") in the amount of $618.72 for failure to timely pay and (2) statutory interest in the amount of $284.82. Also on November 23, 2015, respondent sent petitioners a statutory notice of balance due (i.e., notice and demand for payment). However, the amount owing remained unpaid.

On September 12, 2017, petitioners filed a joint voluntary petition in bankruptcy under Chapter 7 of the Bankruptcy Act with the U.S. Bankruptcy Court for the Southern District of Iowa. Later that year, on December 5, 2017, the Bankruptcy Court issued a discharge under 11 U.S.C. sec. 727, and on the following day petitioners' bankruptcy case was closed.

The Order of Discharge that was issued by the Bankruptcy Court was accompanied by an "Explanation of Bankruptcy Discharge in a Chapter 7 Case". The Explanation included a paragraph under the heading "**Most debts are discharged**", the first sentence of which stated: "Most debts are covered by the discharge, but not all." (Emphasis added.) A further paragraph was headed "**Some debts are not discharged**", and included the following sentence: "Examples of debts that are not discharged are: * * * debts for most taxes". (Emphasis added.)

On June 25, 2018, respondent sent petitioners Notice CP92, Seizure Of Your State Tax Refund And Notice Of Your Right To A Hearing, notifying petitioners that "We seized (levied) **$2,624.00** of your state tax refund and applied it to your unpaid federal taxes" and that petitioners could appeal the seizure by requesting "a Collection Due Process hearing by **July 25, 2018**."[1]

On July 26, 2018, respondent received from petitioners a Form 12153, Request For A Collection Due Process Or Equivalent Hearing, dated July 20, 2018,

[1] Neither the June 25, 2018 Notice CP92 nor the record as a whole definitively identifies the taxable (calendar) year for which petitioners overpaid their State tax. However, petitioners' transcript of account for 2014 clearly reflects a credit of $2,624 (i.e., the amount of the State tax refund specified in Notice CP92) that was applied against their Federal income tax for 2014.

challenging the aforementioned seizure.[2] The Form 12153 included statements that "We filed for Bankruptcy & were discharged in Dec 2017" and that "You took Sarah's money to pay Scott's back taxes that should have been written off". Also, on the line for "Collection Alternative", petitioners checked the boxes for "Installment Agreement", "Offer in Compromise", and "I Cannot Pay Balance".

In due course respondent's Appeals Office sent petitioners a letter scheduling a telephone conference and advising them that if they wanted to pursue a collection alternative, then they must provide within 14 days a completed Form 433-A, Collection Information Statement, or a Form 656, Offer-In-Compromise, with the required supporting documentation. Neither of these forms, nor other financial documentation, was ever provided by petitioners, nor did petitioners ever propose any specific collection alternative or demonstrate an inability to pay.

A telephone conference with petitioners was conducted by the settlement officer of respondent's Appeals Office on November 8, 2018. Much of the conference focused on an apparent overpayment of tax for 2017. In this regard, the settlement officer's notes state that petitioners were "explaining the overpayment should have been applied to tax year 2014 because Mrs. Wilson is not responsible for the liabilities on tax years 2003 and 2004." Further, the settlement officer's notes also state that the Internal Revenue Service had attempted, and apparently was continuing to attempt, to transfer the overpayment to 2014. Finally as relevant, the settlement officer's notes state that petitioners represented that "after the money is properly transferred, [they] are going to submit an Offer in Compromise or request an installment agreement" but that the seizure of the State tax refund per the June 25, 2018 Notice CP92 would be sustained "as it was issued appropriately" given that the amount of the seizure was less than petitioners' outstanding balance for 2014 even after the proper crediting of the overpayment[s] in question.[3]

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[2] The envelope containing the Form 12153 was postmarked by the U.S. Postal Service July 21, 2018.

[3] Petitioners' transcript of account for 2014, which transcript reflects an account status date of March 27, 2019, includes (1) a credit in the amount of $3,993.43 for an overpayment from 2003 and (2) a credit in the amount of $1,769.57 for an overpayment from 2004. Although these overpayments were applied to petitioners' liability for 2014, there is nothing in the record to suggest that petitioners submitted a collection alternative after the crediting of such overpayments, as petitioners had represented they would do.

On November 20, 2018, respondent sent each petitioner a Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330.[4] In the notice of determination respondent sustained the seizure of petitioners' State tax refund. Petitioners responded by timely filing a petition with this Court and commencing the present case. In the petition, petitioners allege only that "All previous taxes were to be included in bankruptcy" and that "All previous taxes were only Scott's, not Sarah's – therefore all refunds should be applied to 2014 not previous years."

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). The Court may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); 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. Sundstrand Corp., 98 T.C. at 520. However, the nonmoving party may not rest upon mere allegations or denials of his or her pleadings but instead must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d); see Sundstrand Corp., 98 T.C. at 520. After carefully reviewing the record, the Court concludes that there is no genuine dispute for trial and respondent is entitled to a decision in his favor as a matter of law.

B. Petitioners' Bankruptcy

In the petition that they filed to commence the present case, petitioners allege that "All previous taxes were to be included in bankruptcy." The Court construes this allegation to mean that, in petitioners' view, the tax liability for the year in issue, 2014, was discharged by virtue of the Order of Discharge issued by the Bankruptcy Court on December 5, 2017. However, as the Bankruptcy Court made plain in its "Explanation of Bankruptcy Discharge in a Chapter 7 Case", not all debts – specifically including "debts for most taxes" -- were covered by the discharge.

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

A discharge under Chapter 7 of the Bankruptcy Act "relieves a debtor from all personal liabilities (incurred before the filing of the bankruptcy petition) except those listed in section 523 of the Bankruptcy Code." Richardson v. Commissioner, T.C. Memo. 2018-189, at [*11], citing 11 U.S.C. sec. 727(b); Bussell v. Commissioner, 130 T.C. 222, 234 (2008). As applicable to the present case, section 523(a)(1)(A) of the Bankruptcy Act, through its cross-reference to section 507(a)(8) of the Bankruptcy Act, excepts from discharge any tax "for which a return * * * is last due, including extensions, after three years before the date of the filing of the [bankruptcy] petition".

In the present case, petitioners filed their bankruptcy petition on September 12, 2017. Three years before that date was September 12, 2014. Petitioners' income tax return for 2014 was due on October 15, 2015, pursuant to an extension of time to file. The return filing date was after September 12, 2014. Therefore, petitioners' income tax liability for 2014 was not discharged in bankruptcy because it was a tax "for which a return * * * is last due, including extensions, after three years before the date of the filing of the [bankruptcy] petition".

Regarding the addition to tax ("penalty") that respondent assessed for failure to timely pay, it is also clear that such addition was excepted from discharge. In that regard, and as applicable to the present case, section 523(a)(7) of the Bankruptcy Act excepts from discharge a tax penalty "imposed with respect to a transaction or event that occurred before three years before the date of the filing of the [bankruptcy] petition".[5] As previously stated, petitioners filed their bankruptcy petition on September 12, 2017, and three years before that date was September 12, 2014. Petitioners were legally obliged to pay their income tax for 2014 by April 15, 2015. See sec. 6151(a) (" the person * * * shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return"); see also sec. 6072(a) ("returns made on the basis of the calendar year shall be filed on or before the 15th day April following the close of the calendar year"); sec. 6651(a)(2), imposing the addition to tax ("penalty") for failure to timely pay. Petitioners' failure to timely pay their income tax by the statutory due date was not "a transaction or event that occurred before three years before the date of the filing of the [bankruptcy] petition" (emphasis added); rather,

[5] See Roberts v. United States, 129 B.R.171, 172 (C.D. Ill 1991) ("Reduced to its simplest form, sec. 523(a)(7) [of the Bankruptcy Act] means that government fines or penalties are not dischargeable except for tax penalties which (A) relate to a tax which is itself dischargeable, or (B) stem from a transaction that occurred more than three years before the bankruptcy petition was filed"), citing In re Roberts, 906 F.2d 1440, 1441-42 (10th Cir. 1990). See also In re Moore, 2017 WL 934641 (Bankr. N.D. Okl. 2017), at *3.

such failure was a transaction or event that occurred after three years before the date of the filing of the [bankruptcy] petition. Accordingly, liability for the addition to tax ("penalty") was not discharged.

Finally, regarding statutory interest on an underpayment of tax, this Court has previously held that debtors remain personally liable after a discharge for both (1) any pre(bankruptcy)petition interest that was not satisfied out of the bankruptcy estate in respect of a nondischargeable tax debt and (2) post(bankruptcy)petition interest in respect of such debt. Leathley v. Commissioner, T.C. Memo. 2010-194, at *2. See In re Moore, 2017 WL 934641 (Bankr., N.D. Okl. 2017), at n.7, citing with approval Leathley v. Commissioner, T.C. Memo. 2010-194. Accordingly, statutory interest on petitioners' liability for income tax for 2014 is not excepted from discharge.[6]

C. Crediting of Overpayments of Tax to 2014

Petitioners further allege in the petition in the present case that "All previous taxes were only Scott's, not Sarah's – therefore all refunds should be applied to 2014 not previous years." In this regard the Court understands, from the settlement officer's notes, that petitioners were concerned that an overpayment of tax from 2017 (a year for which petitioners had apparently filed a joint return) had been applied to Mr. Wilson's separate liabilities for 2003 and 2004 rather than to petitioners' joint liability for 2014.[7] The settlement officer's notes also state that the Internal Revenue Service had attempted, and apparently was continuing to attempt, to transfer such overpayment to 2014. And judging from the certified transcript for petitioners' account for 2014, see supra n. 3, it appears that such transfer was successful, as an overpayment of tax of $3,993.43 for 2003 and an overpayment of tax of $1,769.57 for 2004 were both credited to petitioners' account for 2014.

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[6] The certified copy of the Certificate Of Assessments, Payments, And Other Specified Matters that respondent attached as an exhibit to respondent's motion does not reflect any recovery by respondent as a creditor in petitioners' bankruptcy proceeding, nor is there anything in the record to reflect a recovery.

[7] Petitioners appear to recognize that their liability for 2014 is joint and several given that they filed a joint return for such year. See sec. 6103(d)(3).

Collection Alternatives

Although their Form 12153 suggested possible interest in a collection alternative, including an administrative determination of currently-not-collectible (CNC) status, petitioners never proposed a collection alternative during the administrative stage of this case, nor did they produce financial documentation for consideration by the settlement officer. Here the law is clear that as a prerequisite for consideration, much less approval, by the IRS of a collection alternative, including administrative relief afforded by CNC status, it is generally incumbent on a taxpayer to provide requested financial information 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. Moreover, it is not an abuse of discretion for the IRS Appeals Office to decline to consider a collection alternative where no specific proposal is ever placed before the settlement 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 settlement officer, to start negotiations regarding a collection alternative by making in the first instance a specific proposal. See also Magana v. Commissioner, 118 T.C. 488, 493 (2002) ("generally it would be anomalous and improper for us to conclude that respondent's Appeals Office abused its discretion * * * in failing to grant relief, or in failing to consider arguments, issues, or other matter not raised by taxpayers or not otherwise brought to the attention of respondent's Appeals Office"); Giamelli v. Commissioner, 129 T.C. 107, 115 (2007) (the Court does not have authority to consider issues that were not raised before respondent's Appeals Office).

Further, in their appeal to this Court petitioners did not include in their petition either assignment of error or allegation of fact sufficient to raise an issue regarding a collection alternative. See Rule 331(b)(4) (" *** Any issue not raised in the assignments of error [in the petition] shall be deemed to be conceded. *** ").

Under these circumstances the Court need not discuss the matter further other than to conclude that, on the record presented, petitioners are not entitled to a collection alternative in respect of their liability for 2014.

Conclusion

Premises considered, it is hereby

ORDERED that respondent's Motion For Summary Judgment, filed April 30, 2019, as supplemented June 10, 2019, is granted. It is further

ORDERED AND DECIDED that the determination of respondent's Appeals Office, as embodied in the Notice Of Determination Concerning Collection Action(s) dated November 20, 2018, that "the levy was issued appropriately" is sustained.

(Signed) Robert N. Armen
Special Trial Judge

Entered: **JUN 17 2019**