UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

DARLINE AUGUSTINE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 12248-18 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER AND DECISION

This is a "collection due process ("CDP") case brought under I.R.C. section 6330 by petitioner Darline Augustine. Now before the Court is the Commissioner's motion for summary judgment, which contends (1) that since Ms. Augustine received a statutory notice of deficiency for the years in suit, and did not file a Tax Court petition to challenge those determinations, she is now barred by section 6330(c)(2)(B) from challenging her underlying liability in this CDP case, and (2) that because she failed to provide financial information and a missing tax return, Appeals did not abuse its discretion in denying her a collection alternative. We will grant the Commissioner's motion.

Background

The parties' filings show the following facts, which Ms. Augustine does not dispute:

The tax liabilities at issue

For the years 2013 and 2014, Ms. Augustine filed Federal income tax returns on which she claimed deductions that reduced her tax liability. The Small Business and Self-Employed ("SBSE") division of the IRS examined her returns, disallowed the deductions after concluding that they were not substantiated, and on

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January 19, 2016, issued a statutory notice of deficiency ("SNOD") determining deficiencies of tax for both years--in the amounts of $12,270 for 2013 and $15,070 for 2014. (The IRS also determined accuracy-related penalties, but as to those penalties respondent now concedes he cannot show compliance with section 6751(b)(1). We will therefore not sustain those penalties and will not discuss them further.) The IRS sent the SNOD to multiple addresses that the IRS had for Ms. Augustine and her representative, and she does not allege that she did not receive it. However, she did not file a petition in the Tax Court challenging those liabilities (which would have been due April 18, 2016), and the IRS assessed them.

Post-SNOD dealings with SBSE, NTA, and Appeals

Rather than filing a Tax Court petition, Ms. Augustine sent information to SBSE to attempt to induce a revision of the determinations that had been made against her. By letter of April 13, 2016, SBSE advised her that it made no change to its previous determinations (i.e., those reflected in the SNOD).

Ms. Augustine had correspondence with personnel in the office of the National Taxpayer Advocate ("NTA") about a request that the IRS rescind the SNOD. The NTA stated that a rescission should be made, but no action was taken before Ms. Augustine's deadline for filing a Tax Court petition; and it appears the SNOD was never rescinded.

The NTA also urged that Ms. Augustine should be allowed a hearing before IRS Appeals, and this apparently occurred. Ms. Augustine signed a Request for Appeals Review on April 20, 2016. Her chronology (Doc. 21) shows that from July 2016 through at least November 2016, she was communicating with Appeals regarding the liabilities at issue in this case, and that on September 7, 2016, she attended an Appeals Conference ("Met with Leonard Greco in NYC at 290 Broadway"). These efforts did not result in any abatement of the assessments that had been made against her.

The CDP request

After Ms. Augustine failed to pay the assessed liabilities, the IRS issued to her on October 2, 2017, a "Notice of intent to levy and notice of your right to a hearing". In response to that notice, Ms. Augustine filed with the IRS a Form 12153, "Request for a Collection Due Process or Equivalent Hearing". On that form she stated, as the reason for her CDP request: "I will face a significant financial hardship if I am forced to pay the full amount of my taxes. I cannot pay

my taxes I have reasonable expenses exceeding my income. I want to dispute the amount the IRS assessed."

Agency-level CDP hearing

On December 20, 2017, IRS Appeals sent a letter to Ms. Augustine explaining the CDP process. The letter acknowledged that in a CDP hearing a taxpayer may challenge "[w]hether you owe the amount due, but only if you did not receive a statutory notice of deficiency" (which Ms. Augustine had received).

The letter also explained that if Ms. Augustine wanted "alternative collection methods such as an installment agreement", then she must submit (1) a Form 433-A, "Collection Information Statement", and (2) a signed Federal income tax return for the year 2016, which (the letter said) had never been filed.

Ms. Augustine submitted amended returns for 2013 and 2014 that reported a reduced liability, and Appeals forwarded the returns to the IRS's examination personnel.

Neither Ms. Augustine nor her representative ever submitted a Form 433-A or a 2016 return. Nonetheless, Appeals suggested an installment agreement requiring monthly payments of $490. Ms. Augustine's representative stated that she could not afford such payments, and Appeals repeated the request for Form 433-A. It was never provided.

Notice of determination

Appeals issued a notice of determination to Ms. Augustine on May 30, 2018, sustaining the levy notice. The notice of determination recounted Appeals' obtaining "verification from the IRS office collecting the tax that the requirements of any applicable law, regulation or administrative procedure with respect to the proposed levy have been met." Regarding collection alternatives, the notice stated: "You did not provide your Form 1040 tax returns for tax year 2016 and the Form 433-A, Financial Collection Statement. The documentation was necessary in order to make a determination concerning a collection alternative for you. Since there was no response from you and no documentation provided, consideration of your proposed collection alternative of an installment agreement or other less intrusive methods of collection is not possible".

Tax Court petition

In response to the notice of determination, Ms. Augustine timely filed a petition in this Court on June 19, 2018. The petition challenged the liability that the IRS had assessed and argued that she was entitled to deductions that the IRS had disallowed.

Motion for summary judgment

The IRS filed its motion for summary judgment (Doc. 7), arguing (1) that, because Ms. Augustine had received a notice of deficiency for 2013 and 2014, section 6330(c)(2)(B) bars her from challenging the liabilities in the CDP context, and (2) that because Ms. Augustine failed to provide financial information on Form 433-A and failed to submit her 2016 return, Appeals did not abuse its discretion in declining to enter into an installment agreement or other collection alternative. We issued an order (Doc. 9) on January 30, 2019, explaining the nature of a motion for summary judgment and requiring Ms. Augustine to file a response.

On April 15, 2019, Ms. Augustine filed a response (Doc. 15) that stated, in its entirety:

> I write to oppose the IRS motion for summary judgment because I contracted and received assistance from the tax payer advocate service in 2015 and 2016, and we secured my right to dispute the underlying tax liabilities in tax court, if need be.

By order of April 22, 2019 (Doc. 17), we allowed her to file a supplemental response by no later than May 6, 2019. On April 29, 2019, we received from Ms. Augustine another letter (Doc. 18), which informed us that she is getting the help of a Low Income Tax Clinic ("LITC"), and which states: "With regard to the reply to the summary judgment, I will have to get assistance from a low income legal service. I am not an attorney and legal language is quite opaque to me." No attorney from an LITC filed an entry of appearance in this case. We issued another order (Doc. 19) on May 2, 2019, which gave further explanation and set a deadline for a supplemental filing.

Ms. Augustine filed an opposition (Doc. 21) in which she sets out a detailed chronology of her dealings with the IRS. The main point of her opposition is that she does not owe the tax that the IRS has assessed against her. She does not allege

and her opposition does not show that the SNOD was ever rescinded. Her opposition does not make any mention of a proposed installment agreement or other collection alternative.

(We also ordered (see Doc. 26) filings on the issue of Appeals' verification (pursuant to section 6330(c)(1)) of IRS compliance with the requirement of section 6751(b)(1) that penalty determinations receive supervisory approval. As we noted above, the Commissioner conceded non-compliance. (See Doc. 27.))

Discussion

I. Summary judgment standard

Where the pertinent facts are not in dispute, a party may move for summary judgment to expedite the litigation and avoid an unnecessary trial. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted where there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(a) and (b); see Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994); Zaentz v. Commissioner, 90 T.C. 753, 754 (1988). There is no dispute in this case about the material facts.

II. General CDP procedures

A. Right to a CDP hearing

If a taxpayer fails to pay any Federal income tax liability after demand, section 6331(a) authorizes the IRS to collect the tax by levy on the taxpayer's property. However, the IRS must first issue a final notice of intent to levy, and notify the taxpayer of the right to an administrative hearing before IRS Appeals. Secs. 6320(a), 6330(a) and (b)(1). After receiving such a notice, the taxpayer may request an administrative hearing before IRS Appeals. Sec. 6330(a)(3)(B), (b)(1).

B. Collection issues at the CDP hearing

At the CDP hearing, IRS Appeals must make a determination whether the proposed collection action may proceed. In so doing, Appeals is required to: verify that the requirements of any applicable law and administrative procedure have been met by IRS personnel, see sec. 6330(c)(3)(A); consider any collection alternatives proposed by the taxpayer, see sec. 6330(c)(3)(B) (citing

sec. 6330(c)(2)); and consider "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary", see sec. 6330(c)(3)(C).

Ms. Augustine did not raise any of these issues in her petition or in her response to the Commissioner's motion for summary judgment. (Her request for a CDP hearing did indicate a desire for a collection alternative; and during the CDP hearing her representative expressed an interest in an installment agreement. However, Ms. Augustine failed to provide Appeals with the financial information and a missing tax return that was necessary for Appeals to have in order to consider a collection alternative. Consequently, in the absence of that necessary information, Appeals did not abuse its discretion in denying a collection alternative. See Tucker v. Commissioner, T.C. Memo. 2014-103; Huntress v. Commissioner, T.C. Memo. 2009-161.)

C. Liability challenges in the CDP hearing

A liability challenge may sometimes be raised in an agency-level CDP hearing (and in the subsequent Tax Court suit). Section 6330(c)(2)(B) provides:

> The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

Id. (emphasis added). Thus, in creating the CDP remedy, Congress manifestly intended that the pre-assessment deficiency case under section 6213 (authorized when an SNOD is issued) continue to be the principal vehicle for the litigation of liability. A taxpayer who receives an SNOD determining a tax liability has available to him the remedy of a deficiency case in the Tax Court. When a taxpayer foregoes the opportunity for that challenge, he may not thereafter attempt the challenge in a CDP hearing before IRS Appeals (or in a CDP case before the Tax Court).

D. Tax Court review

When IRS Appeals issues its CDP determination, the taxpayer may "petition the Tax Court for review of such determination", pursuant to section 6330(d)(1), as Ms. Augustine has done. Where the validity of the underlying liability is properly

at issue, we review that determination de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000). For other issues, we review the determination for abuse of discretion. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). That is, we decide whether the determination was arbitrary, capricious, or without sound basis in fact or law. See Murphy v. Commissioner, 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Sego v. Commissioner, 114 T.C. at 610; Goza v. Commissioner, 114 T.C. at 181-182.

III. Analysis

This case is resolved simply: The only contention that Ms. Augustine advances is barred by section 6330(c)(2)(B). When she previously received from the IRS the SNOD that determined tax liabilities, Ms. Augustine thereby had a prior opportunity to challenge that liability determination. She did not do so. She is barred from doing so now in this CDP case.

Whatever else transpired among Ms. Augustine, SBSE, the NTA, and Appeals, it remains true that she received the SNOD and could have litigated her 2013 and 2014 liabilities in this Court if she had filed a timely petition seeking that relief. Moreover, even if her receipt of the SNOD were not determinative, she was also given an opportunity in 2016 to be heard by IRS Appeals on the issue of her underlying liabilities. This, too, was a prior "opportunity to dispute such tax liability".

We note that, if Ms. Augustine were to pay the tax in dispute, section 6330(c)(2)(B) would not bar her from filing a timely administrative claimed for refund and, if it were denied, timely litigating that refund claim in the district court or the Court of Federal Claims. See 26 U.S.C. secs. 6511(a), 6532(a), 7422(a); 28 U.S.C. secs. 1346(a)(1), 1491(a)(1).

In view of the foregoing, it is

ORDERED that the Commissioner's motion for summary judgment is denied in part, in that we do not sustain Ms. Augustine's liability for, nor the IRS's right to collect, the accuracy-related penalties assessed for 2013 and 2014. But it is further

ORDERED that the Commissioner's motion for summary judgment is granted in all other respects. It is further

ORDERED AND DECIDED that respondent may proceed with the collection of Ms. Augustine's Federal income tax for 2013 and 2014 as described in the "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code" dated May 30, 2018, except

That, pursuant to the Commissioner's concession, petitioners are not liable for (and the Commissioner may not proceed to collect) the accuracy-related penalties assessed against petitioner for 2013 and 2014 pursuant to section 6662(a).

(Signed) David Gustafson
Judge

ENTERED: **NOV 14 2019**