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UNITED STATES TAX COURT
WASHINGTON, DC 20217

CHRISTOPHER B. SCOTT,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 10487-18L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER AND DECISION

The Petition in this case was filed in response to a notice of determination sustaining the filing of two Notices of Federal Tax Lien (NFTLs) to collect unpaid section 6672[1] trust fund recovery penalties for a number of taxable periods in 2013, 2015, and 2016.[2] On August 27, 2019, respondent filed a Motion for Summary Judgment and a Declaration of Settlement Officer Renee D. Meskill in support thereof (collectively, the Motion). On September 6, 2019, the Court issued an Order directing petitioner to file a response to the Motion by September 30, 2019. To date, petitioner has failed to file a response.

Summary judgment "is intended to expedite litigation and avoid unnecessary and expensive trials." Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted where there is no genuine issue of material fact and a decision may be rendered as a matter of law. Rule 121(a), (b). The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences are viewed in a light most favorable to the nonmoving party. Craig v. Commissioner, 119 T.C. 252, 260 (2002); Dahlstrom v.

[1]Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended and in effect for the relevant periods, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[2]By Order dated October 15, 2018, the Court dismissed the Petition for lack of jurisdiction to the extent it purported to seek review of notices of deficiency relating to petitioner's 2013, 2015, and 2016 taxable years.

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Commissioner, 85 T.C. 812, 821 (1985). The party opposing summary judgment must set forth specific facts showing that a genuine question of material fact exists and may not rely merely on allegations or denials in the pleadings. Rule 121(d); Grant Creek Water Works, Ltd. v. Commissioner, 91 T.C. 322, 325 (1988).

Where, as here, the nonmoving party has failed to respond to a motion for summary judgment as required under Rule 121(b) and the Court's order, a decision may be entered against the nonmoving party. Rule 121(d) (last sentence). We accordingly will enter a decision in respondent's favor on this ground.

In the alternative, even if respondent's Motion is considered on the merits, he is also entitled to a decision in his favor, as discussed hereinafter.

Section 6321 imposes a lien in favor of the United States on all property and rights to property of a taxpayer after a demand for payment of taxes has been made and the taxpayer fails to pay. The lien arises when the taxes are assessed. Sec. 6322. For the lien to be valid against certain categories of third parties, the Secretary generally must file a lien notice with certain State or local authorities where a taxpayer's property is situated. Sec. 6323(a), (f); Behling v. Commissioner, 118 T.C. 572, 575 (2002). The Secretary is required to notify the taxpayer in writing of the filing of a lien notice and of the taxpayer's right to a hearing concerning such a notice. Sec. 6320(a)(1), (3).

The taxpayer may then request a hearing before the Internal Revenue Service Office of Appeals (Appeals). Sec. 6320(b)(1). At the hearing, the taxpayer may raise any relevant issue relating to the unpaid tax or the lien, including challenges to the appropriateness of collection actions and offers of collection alternatives. Secs. 6320(b)(4), 6330(c)(2)(A); Sego v. Commissioner, 114 T.C. 604, 608-609 (2000); Goza v. Commissioner, 114 T.C. 176, 180 (2000). A taxpayer may contest the existence or amount of the underlying tax liability if the taxpayer did not receive a statutory notice of deficiency for the liability or did not otherwise have an earlier opportunity to dispute it. Sec. 6330(c)(2)(B); see also Sego v. Commissioner, 114 T.C. at 609. Following the hearing, Appeals must make a determination whether the Commissioner may proceed with the proposed collection action, taking into consideration (1) whether the requirements of applicable law and administrative procedure have been met, (2) any relevant issues raised by the taxpayer, and (3) whether the proposed collection action appropriately balances the need for efficient collection of taxes with the taxpayer's legitimate concern that the collection action be no more intrusive than necessary.

Sec. 6330(c)(3). We have jurisdiction to review Appeals' determination. Sec. 6330(d)(1).

If the validity of the underlying tax liability is properly at issue, we review it de novo. Goza v. Commissioner, 114 T.C. at 181-182. As to issues other than the underlying liability, we review Appeals' determination for abuse of discretion. Sego v. Commissioner, 114 T.C. at 610; Goza v. Commissioner, 114 T.C. at 182. An abuse of discretion occurs if the determination is arbitrary, capricious, or without sound basis in fact or law. See Murphy v. Commissioner, 125 T.C. 301, 319-320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Freije v. Commissioner, 125 T.C. 14, 23 (2005). If a taxpayer does not propose a collection alternative, it is not an abuse of discretion for an Appeals officer to decline to consider one. E.g., Kindred v. Commissioner, 454 F.3d 688, 696 (7th Cir. 2006); Obiakor v. Commissioner, T.C. Memo. 2015-112, at *21.

Petitioner has not disputed the following matters respondent alleges in his Motion, which respondent has substantiated with relevant documents from the administrative file. In April of 2014, respondent sent a Letter 1153 to petitioner's last known address proposing to assess section 6672 trust fund recovery penalties against him for unpaid employment taxes owed by a business entity called 2408 W Kennedy LLC. The letter indicated that respondent had identified petitioner "as a person required to collect, account for, and pay over withheld taxes" for the business and that he could challenge the proposed assessment by mailing a written appeal within 60 days. Attached to the letter was a list of taxable periods for which penalties were proposed, including the first and second quarters of 2013. The letter was returned to respondent unclaimed. In August of 2014, respondent assessed the trust fund recovery penalties against petitioner in the amounts listed in the letter for the first and second quarters of 2013.

Respondent sent another Letter 1153 to petitioner in December of 2016, proposing to assess section 6672 trust fund recovery penalties against him based on employment taxes owed by a different entity called Tampa Hyde Park Cafe LLC. Attached to the letter was a list of taxable periods for which penalties were proposed, including the following: all four quarters of 2013, all four quarters of 2015, and the first and second quarters of 2016. This letter was delivered to the front desk at the condominium complex where petitioner resided. Respondent assessed the trust fund recovery penalties against petitioner for the periods and amounts listed in this letter in March of 2017.

Respondent subsequently sent petitioner two notices of Federal tax lien filing notifying him of the filing of NFTLs concerning the August 2014 and March 2017 assessments. The first NFTL was dated August 1, 2017, and covered the March 2017 assessments for the third and fourth quarters of 2013, all four quarters of 2015, and the first two quarters of 2016. Petitioner challenged respondent's decision to file this NFTL by submitting a timely request for a collection due process (CDP) hearing on a Form 12153. The Form 12153 indicated that the basis for the request was a "Filed Notice of Federal Tax Lien" for the tax periods "2013-2016". A copy of the August 1, 2017 NFTL was attached to the Form 12153. Petitioner explained his reasons for requesting a CDP hearing as follows: "I do not believe I owe these taxes. I do not believe that the collection process and timelines have been followed by the respective agents and IRS personnel. I do not believe that I owe any penalties and interest associated with these taxes. I don't know who the company is that I'm being held responsible for." Petitioner did not check any of the appropriate boxes on Form 12153 to indicate interest in pursuing a collection alternative, nor did he indicate interest in doing so elsewhere on the form.

The second NFTL was dated August 10, 2017, and covered the August 2014 and March 2017 assessments for the first and second quarters of 2013. Petitioner challenged respondent's decision to file this NFTL by submitting a second timely request for a CDP hearing on a Form 12153. This Form 12153 indicated that the basis for the hearing request was a "Filed Notice of Federal Tax Lien" for the tax period "2013". A copy of the August 10, 2017 NFTL was attached to the Form 12153. Petitioner's reasons for requesting a CDP hearing were identical to those listed on his previously filed Form 12153, and he again did not indicate interest in pursuing a collection alternative.

The same Appeals settlement officer (SO) was assigned to conduct one CDP hearing for both of petitioner's CDP hearing requests. The SO verified that all pre-filing procedural and administrative requirements had been met with respect to the NFTLs, including proper assessment of the penalties, mailing of notice and demand for payment to petitioner's last known address, and the existence of a remaining balance at the time the NFTLs were filed. The SO also confirmed that 2408 W Kennedy LLC and Tampa Hyde Park Cafe LLC had defaulted on bankruptcy plans under which those entities were supposed to pay the delinquent employment taxes that gave rise to the penalty assessments against petitioner.

By letter dated February 2, 2018, the SO acknowledged that petitioner had requested a CDP hearing concerning an NFTL filing with respect to all four quarters of 2013, all four quarters of 2015, and the first two quarters of 2016. The

SO's letter notified petitioner that a telephone conference was scheduled for February 28, 2018, and that the conference would give him an opportunity to explain to the SO why he disagreed with the lien filings and to discuss collection alternatives. The letter also explained that the SO would consider any relevant issues that petitioner wanted to discuss, including collection alternatives, challenges to the appropriateness of the lien filing, and whether petitioner actually owed the underlying liabilities (as long as he had no prior opportunity to dispute them).[3] Finally, to enable the SO to consider collection alternatives, the letter asked petitioner to submit Federal income tax returns for his 2015 and 2016 taxable years, along with a completed Form 433-A, Collection Information Statement, and proof that his estimated tax payments had been paid in full for the current year. The letter gave petitioner 21 days to provide the tax returns and 14 days to provide the other information.

During the telephone conference (which, to accommodate petitioner, was postponed to March 8, 2018) the SO and petitioner discussed petitioner's challenge to the underlying tax liabilities and his concerns about the collection process. The matters discussed included the business entities involved, whether petitioner had actually received the Letters 1153, and the possibility that the liabilities at issue might be paid as part of separate bankruptcy proceedings concerning 2408 W Kennedy LLC and Tampa Hyde Park Cafe LLC. The SO promised to mail account transcripts to petitioner. She also told petitioner that she would expect to hear back from him within 14 days of sending the transcripts if he had any information for her to consider with respect to the underlying tax liabilities.

The day after the telephone conference, the SO sent two letters to petitioner. One letter enclosed a set of transcripts relating to taxable periods not involved in the CDP hearing, but which the SO noted could be considered for a collection alternative. The other letter enclosed transcripts for taxable periods that were at

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[3]The SO took the position in her letter that petitioner had a prior opportunity to challenge the underlying tax liabilities associated with Tampa Hyde Park Cafe LLC (and was thus precluded from doing so during the CDP hearing) but that he might still have been eligible (subject to further verification) to challenge the underlying tax liabilities associated with 2408 W Kennedy LLC. For purposes of deciding this Motion, we will resolve the factual issues concerning petitioner's entitlement to challenge the underlying tax liabilities in his favor. We accordingly assume for purposes of summary adjudication that petitioner was entitled to challenge all of the underlying tax liabilities during the CDP hearing.

issue in the CDP hearing, which the SO had annotated to identify the entities to which various assessments related. The second letter also instructed petitioner that he needed to submit information (tax returns for 2015 and 2016, Form 433-A and supporting documentation, and potentially Form 656, Offer in Compromise) within 14 days from the date of the letter if he wished to be considered for a collection alternative. In addition, the second letter asked petitioner to "submit any information with supporting documentation that you would like me to consider regarding the Trust Fund Recovery Penalty assessments within 14 days of this letter", i.e., by March 23, 2018.

Petitioner acknowledged receipt of both letters and the enclosed transcripts in a reply dated March 22, 2018. In his March 22 letter, petitioner said that he needed more time to file his 2015 and 2016 tax returns because he was "awaiting the processing of an amended return" before he could finalize them, and he asked for an additional 30 days "to work through these specific transcripts" and "reconcile these activities with the IRS and bankruptcy court payments already made on behalf of these entities."

The SO declined to grant petitioner additional time. Appeals then issued a notice of determination on April 19, 2018, sustaining the filing of the NFTLs. The notice of determination explained that petitioner failed to provide information to support a challenge to the underlying tax liabilities and further concluded that, because petitioner made no effort to pursue a collection alternative, the NFTL filings adequately balanced the need for efficient collection of taxes with petitioner's legitimate concern that the collection action be no more intrusive than necessary.

We first address petitioner's challenge to the underlying tax liabilities, which we review de novo. Construing the undisputed facts in the light most favorable to petitioner, as we must when deciding a motion for summary judgment, we conclude that petitioner had no opportunity prior to the CDP hearing to challenge the underlying tax liability for any of the taxable periods at issue. However, even though petitioner's CDP hearing requests indicated his desire to contest the validity of the underlying tax liabilities, he did not actually provide any information to the SO suggesting that the penalties were not properly assessed against him. A "taxpayer does not properly raise an issue, including the underlying liability, during the [CDP] hearing if it 'fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence.'" LG Kendrick, LLC v. Commissioner, 146 T.C. 17, 34 (2016) (quoting secs. 301.6320-1(f)(2), Q & A-F3 and 301.6330-1(f)(2), Q & A-F3, Proced. &

Admin. Regs. and citing Pough v. Commissioner, 135 T.C. 344, 349 (2010)). We will not consider an issue that was not properly raised before Appeals. Id.

Even though the SO did not believe petitioner was entitled to challenge at least some of the penalties during the CDP hearing, she still gave petitioner 14 days after their telephone conference to provide information relating to his liability for the underlying penalties. We have held that setting a deadline for a taxpayer to provide information two weeks from the date of an Appeals officer's letter is not an abuse of discretion unless the context indicates that the deadline was unreasonably short. Shanley v. Commissioner, T.C. Memo. 2009-17, slip op. at 12-13.

The context here establishes that the two week deadline was reasonable. During the more than two months from the date of the SO's initial scheduling letter to the issuance of the notice of determination, petitioner never submitted any information to the SO explaining why he should not be held liable for the underlying penalties. The SO's initial letter alerted petitioner that a telephone conference would take place in 26 days and indicated that the underlying liabilities would be on the agenda. The SO then postponed the call for an additional week at petitioner's request. The SO told petitioner on the call that she would expect to receive any information from him about the underlying liabilities within two weeks, and after the call she promptly sent petitioner account transcripts that identified for him the entities associated with various penalty assessments.[4] Petitioner did not request more time to respond to the SO until the day before the deadline. Under these circumstances, petitioner had a reasonable period to make his case. He failed to provide any information, thus waiving his right to challenge his liability for any of the penalties at issue.

In all other respects, we review Appeals' determination for abuse of discretion. As we construe the Petition, petitioner alleges that the SO abused her discretion in three ways: (1) by failing to provide another opportunity after the telephone conference to address his challenge to the underlying tax liabilities; (2) by declining to provide additional time for petitioner to file his 2015 and 2016 tax returns; and (3) by concluding that it was appropriate to pursue collection of

[4]These transcripts covered all of the taxable periods at issue. The SO thus gave petitioner the opportunity to submit information relating even to those underlying tax liabilities that she did not think petitioner was permitted to challenge.

the trust fund recovery penalties from him personally even though the business entities for which he was being held responsible were involved in bankruptcy proceedings.

As we have just discussed, the SO gave petitioner sufficient time--two weeks--to reply to her with information addressing his liability for the underlying penalties. He did not provide any new information to her during that period, or indeed at any time during the period of over a month between the telephone conference and the issuance of the notice of determination. Settlement officers are not required to wait a designated period before making a determination about a collection action. See, e.g., Clawson v. Commissioner, T.C. Memo. 2004-106, slip op. at 17.

Petitioner had just as much time to file his 2015 and 2016 tax returns. The SO first requested the returns in her initial scheduling letter more than two months before Appeals issued the notice of determination. Although petitioner requested more time to complete the returns while he waited for an amended return to be processed, he did not suggest an alternative deadline. In other contexts, we have held that taxpayers are required to file timely returns using the best available information, because later developments can be accounted for by filing an amended return. See, e.g., Mileham v. Commissioner, T.C. Memo. 2017-168, at *44. The SO did not abuse her discretion by holding petitioner to this standard. Moreover, the returns were only relevant to petitioner's eligibility for collection alternatives, which petitioner did not request and made no effort to pursue. Cf. Fakurnejad v. Commissioner, T.C. Memo. 2019-70, at *8 (noting that an SO may reject a collection alternative solely because a taxpayer is not current in his tax filing obligations). Under these circumstances, the SO did not abuse her discretion by refusing to extend the time for petitioner to file his delinquent tax returns. See Shanley v. Commissioner, T.C. Memo. 2009-17, slip op. at 14 (taxpayer's failure to provide "any substantial reason to grant an extension" supported conclusion that Appeals officer's refusal to allow more time to provide information was not an abuse of discretion).

Petitioner's position that it was inappropriate for respondent to pursue him personally for collection of the section 6672 penalties while the business entities for which he was being held responsible were in bankruptcy is also unavailing. Respondent "is not obligated to collect taxes from an employer's corporate assets or from its bankruptcy estate before collecting a trust fund recovery penalty from the responsible person." Bishay v. Commissioner, T.C. Memo. 2015-105, at *20 (citing Frank v. D'Ambrosi, 4 F.3d 1378, 1386 (6th Cir. 1993)). Although

respondent's general policy is not to pursue collection of trust fund recovery penalties from an individual taxpayer while a liable business entity is in compliance with a bankruptcy plan that provides for full payment of the delinquent taxes, see Internal Revenue Manual pt. 5.9.8.10(1) (Sept. 29, 2015), the SO confirmed that neither 2408 W Kennedy LLC nor Tampa Hyde Park Cafe LLC was in compliance with its bankruptcy payment obligations. The SO consequently did not abuse her discretion in determining that the collection action against petitioner should be sustained.

The SO also complied in all other respects with the section 6330(c) requirements governing the CDP hearing. She verified that respondent had satisfied all requirements of applicable law or administrative procedure before filing the NFTLs. She also considered all issues that petitioner raised (including by giving him an opportunity to challenge the underlying tax liabilities, despite her conclusion that he may have been precluded from challenging some of them). Furthermore, because petitioner declined to pursue collection alternatives, the SO concluded that no alternative collection action would better balance the need to efficiently collect taxes with petitioner's interest in limiting the intrusiveness of the collection action. Accordingly, the Appeals determination sustaining the NFTL filings fully complied with the applicable statutory requirements and was not an abuse of discretion.

As we have discussed, Rule 121(d) provides that a decision may be entered against a party who rests on his pleadings after the opposing party has filed a properly supported motion for summary judgment. Petitioner did not respond to respondent's Motion and has not raised a genuine dispute as to any material fact. Also, as we have explained, petitioner did not properly raise a dispute as to the underlying tax liabilities involved in this case, and Appeals' determination to sustain the NFTL filings was not an abuse of discretion. Respondent is therefore entitled to judgment as a matter of law. Consequently, the Court concludes that summary judgment is appropriate.

In view of the foregoing, it is

ORDERED that respondent's Motion for Summary Judgment, filed August 27, 2019, is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the first, second, third, and fourth quarters of 2013, the first, second, third, and fourth quarters of 2015, and the first and second quarters of

2016, as determined in the notice of determination dated April 19, 2018, upon which this case is based.

(Signed) Joseph H. Gale
Judge

Judge

ENTERED: **NOV 07 2019**