

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

MILTON W. ASHER, JR.,)	
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Petitioner,)	
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v.)	Docket No. 17999-18SL.
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COMMISSIONER OF INTERNAL REVENUE,)	
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Respondent)	
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ORDER

This is a collection review case involving a proposed levy to collect petitioner’s outstanding income tax liabilities for the taxable (calendar) years 2013 and 2014. Presently pending before the Court is respondent’s Motion For Summary Judgment, filed February 13, 2019, pursuant to Rule 121.¹ Petitioner filed a Response on June 11, 2019, objecting to the granting of respondent’s motion. Most recently, respondent’s motion was assigned to the undersigned for disposition by Order of the Chief Judge on July 3, 2019.

For reasons to be discussed, respondent’s Motion For Summary Judgment will be granted in part and denied in part.

I. Background

Petitioner, a single individual, resided in the State of Missouri at the time that the petition was filed with the Court.

¹ All Rule references are to the Tax Court Rules of Practice and Procedure.

A. Petitioner's Income Tax Returns for 2013 and 2014

The taxable years that are at issue in this case are the two calendar years 2013 and 2014.

1. Calendar Year 2013

Petitioner's income tax return for 2013 was due on April 15, 2014. However, it was not filed until February 29, 2016.

On his 2013 return petitioner reported a tax liability of \$9,010. Petitioner did not prepay any part of that liability and he did not remit payment, in whole or in part, with his return.

On April 4, 2016, respondent assessed against petitioner income tax of \$9,010 as reported by him on his return, together with additions to tax ("penalties") for failure to timely file, failure to timely pay, and failure to pay estimated tax, as well as statutory interest. On that same date respondent sent petitioner a statutory notice of balance due, i.e., notice and demand, pursuant to section 6303.² However, no part of the amount owing was satisfied.

2. Calendar Year 2014

Petitioner's income tax return for 2014 was due on April 15, 2015. However, it was not filed until February 29, 2016.

On his 2014 return petitioner reported a tax liability of \$11,918. Petitioner did not prepay any part of that liability and he did not remit payment, in whole or in part, with his return.

On April 4, 2016, respondent assessed against petitioner income tax of \$11,918 as reported by him on his return, together with additions to tax ("penalties") for failure to timely file, failure to timely pay, and failure to pay estimated tax, as well as statutory interest. On that same date respondent sent

² Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended.

petitioner a statutory notice of balance due, i.e., notice and demand, pursuant to section 6303. However, no part of the amount owing was voluntarily satisfied.³

B. Respondent's Final Notice and Petitioner's Request for Hearing

On November 29, 2017, respondent sent petitioner a Final Notice/Notice Of Intent To Levy And Notice Of Your Right To A Hearing regarding the amount then owed by him for 2013 and 2014 (\$34,164.05, projected to December 9, 2017). Petitioner responded by filing Form 12153, Request For A Collection Due Process Or Equivalent Hearing, challenging the proposed levy.⁴ In the Form 12153 petitioner requested a collection alternative, checking the boxes for "Installment Agreement" and "Offer in Compromise".⁵ In an Attachment to the Form 12153 petitioner (1) expanded on his request for a collection alternative, (2) challenged the additions to tax ("penalties"), and (3) alleged that certain payments made by him were not properly credited by respondent:

* * * The taxpayer believes that he is entitled to abatement of all penalties assessed against him.

Further, the taxpayer had reasonable cause for failure to pay the taxes in a timely manner.

Additionally, the taxpayer made payments on his account which were improperly applied by the [S]ervice. * * *

³ Petitioner's account for 2014 was credited on April 15, 2018, in the amount of \$3,368, which amount was attributable to an overpayment of tax reported by petitioner on his income tax return for 2017. See sec. 6402(a), regarding the statutory embodiment of the common law right of set-off. See also the discussion in the text infra regarding petitioner's 2017 return.

⁴ The Form 12153 was transmitted to respondent by petitioner's attorney as an enclosure to the attorney's December 18, 2017 letter. It would appear that such letter may have also transmitted Form 433-A, Collection Information Statement For Wage Earners And Self-Employed Individuals, which was signed by petitioner and dated December 17, 2017.

⁵ Notably, petitioner did not check the box for "I Cannot Pay Balance".

C. The Administrative Hearing

By letter dated April 3, 2018, respondent's settlement officer contacted petitioner's attorney⁶ and scheduled a telephone conference for May 24, 2018, at 2:30 p.m. The settlement officer also advised that if petitioner wished for her to consider a collection alternative such as an installment agreement or offer in compromise, then petitioner needed to provide within 21 days a "signed tax return" for 2017 and "proof [within 14 days] that estimated tax payments are paid in full for the year to date", i.e., for 2018. Regarding the latter requirement, the settlement officer advised that "[p]ast due estimated tax payments may be included in an installment agreement, however, an offer in compromise can't be accepted unless estimated tax payments are paid in full."

The settlement officer's April 3, 2018 letter also included the following two paragraphs:

* * * You stated in your hearing request that payments made were improperly applied by the [S]ervice. Please provide copies of the checks showing dates and amounts of the payments that were made.

In you[r] [sic] request for a hearing you also stated you are entitled to the abatement of penalties assessed against you. Please submit a written request detailing the circumstances for which you believe would qualif[y] you for abatement of the penalty(s). Please be specific to the type of penalty(s) and period(s) for the abatement of penalty.

In mid-morning on May 24, 2018, petitioner's attorney sent a fax to the settlement officer. In its entirety the fax read as follows:

Good morning [settlement officer]! We are submitting the information on record for the Collection Due Process Hearing set for today, May 24, 2018 at 2:30 p.m. on behalf of my client, Milton W. Asher, Jr. Please issue the Notice of Determination directly to me.

Thanks so much for your continued cooperation in this matter.

⁶ Petitioner's attorney in the administrative proceeding is the same attorney who represents petitioner in the present judicial proceeding.

It is not clear what petitioner's attorney meant when he said that "We are submitting the information on record".⁷ However, there is nothing in the record before the Court to suggest, much less demonstrate, that petitioner ever submitted "a written request detailing the circumstances for which you believe would qualif[y] you for abatement of the penalty(s)" or "copies of the checks showing dates and amounts of the payments that were made", as requested by the settlement officer in her April 3, 2018 letter.⁸

Later in the day on May 24, 2018, petitioner's counsel and the settlement officer spoke by telephone. Although the conversation was not transcribed, the parties agree that the discussion was short, did not substantively touch on either penalty abatement or the crediting of payments that might have been made, and culminated with petitioner's counsel's request that a notice of determination be issued. According to petitioner's counsel, he made such request because the settlement officer "would not consider a Collection Due Process Hearing without the filing of the 2017 tax return", a statement that is substantively supported by the settlement officer's April 3, 2018 letter, as discussed above.

The administrative process concluded on August 10, 2018, with the issuance of a Notice Of Determination Concerning Collection Action(s) that sustained the proposed levy.

Between May 24, 2018 (the date of the telephone conference) and August 10, 2018 (the date of the Notice Of Determination) there were no substantive contacts between petitioner (or petitioner's counsel) and the settlement officer; indeed, the record suggests that there were no contacts between the parties whatsoever.

D. Petitioner's Income Tax Return for 2017

In mid- and late-December 2017 petitioner made two estimated tax payments for 2017 in the total amount of \$7,500, and in January 2018 he made a

⁷ But see n.4, *supra*, regarding Form 433-A, which appears to have been sent to the settlement officer some months earlier and was therefore "on record".

⁸ Indeed, in the Case Activity Record for the date of May 24, 2018, the settlement officer stated that "Have not rec'd any of the requested info". And in paragraph 11 of the pending Motion For Summary Judgment, respondent's counsel states that "There were no documents attached to the fax", a statement that petitioner's counsel expressly admits in his Response to such motion.

third estimated tax payment for that year of \$2,100. On or before April 15, 2018, petitioner filed an extension of time to file that served to extend to October 15, 2018, the time by which he was required to file his 2017 return. Further, on April 15, 2018, petitioner made a \$2,800 payment, thereby bringing his total payments for 2017 to \$12,400.

On August 20, 2018, nearly two months before the extended due date, petitioner filed his 2017 return. On his return petitioner reported tax of \$8,922. Respondent assessed the tax reported, together with an addition to tax of \$110 for failure to (timely) pay estimated tax. The overpayment, \$3,368 (i.e., \$12,400 - (\$8,922 + \$110)), was then credited against petitioner's outstanding liability for 2014. See n.3, supra.

E. Petitioner's Income Tax Account for 2018

The record includes a transcript of petitioner's income tax account for 2018 as of December 13, 2018. Such transcript shows two payments of estimated tax for 2018 on August 9, 2018, of \$982 and \$2,250 and a third payment of estimated tax for that year on September 21, 2018, of \$2,250, thereby resulting in a credit balance in petitioner's favor of \$5,482 as of December 13, 2018.⁹

F. The Judicial Action

On September 11, 2018, petitioner, through counsel, filed a petition, thereby commencing the present case.¹⁰ After the case was at issue, respondent filed his Motion For Summary Judgment on February 13, 2019. Thereafter, on June 11, 2019, petitioner filed a Response, objecting to the granting of such motion.

⁹ There is nothing in the record about the status of petitioner's income tax account for 2018 after December 13, 2018.

¹⁰ The petition was timely mailed. See sec. 7502. Also, it should be noted that although the petition alleged only that "The IRS erred in assessing tax liability * * * for tax years 2013 and 2014" and that "Petitioner has substantial documentation to prove that 2013 & 2014 tax liability is erroneous", respondent has not made any argument that, by virtue of the second sentence of Rule 331(b)(4), petitioner has conceded issues regarding collection alternatives and the crediting of payments.

II. 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); Rule 121(a). 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. Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994); Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

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, 609-610 (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. In reviewing for abuse of discretion, the Court will sustain the determination of the Appeals Office unless such determination is arbitrary, capricious, or without reasonable basis in fact or law. See, e.g., Freije v. Commissioner, 125 T.C. 14, 23 (2005); Ansley-Sheppard-Burgess Co. v. Commissioner, 104 T.C. 367, 371 (1995).

C. Underlying Liabilities; Crediting of Alleged Payments

A taxpayer may challenge the existence or amount of the taxpayer's underlying tax liabilities only if the taxpayer did not receive a notice of deficiency for such tax liabilities or did not otherwise have an opportunity to dispute them. Sec. 6330(c)(2)(B). In a case such as the present one, the taxpayer's underlying tax liabilities include additions to tax ("penalties") such as those under sections 6651(a)(1) and (2) and 6654(a) for failure to timely file, failure to timely pay, and failure to pay estimated tax, respectively. Katz v. Commissioner, 115 T.C. 329, 339 (2000).

In the present case the settlement officer made plain in her April 3, 2018 letter to petitioner's attorney that petitioner could challenge the "penalties assessed against [him]" but that he need to "submit a written request detailing the circumstances for which you believe would qualif[y] you for abatement of the penalty(s) [and specify] the type of penalty(s) and period(s) for the abatement of penalty." Similarly, the settlement officer made plain in her letter that she would consider petitioner's allegation that "payments made were improperly applied by the [S]ervice" but that petitioner needed to "provide copies of the checks showing dates and amounts of the payments that were made." The settlement officer's willingness to consider these matters was not otherwise subject to any precondition. However, petitioner never, either before the May 24, 2018 telephone conference or after such conference, provided anything for the settlement officer to consider. Thus, there was no basis on which the settlement officer could have addressed either the underlying liabilities or the crediting of alleged payments. For that reason petitioner is barred from pursuing either of those issues in the present judicial proceeding. See Giamelli v. Commissioner, 129 T.C. 107, 114-115 (2007) (holding in pertinent part that on appeal of a collection determination, the Court will limit its review to those issues "properly raised" during the collection hearing; sec. 301.6330-1(f)(2), Q&A-F3, Proced. & Admin. Regs., stating in pertinent part that "an issue is not properly raised * * * if consideration [of the issue by Appeals] is requested [by a taxpayer] but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence."); see also Magana v. Commissioner, 118 T.C. 488, 493 (2002).

D. Collection Alternatives

The Commissioner may, of course, condition his willingness to grant a collection alternative to a taxpayer on the taxpayer being in compliance with his or hers other Federal tax 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. In the present case the settlement officer would not entertain a collection alternative unless petitioner was in filing compliance for 2017 and further unless "estimated tax payments are paid in full for the year to date", i.e., for 2018. Regarding the latter requirement, the settlement officer appeared willing to waive it insofar as an installment agreement was concerned, advising in her April 3, 2018 letter to petitioner's counsel that "[p]ast due estimated tax payments may be included in an installment agreement, however an offer in compromise can't be accepted unless estimated tax payments are paid in full."

The record demonstrates that at all relevant times petitioner was in filing compliance for 2017, having timely filed for an extension and then thereafter having filed his 2017 return nearly two months before the October 15, 2018 due date. Thus, petitioner being in filing compliance at all times for 2017, it was an abuse of discretion by the settlement officer to refuse to consider a collection alternative based on petitioner's failure to file a return some 6 months before the return was statutorily due.

Further, at the time of the May 24, 2018 telephone conference petitioner had yet to make any estimated tax payment for 2018. At most, petitioner was only one installment in arrears (i.e., the installment potentially due April 15, 2018). However, the settlement officer had advised that “[p]ast due estimated tax payments may be included in an installment agreement”, and an installment agreement was one of the two types of collection alternative that petitioner had expressly requested. In addition, given the variable nature of petitioner's income, it is not clear that a payment of estimated tax was even required as of April 15, 2018.¹¹ E.g., sec. 6654(d)(2). In view of the foregoing, the Court cannot conclude that the settlement officer did not abuse her discretion in refusing to consider a collection alternative based on petitioner's failure to make an estimated tax payment for 2018 as of May 24, 2018.

E. Other Matters

Other than as already discussed, petitioner has not raised any issue with respect to the administrative proceeding or in opposition to respondent's Motion For Summary Judgment. Drawing all factual inferences against respondent, the Court concludes that, other than as discussed above in part II.D. of this Order, there are no genuine issues or disputes of material fact in this case and that respondent is entitled to judgment as a matter of law.

[continued on next page]

¹¹ Here the Court is mindful of the fact that it has been asked to summarily adjudicate the issues in this case rather than to decide such issues based on an evidentiary record compiled after a trial.

III. Conclusion

To give effect to the foregoing, it is hereby

ORDERED that respondent's Motion For Summary Judgment, filed February 13, 2019, is granted in that petitioner is barred in the present judicial proceeding from: (1) challenging the existence or amount of his underlying liabilities for the two years in issue, specifically including any of the additions to tax ("penalties") for those years; (2) raising any issue regarding alleged payments that may have been made by him for either of the two years in issue; and (3) raising any other issue other than as described in the following ORDERED paragraph of this Order. It is further

ORDERED that respondent's Motion For Summary Judgment, filed February 13, 2019, is denied insofar as petitioner may be entitled to a collection alternative in the form only of either an offer in compromise (based solely on inability to pay and not on doubt as to liability) or an installment agreement.

The parties may wish to consider whether it would be productive, and therefore advisable, to move for a remand of this case so that a different settlement officer in respondent's Appeals Office might consider the propriety of a collection alternative within the framework of the second ORDERED paragraph of this Order. See sec. 6330(d)(3).

(Signed) Robert N. Armen
Special Trial Judge

Dated: Washington, D.C.
July 8, 2019