

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DOUGLAS C. HENDRIKS,)
)
Petitioner,) **BD**
)
v.) Docket No. 681-18 L.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent.)

ORDER AND DECISION

On January 11, 2018, petitioner filed a petition to review a Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated December 15, 2017 (notice of determination), that sustained a proposed levy in respect of petitioner’s outstanding income tax liabilities for the taxable (calendar) years 2008, 2009, 2010, 2011, 2012, 2013, 2014, and 2015.¹ Subsequently, following the Court’s remand of this case to respondent’s Appeals Office, the Appeals Office issued a Supplemental Notice Of Determination Concerning Collection Action Under Section 6320 and/or 6330, dated April 10, 2019 (supplemental notice of determination), which sustained both the filing of a Federal tax lien for 2008 through 2015 and the proposed levy for those years.

Pending before the Court is respondent’s Motion For Summary Judgment, filed June 21, 2019. In support of his motion respondent attached the Declaration Of Settlement Officer David C. Melcher (who was assigned to conduct the supplemental administrative hearing) with exhibits and Forms 4340, Certificate Of Assessment, Payments, And Other Specified Matters, for petitioner’s income tax accounts for 2008 through 2015. On July 30, 2019, petitioner filed a Response objecting to the granting of respondent’s motion. By Order dated August 9, 2019, respondent’s motion was assigned to the undersigned for disposition. See sec. 7443A(b)(4), (c).

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

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After review of the record, and as discussed more fully below, the Court concludes that there are no genuine issues or disputes of material fact and that respondent is entitled to judgment as a matter of law. Accordingly, the Court will grant respondent's Motion For Summary Judgment.

Background

Petitioner resided in the State of South Dakota at the time that his petition was filed with the Court.

A. Petitioner's Returns and Tax Liabilities for 2008 through 2015

1. 2008

On July 20, 2012, petitioner filed his 2008 income tax return, reporting tax of \$20,129 but failing to remit full payment. On October 29, 2012, respondent assessed the tax reported, as well as (1) additions to tax ("penalties") for failure to timely file and for failure to timely pay and (2) statutory interest, and issued to petitioner notice and demand for payment ("statutory notice of balance due"). Further assessments for late payment and/or statutory interest followed, with notice and demand for payment being made in each instance. However, amounts owing by petitioner remained unpaid.

2. 2009

Petitioner failed to timely file a 2009 income tax return, and respondent prepared a so-called substitute for return. See sec. 6020(b). In response, petitioner submitted an amended return on May 18, 2015, which return respondent filed and accepted. On July 6, 2015, respondent assessed tax of \$53,977, which was not fully paid, as well as (1) additions to tax for failure to timely file and for failure to timely pay and (2) statutory interest, and issued to petitioner notice and demand for payment. Further assessments for statutory interest followed, with notice and demand for payment being made in each instance. However, amounts owing by petitioner remained unpaid.

3. 2010

Petitioner failed to timely file a 2010 income tax return, and respondent prepared a substitute for return. In response, petitioner submitted an amended return on May 18, 2015, which return respondent filed and accepted. On July 6,

2015, respondent assessed tax of \$40,321, which was paid, together with (1) additions to tax for failure to timely file, for failure to timely pay, and for failure to pay estimated tax and (2) statutory interest, and issued to petitioner notice and demand for payment. Further assessments for statutory interest followed, with notice and demand for payment being made in each instance. However, amounts owing by petitioner for additions to tax and for statutory interest remained unpaid.

4. 2011

Petitioner failed to timely file a 2011 income tax return, and respondent prepared a substitute for return. In response, petitioner submitted an “amended return” on August 5, 2015, which return respondent filed and accepted. On September 7, 2015, respondent assessed tax of \$51,384, which was paid, together with (1) additions to tax for failure to timely file, for failure to timely pay, and for failure to pay estimated tax and (2) statutory interest, and issued to petitioner notice and demand for payment. Further assessments for statutory interest followed, with notice and demand for payment being made in each instance. However, amounts owing by petitioner for additions to tax and for statutory interest remained unpaid.

5. 2012

Petitioner failed to timely file a 2012 income tax return, and respondent prepared a substitute for return. In response, petitioner submitted an amended return on August 5, 2015, which return respondent filed and accepted. On September 7, 2015, respondent assessed tax of \$35,613, no part of which was paid, together with (1) additions to tax for failure to timely file, for failure to timely pay, and for failure to pay estimated tax and (2) statutory interest, and issued to petitioner notice and demand for payment. Further assessments for an addition to tax for failure to timely pay and for statutory interest followed, with notice and demand for payment being made. On May 7, 2018, additional tax of \$11,995 based on an audit deficiency (and a defaulted deficiency notice) was assessed, and notice and demand for payment was made by respondent. However, amounts owing by petitioner remained unpaid.

6. 2013

Petitioner failed to timely file a 2013 income tax return, and respondent prepared a substitute for return. In response, petitioner submitted an amended return on August 5, 2015, which return respondent filed and accepted. On

September 7, 2015, respondent assessed tax of \$37,169, no part of which was paid, together with (1) additions to tax for failure to timely file, for failure to timely pay, and for failure to pay estimated tax and (2) statutory interest, and issued to petitioner notice and demand for payment. Further assessments for an addition to tax for failure to timely pay and for statutory interest followed, with notice and demand for payment being made. On May 7, 2018, additional tax of \$16,514 based on an audit deficiency (and a defaulted deficiency notice) was assessed, and notice and demand for payment was made by respondent. However, amounts owing by petitioner remained unpaid.

7. 2014

On October 15, 2015, pursuant to an extension, petitioner timely filed his 2014 income tax return, reporting tax of \$38,008 but paying no part of that amount. On November 23, 2015, respondent assessed the tax reported, as well as (1) additions to tax for failure to timely pay and for failure to pay estimated tax and (2) statutory interest, and issued to petitioner notice and demand for payment. Further assessments for an addition to tax for failure to timely pay and for statutory interest followed, with notice and demand for payment being made. On May 7, 2018, additional tax of \$22,881 based on an audit deficiency (and a defaulted deficiency notice) was assessed, and notice and demand for payment was made by respondent. However, amounts owing by petitioner remained unpaid.

8. 2015

On October 17, 2016, pursuant to an extension, petitioner timely filed his 2015 income tax return, reporting tax of \$294,038, but paying no part of that amount. On January 16, 2017, respondent assessed the tax reported, as well as (1) additions to tax for failure to timely pay and for failure to pay estimated tax and (2) statutory interest, and issued to petitioner notice and demand for payment. However, amounts owing by petitioner remained unpaid.

B. Proposed Levy and Filed Tax Lien; Petitioner's Challenge

On June 7, 2017, respondent issued to petitioner a Letter 1058, Final Notice/Notice Of Intent To Levy And Notice Of Your Right To A Hearing, for petitioner's outstanding 2008 through 2015 income tax liabilities, aggregating \$606,161.39 through July 7, 2017. On June 20, 2017, respondent issued to petitioner a notice of tax lien filing with respect to those same liabilities.

On July 4, 2017, petitioner timely filed a Form 12153, Request For A Collection Due Process Or Equivalent Hearing, (1) under section 6320, as to the filing of the Federal tax lien for 2008 through 2015, and (2) under section 6330, as to the proposed levy for those same years. Among other things, petitioner requested in the Form 12153 a collection alternative in the form of an installment agreement and that the Federal tax lien be withdrawn pursuant to section 6323(j).

In an October 10, 2017 letter to petitioner, the then-assigned Appeals settlement officer scheduled a telephone hearing with petitioner for November 9, 2018, as to the proposed levy for 2008 through 2015. The letter failed, however, to mention petitioner's request for a hearing as to the filing of the Federal tax lien for those same years.

On December 15, 2017, respondent issued the notice of determination sustaining the proposed levy for 2008 through 2015. However, the notice of determination contained no findings or determination as to the appropriateness of the filing of the Federal tax lien for 2008 through 2015, failing to note petitioner's timely request for a hearing under section 6320 as to the lien filing for those years.

On January 11, 2018, petitioner filed the petition commencing the present case. Petitioner asserts in the petition that enforced collection is not appropriate, that the filing of a notice of Federal tax lien adversely affects his ability to generate income, and that an installment agreement is a viable collection alternative.

C. Respondent's Motion For Summary Judgment, filed August 14, 2018

On August 14, 2018, respondent filed a motion for summary judgment. Although the Court directed petitioner to file a response to respondent's motion, petitioner failed to do so. Nevertheless, in an Order dated October 22, 2018, the Court denied respondent's motion noting, among other things, that the December 15, 2017 notice of determination failed to address petitioner's timely request for a hearing as to the filing of the Federal tax lien.

D. The Court's Remand of this Case to Respondent's Appeals Office

On November 16, 2018, respondent filed a motion to remand, which motion was supplemented on December 7, 2018. On December 28, 2018, petitioner filed a response stating, among other things, that he did not object to remand because it would allow him the opportunity to present collection alternatives.

By Order dated February 15, 2019, the Court granted respondent's motion to remand, as supplemented, and remanded this case respondent's Appeals Office for a further administrative hearing pursuant to section 6330.²

Pursuant to the Court's February 15, 2019 Order, this case was remanded to respondent's Appeals Office in Kansas City, Missouri, and assigned to Settlement Officer David C. Melcher (the SO) to conduct a supplemental administrative hearing.

On February 28, 2019, the SO sent petitioner (and his representative) a letter stating that, pursuant to the Court's remand of this case for a supplemental hearing, the SO was scheduling a telephone conference with petitioner for March 21, 2019. In the letter the SO also informed petitioner that in order for the SO to consider a collection alternative such as an installment agreement, petitioner must provide: a completed Form 433-A, Collection Information Statement For Individuals; signed tax returns for 2016 and 2017; bank statements for the last three months; verification of estimated tax payments for 2016, 2017, and 2018; a listing of assets reflecting current valuations; and petitioner's proposed collection alternative(s). The SO asked that these documents (except for the tax returns) be provided in 14 days and that the returns be provided in 21 days.

On March 21, 2019, petitioner's representative telephoned the SO and requested an extension of one week to put together a proposed collection alternative. The SO agreed and rescheduled the supplemental settlement hearing for March 28, 2019.

On March 28, 2019, petitioner's representative telephoned the SO and requested an additional extension of one day, to which the SO agreed. The representative indicated that an effort was being made to prepare the missing 2016 and 2017 tax returns, but not all of the information had been provided by petitioner to permit their preparation. The representative also stated he was aware that the lack of estimated tax payments for 2016, 2017, and 2018 would be problematic.

On March 29, 2019, the SO attempted to contact petitioner's representative, but there was no answer nor was there any response from the representative to the

² The parties had agreed that, on remand, the Appeals Office would hold a supplemental hearing to consider the appropriateness of the filing of the Federal tax lien, as well as any collection alternatives that petitioner might propose.

SO's voice mail message. As of April 10, 2019, petitioner's representative had not contacted the SO or otherwise provided the requested financial information or tax returns, proposed any collection alternative, or meaningfully participated in the supplemental hearing with the SO.

On April 10, 2019, the Appeals Office issued the supplemental notice of determination sustaining the collection actions (lien filing and proposed levy) for 2008, 2009, 2010, 2011, 2012, 2013, 2014, and 2015.

This matter is now before the Court on respondent's Motion For Summary Judgment, filed June 21, 2019. On July 30, 2019, petitioner filed his Response to respondent's motion, indicating that he was still in the process of trying to assemble the financial information previously requested by the SO and that the filing of the Federal tax lien was complicating the consummation of various real estate transactions.

Discussion

In rendering an administrative determination in a collection review proceeding under sections 6320 and/or 6330, respondent's Appeals Office must verify that all applicable laws and administrative procedures were satisfied. Sec. 6330(c)(1). The Appeals Office also must consider any legitimate issue raised by the taxpayer, including offers of collection alternatives, appropriate spousal defenses, and challenges to the appropriateness of the collection action. Sec. 6330(c)(2)(A). A taxpayer may challenge the existence or amount of the underlying tax liability if the taxpayer did not receive a notice of deficiency or did not otherwise have an opportunity to dispute such tax liability. Sec. 6330(c)(2)(B). Finally, the Appeals Office must consider whether the collection action balances the need for efficient collection against the taxpayer's concern that collection be no more intrusive than necessary. Sec. 6330(c)(3)(C).

The purpose of summary judgment is to expedite litigation and avoid unnecessary and time-consuming 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 matters and inferences drawn from them in the light most favorable to the nonmoving party. Id. However, where the moving party properly makes and supports a motion for summary judgment, an adverse

party may not rest upon the mere allegations or denials of such party's pleading, but must set forth specific facts, by affidavit or otherwise, showing that there is a genuine issue or dispute for trial. Rule 121(d).

As indicated above and discussed more fully below, the record establishes that there is no genuine issue or dispute as to any material fact and that the determinations of respondent's Appeals Office to sustain the collection actions (lien filing and proposed levy) were proper as a matter of law. Accordingly, the Court will grant respondent's Motion For Summary Judgment.

A. Section 6330(c)(2)(B)

Where the validity of the underlying tax liability is properly at issue, the Court will review that matter on a de novo basis. However, where the validity of the underlying tax liability is not properly at issue, the Court will review the Commissioner's administrative determination for abuse of discretion. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000).

Section 6330(c)(2)(B) provides that the existence or amount of the underlying tax liability can only be contested if the taxpayer did not receive a notice of deficiency for the tax liability in question or did not otherwise have an earlier opportunity to dispute such liability. Goza v. Commissioner, 114 T.C. at 180-181. In reviewing the Appeals Officer's determinations, this Court will not review the underlying tax liability if raised for the first time on appeal of a notice of determination and instead will ordinarily consider only those issues that the taxpayer raised at the administrative hearing. Giamelli v. Commissioner, 129 T.C. 107, 113 (2007). The merits of the underlying tax liability are not properly raised during the administrative hearing if the taxpayer professes to challenge the underlying tax liability but fails to present the Appeals Office with any evidence with respect to such liability after being given a reasonable opportunity to present evidence. Sec. 301.6320-1(f)(2), Q&A-F3, Proced. & Admin. Regs.; sec. 301.6330-1(f)(2), Q&A-F3, Proced. & Admin. Regs.; see also Pough v. Commissioner, 135 T.C. 344, 349 (2010) (taxpayer did not file amended tax returns during the hearing). With respect to challenges to penalties or additions to tax, a taxpayer must make a "meaningful challenge" during the administrative hearing. Taggart v. Commissioner, T.C. Memo. 2013-113, at *4.

Where the existence or the amount of the underlying tax liabilities is not in dispute, as in the instant case, the Court reviews for abuse of discretion respondent's determination to proceed with collection of the outstanding liabilities.

Goza v. Commissioner, 114 T.C. at 181-182. An abuse of discretion occurs if the Appeals Office exercises its discretion “arbitrarily, capriciously, or without sound basis in fact or law.” Woodral v. Commissioner, 112 T.C. 19, 23 (1999).

B. Withdrawal of the Notice of Federal Tax Lien (NFTL)

A Federal tax lien arises automatically after notice and demand for payment of an assessed tax liability is not made. Sec. 6321; see sec. 6303. However, section 6323 provides that such lien shall not be valid against any purchaser, holder of a security interest, mechanic’s lien or, or judgment lien creditor until the Secretary files a notice of lien with the appropriate public official. Sec. 6323(a), (f).

Respondent is permitted but not required to withdraw an NFTL under four situations, including where “the filing of such notice was premature or otherwise not in accordance with administrative procedures” or “the withdrawal of such notice will facilitate the collection of the tax liability” or “the withdrawal of such notice would be in the best interests of the taxpayer * * * and the United States.” See sec. 6323(j). The authority to withdraw an NFTL is permissive, and respondent is generally not required to withdraw an NFTL even if the conditions are fully met. See, e.g., Taggart v. Commissioner, T.C. Memo. 2013-113, at *16-17 (noting that “section 6323(j) uses discretionary, not mandatory, language, and respondent is not required to withdraw the lien even for one of the reasons stated in section 6323(j).”).

On remand of the present case, petitioner was given the opportunity by the Appeals Office to, among other things, propose collection alternatives. However, petitioner failed to propose any specific collection alternative. Neither did petitioner make any specific proposal with respect to withdrawal of the NFTL. In any event, as this Court has noted in previous cases, the decision to withdraw a NFTL lies within the Commissioner’s discretion and is not mandatory. See sec. 6323(j); Taggart v. Commissioner, T.C. Memo. 2013-113; Kyereme v. Commissioner, T.C. Memo. 2012-174. Therefore, the SO on remand in the present case did not abuse his discretion by sustaining the filing of the Federal tax lien.

C. Collection Alternatives

As a prerequisite for consideration or approval by the IRS of a collection alternative, it is generally incumbent on a taxpayer to provide requested financial information in order to permit evaluation of the taxpayer's 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); Pough v. Commissioner, 135 T.C. 344, 351 (2010); 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 a taxpayer must be in current compliance with the taxpayer's obligations to file tax returns and pay estimated tax. 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 Appeals Office to decline to consider a collection alternative where no specific 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. As indicated above, on remand in the present case, petitioner failed to propose any specific collection alternative. Hence the SO on remand did not abuse his discretion in declining to consider collection alternatives for petitioner.

D. Abuse of Discretion

Finally, the record demonstrates that the SO on remand properly verified that the requirements of all applicable laws and administrative procedures were met in the processing of petitioner's case and that the collection actions (lien filing and proposed levy) balance the Government's need for the efficient collection of taxes with petitioner's concerns that the collection actions be no more intrusive than necessary. In sum, the Appeals Office did not abuse its discretion in this case.

Conclusion

Premises considered, it is hereby

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

ORDERED AND DECIDED that respondent may proceed with the collection actions (lien filing and proposed levy) in respect of petitioner's outstanding income tax liabilities for the taxable (calendar) years 2008 through 2015, as determined in the December 15, 2017 notice of determination, as supplemented by the April 10, 2019 supplemental notice of determination, upon which notices this case is based.

(Signed) Robert N. Armen
Special Trial Judge

ENTERED: **AUG 14 2019**