

Background

The following facts are gathered from the pleadings, the motion and the declaration of Settlement Officer (SO) Kathryn E. Dugan in support of it, and petitioner's response to the motion.

Administrative Proceedings

In June 2017, respondent issued to petitioner a Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing, concerning petitioner's employment tax liabilities described above.

In response, petitioner filed a Form 12153, Request for a Collection Due Process or Equivalent Hearing. On the Form 12153, petitioner checked boxes requesting the following collection alternatives: An "Installment Agreement", an "Offer in Compromise", and "I cannot pay balance at this time".

Numerous administrative proceedings followed, culminating in a Supplemental Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330. In her declaration, SO Dugan states that she made the determination to permit collection by levy to proceed. She attaches to her declaration correspondence with petitioner explaining respondent's rejection of his proposed collection alternatives of (1) an installment agreement by which he would agree to make monthly payments of \$2,000 and (2) placing his account in currently-not-collectible status. Apparently, petitioner did not pursue the alternative of an offer in compromise, and there appears to be no disagreement that petitioner owes \$1,170,103 in unpaid employment taxes. SO Dugan explains.

Balancing efficient tax collection with concern regarding intrusiveness

In balancing the government's need to collect the liabilities, with your right to have this collection remain the least intrusive possible, Appeals considered your proposal to pay \$2,000 per month. The initial collection determination provided by Collection indicates that your proposal of \$2,000 per month is not sufficient, but that an installment Agreement of \$22,877 would be appropriate. Appeals offered you an opportunity to dispute these findings and/or to enter into an Installment Agreement of \$22,877 per month. You were not interested in pursuing an Installment Agreement of \$22,877 per month, and disputed the Revenue Officer's findings. Even if your principal payments on vehicle loans were allowed, as you contend

they should be, your proposed Installment Agreement would still not be acceptable, because, based on your own evaluation, you are unable to fund it. A Currently-not-Collectible status is also not appropriate at this time, because the Appeals office has determined you have an ability to make payments towards the outstanding liabilities. Since you owe an assessed balance of \$1,170,103, comprised mostly of Employment Taxes, and a mutually acceptable collection alternative was not established, levy action remains appropriate, despite its intrusiveness.

Also attached to SO Dugan's declaration is a report she transmitted to petitioner's counsel showing how respondent's Collection function determined that petitioner could make installment payments of \$22,877 a month. Collection determined from petitioner's financial statements for the first four months of 2018 that it had claimed "noncash depreciation" of \$137,408 and that it had paid \$67,600 to petitioner's owner. Summing those two amounts-- \$205,008-- and annualizing, Collection determined available funds of \$615,023, which it reduced by an "annualized loss of \$65,963" to determine \$549,060 in funds available for petitioner to stay in compliance with its tax obligations and to make installment payments. "To account for tight margins," Collection divided \$549,060 by 24 to determine required installments of \$22,877 a month.

Assignments of Error and Answer

Petitioner assigns as error that respondent failed to consider a collection alternative offered by it and that he failed properly to determine whether the need for efficient collection of taxes balanced petitioner's legitimate concern that any collection be no more intrusive than necessary. See sec. 6330(b)(2)(A)(iii), (3)(B), (C). Respondent answers, denying that he erred.

Parties' Arguments on the Motion

Respondent argues that, because petitioner did not during its Appeals hearing challenge the existence or amount of its underlying tax liabilities but requested only collection alternatives, we review Appeal's determination for abuse of discretion. See Goza v. Commissioner, 114 T.C. 176, 182 (2000). In his pretrial memorandum, he argues that the scope of our review is the administrative record, not some new record made at trial. See Robinette v. Commissioner, 439 F.3d 455, 460-61 (8th Cir. 2006), rev'g 123 T.C. 85 (2004). He argues that the Commissioner abuses his discretion when he "takes action that is arbitrary or

capricious, lacks sound basis in law, or is not justifiable in light of the facts and circumstances." Mailman v. Commissioner, T.C. Memo. 2003-302 (citing Mailman v. Commissioner, 91 T.C. 1079, 1084 (1988)). He argues that SO Dugan properly reviewed and analyzed the financial information provided by petitioner, and she closed the case only after petitioner disagreed with her determination that it could pay \$22,877 a month and proposed paying only \$2,000 a month, which she thought was inadequate given its resources. That, respondent concludes, was neither arbitrary, capricious, lacking a sound basis in law, or nonjustifiable in light of the facts and circumstances and, therefore, did not constitute an abuse of discretion. [Motion, par. 42, 42.]

In its response, petitioner argues that a genuine dispute as to material facts precludes summary judgment. It argues that respondent's calculation of petitioner's reasonable collection potential (RCP) was flawed because he (1) failed to subtract the annual principal payments of \$506,148 that petitioner was making on its limousines from its available cash flow, (2) erroneously included amounts paid to drivers as tips, and (3) failed to take account of the seasonable nature of petitioner's business. Whether petitioner's RCP should have been reduced by those principal payments and its tip payments, it argues, present genuine issues of material fact. If those two reductions were made, it continues, its RCP would be negative \$935 a month, calculated as follows:

Petitioner's Net Income	\$ 82,704
Annualized Depreciation on Fleet	412,224
Principal Payments	<u>(506,148)</u>
Estimated Annual Cash Flow	(11,220)
/ 24 months	(935) per month

Analysis

Section 6159 authorizes the Secretary to enter into written agreements allowing taxpayers to pay tax in installments if he deems the "agreement will facilitate full or partial collection of such liability." Internal Revenue Manual pt. 5.14.1.4 (4) (09-19-2014) provides: "[I]n installment agreements should reflect the taxpayer's ability to pay throughout the duration of [the] agreements." We have said:

A taxpayer's ability to pay is determined by comparing his monthly income to allowable expenses. Therefore, a SO may accept, at minimum, a monthly payment equal to the excess of a taxpayer's

monthly income over the taxpayer's allowable expenses. But it is not an abuse of discretion for a SO to reject a proposed installment agreement when a taxpayer's monthly income does not support the proposed payment.

Western Hills Residential Care, Inc. v. Commissioner, T.C. Memo. 2017-98, at *14 (citations omitted).

It is true that SO Dugan rejected petitioner's \$2,000 a month offer because she thought it could pay substantially more. And while petitioner wants us to believe that it had negative monthly cash flow, which, if true, would likely rule out a \$22,877 monthly installment payment obligation, it would also appear to rule out monthly installment payments of \$2,000. Petitioner is not clear on why it is resisting summary judgment with respect to respondent denying it the collection alternative of an installment agreement. Possibly, petitioner is arguing in favor of having its tax debt classified as currently not collectible. Clearly that is an alternative that it requested in asking for a collection due process hearing, and the continued viability of that claim is to be inferred from its computation of a negative collection potential. Also, it is not clear to us whether petitioner is relying only on the administrative record to support its claim that SO Dugan abused her discretion or whether, in aid of its claim that there is a dispute as to material facts, petitioner wants to supplement the administrative record. Assumedly, respondent would object to petitioner going beyond the administrative record, relying on the opinion of the Court of Appeals in Robinette. Without a fuller understanding of the parties' positions and arguments, we think that the best course is for us to deny the motion and await further information from the parties at or before the trial of this case. The case is set for trial on the trial calendar of the Court set to commence on Monday, October 28, 2019, in Baltimore, Maryland.

It is, therefore,

ORDERED, the motion is denied.

**(Signed) James S. Halpern
Judge**

Dated: Washington, D.C.
October 10, 2019