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UNITED STATES TAX COURT
WASHINGTON, DC 20217

ARNOLD SIMON,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 20945-17 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER AND DECISION

This case is before us to review a Notice of Determination (determination) sent by respondent's Appeals Office (Appeals) to petitioner sustaining two actions respondent took to assist him in collecting from petitioner trust fund recovery penalties (TFRPs) assessed against him pursuant to section 6672 with respect to unpaid employment taxes of Designer License Holding Company, LLC (Designer), for the quarters ended March 31, June 30, September 30, and December 31, 2010 (2010 quarters).[1] The two actions were (1) filing a notice of Federal tax lien (NFTL) and (2) notifying petitioner of respondent's intent to levy. Respondent has moved for summary adjudication in his favor (motion) and petitioner opposes our granting the motion (opposition).

[1]Sec. 6672(a) imposes a penalty equal to the amount of any unpaid employment taxes withheld by a corporation from its employees' wages on any person who willfully fails to collect, account for, or pay over those taxes. In general, any person with the duty and authority to cause the corporation to withhold and pay over the taxes in question can be subject to liability under sec. 6672(a). See sec. 6671(b).

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All section references are to the Internal Revenue Code presently in effect, and all Rule references are to the Tax Court Rules of Practice and Procedure. Dollar amounts have been rounded to the nearest dollar. We review the determination pursuant to sections 6320(c) and 6330(d).

Summary judgment is appropriate "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b). The moving party bears the burden of proving that no genuine dispute as to any material fact exists, and we will draw any factual inferences in the light most favorable to the nonmoving party. See, e.g., Anonymous v. Commissioner, 134 T.C. 13, 15 (2010).

We will grant the motion.

Background

The following facts are gathered from the pleadings, the motion and the declaration of Settlement Officer (SO) Sharron E. Dillon in support of it, and petitioner's opposition to the motion and the declaration of one of petitioner's counsel, J. Ted Donovan, in support of the opposition.

Assessment of TFRPs

By letter dated April 4, 2012 (April 4 letter), respondent informed petitioner that he proposed assessing TFRPs totaling $129,199 against petitioner as a responsible person of Designer with respect to the 2010 quarters. The letter informed petitioner that he could protest or appeal the proposed assessments.

On petitioner's behalf, another of his counsel, Kevin J. Nash, responded to the April 4 letter with a "written protest and appeal" (protest). Mr. Nash requested a conference to review all of the facts and circumstances surrounding the proposed assessments. He claimed that, "[w]hile payroll taxes are delinquent, they were not willfully left unpaid" because petitioner "lost control of company funds" after Designer went into bankruptcy. He argued:

> Given factual and legal disputes over willfulness, as well as the belief that the taxes will ultimately be paid during the bankruptcy [of Designer], we respectfully request that a decision regarding

> imposition of the Trust Fund Recovery Penalty be deferred, or that the proposed Penalty be withdrawn without prejudice, pending the completion of the administration of Designer's Chapter 7 case and * * * [an] anticipated distribution to the IRS.

Respondent forwarded the protest to his Sacramento, California, Appeals Office, where, on July 3, 2012, it was assigned to Appeals Officer (AO) May Ferguson. AO Ferguson's case activity record shows that she spent 40.25 hours on the case, beginning on July 9, 2012, and ending on March 18, 2014. She records numerous contacts by telephone or correspondence with petitioner's counsel, Messrs. Nash and Donovan.

On March 19, 2014, AO Ferguson transmitted to Appeals Team Manager Nan M. Shimizu her recommendation that the TFRPs should be sustained in full because petitioner was a responsible person who acted willfully in not collecting and paying over Designer's employment taxes for the 2010 quarters. In a letter to petitioner dated March 27, 2014, Ms. Shimizu stated that, because Appeals could not reach agreement with petitioner about the proposed assessment, it was returning the case to respondent's Collection function for assessment of the TFRPs. That letter was misaddressed and may never have reached petitioner. The record also contains an undated and unsigned copy of a letter to Mr. Nash explaining Appeal's rejection of the protest.

On April 3, 2014, respondent assessed TFRPs totaling $129,199 against petitioner for the 2010 quarters (assessed penalties).

2014 Notices

Petitioner did not immediately pay the assessed penalties. On April 28, 2014, respondent sent him notice of respondent's intent to levy and, on May 15, 2014, he sent him notice that he had filed a NFTL (collectively, the 2014 notices). The 2014 notices were the subject of a prior proceeding in this Court, Simon v. Commissioner, dkt. No. 9293-15L. On June 7, 2016, that proceeding came on for hearing on respondent's motion to dismiss for lack of jurisdiction (June 7 hearing). During the hearing, respondent conceded that both 2014 notices were misaddressed and invalid and that petitioner was entitled to receive new notices. The Court encouraged the parties to negotiate and to attempt to settle their differences. By order dated August 10, 2016, we dismissed the case for lack of jurisdiction.

Trustee's Payment

In mid-June 2016, respondent received from Salvatore Lamonica, the bankruptcy trustee of Designer's chapter 7 bankruptcy estate, a letter enclosing a check in the amount of $91,850 drawn to the order of the Internal Revenue Service and referencing a bankruptcy case number and "Debtor: DESIGNER LICENSE HOLDING COMPANY LLC" (trustee's payment). The letter states that the check is "a final distribution check drawn on the [estate's] account" and: "You are receiving this distribution because you filed an allowed claim in the case." Neither the check nor the letter designates the tax period to which the payment is to be applied or whether the payment is to be applied towards the trust fund taxes or non-trust fund taxes.

The 2017 Notices

On February 8, 2017, respondent sent petitioner both notice of his intent to levy to collect the assessed penalties and notice that he had filed a NFTL (together, the 2017 notices).

In response, petitioner submitted a Form 12153, Request for Collection Due Process or Equivalent Hearing. By the form, petitioner did not ask for a collection alternative (e.g., an installment agreement or an offer in compromise) but, rather, disputed his underlying liability for the assessed penalties and, alternatively, alleged that the trustee's payment should have been credited towards his TFRP liability.

Petitioner's CDP hearing request was assigned to SO Dillon. There followed a series of telephone conferences between SO Dillon and Mr. Donovan. She explained to him that petitioner could not raise at the hearing any challenge to the existence or amount of his liability for the assessed penalties because he had previously protested the penalties with Appeals, and Appeals had rejected his protest in March 2014. With respect to application of the trustee's payment, she told Mr. Donovan that she had reviewed all payments and had confirmed that all Designer's employment tax payments were properly cross-referenced and applied to the trust fund recovery penalty liability as appropriate and that the cross-referenced payments reduced petitioner's trust fund recovery penalty liability from

approximately $131,000 to approximately $71,897, calculated through June 30, 2017.[2]

Although petitioner had not asked for a collection alternative on the Form 12153, SO Dillon and Mr. Donovan did discuss the possibility of an installment agreement. Petitioner was offered the opportunity to submit a Collection Information Statement and supporting documentation so that Appeals could evaluate his qualification for a collection alternative, but he failed to do so. Indeed, Mr. Donovan, in his declaration states: "Mr. Simon did not intend to make a proposal for a payment plan."

SO Dillon concluded that Appeals should sustain the collection actions, and, on September 6, 2017, Appeals Team Manager Darryl K. Lee sent the determination to petitioner. Mr. Lee summarizes Appeals' reasons as follows:

> Appeals has determined that all legal and administrative requirements were met prior to the issuance of the Notice of Federal Tax Lien and the Notice of Intent to Levy. It has further been determined that no relief is to be granted and that the lien filing and proposed levy action are sustained.
>
> You are precluded from raising the liability issue within this Collection Due Process because you had a prior opportunity to do so.
>
> You didn't request consideration of any collection alternatives. Despite this, you were offered an opportunity to submit the forms and documentation necessary for Appeals to determine whether or not you qualify for an installment agreement as an alternative to collection, but you failed to submit any of the required information.

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[2]More specifically, in her case activity record for June 6, 2017, SO Dillon wrote that she matched txmods for all 4 quarters of 2010 under MFT 01 (employment tax) & MFT 55 (trust fund recovery penalty) and verified that all payments are cross referenced between the two modules. She further wrote that Designer had made an undesignated bankruptcy payment of $91,850, which was applied to the tax period ending June 30, 2010, first to the non-trust fund portion of the tax, and then the remaining $67,261 to the trust fund portion of the tax. According to her notes, the trust fund portion of the payment was cross-referenced over to petitioner's TFRP liability on the same day.

> In balancing the least intrusive method of collection with the need to efficiently administer the tax laws in the collection of revenue, we have determined that the balance favors sustaining the lien filing and the proposed levy action, notwithstanding its intrusiveness, due to the absence of a viable collection alternative. The lien filing and proposed levy action is [sic] sustained by Appeals.

Pleadings, Motion, and Opposition

Petitioner assigns error to the determination on the grounds that SO Dillon denied him the opportunity to challenge the assessed penalties and refused to consider any reduction or compromise of them.

Respondent denies that he erred and moves for summary judgment on the grounds that petitioner's assignments are meritless. He explains: Because petitioner had a prior opportunity to dispute the assessed penalties, he could not at his CDP hearing raise any challenge to the existence or amount of the penalties; all payments were properly credited; and petitioner was entitled to no collection alternatives because he asked for none.

By the opposition, petitioner argues that he was never accorded a meaningful opportunity to appeal the assessed penalties: "[He] was never able to obtain a face-to-face meeting with the IRS in response to his initial challenge and appeal of the original tax assessment. Instead, the file was transferred from office to office and finally determined by an agent in California following a series of telephone conferences, without a proper or meaningful meeting." He adds: "The IRS did not complete its appeal and issue a ruling for two years." He argues that SO Dillon should have caused the trustee's payment to be credited in full to his liability for the assessed penalties and that she refused to discuss any collection alternatives. He also asks that interest be waived.

Discussion

I. Scope and Standard of Review

Where a taxpayer's underlying liability is properly before us, we review the underlying liability de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000). Otherwise, generally, we review Appeals' determination of the matters raised at the hearing for abuse of discretion. See Lunsford v. Commissioner, 117 T.C. 183, 185 (2001). Appeals abuses its discretion if its determination is arbitrary, capricious, or

without sound basis in law or fact. See Murphy v. Commissioner, 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006).

II. Underlying Liability

Here, we face a preliminary question. The underlying liability here is petitioner's liability for the assessed penalties. See Romano-Murphy v. Commissioner, 152 T.C. __, __ (May 21, 2019), 2019 WL 2193419, at *12 (involving TFRP liability). Petitioner was entitled to raise a challenge to the existence or amount of that liability at his CDP hearing only if he had not otherwise had the opportunity to dispute the liability. See sec. 6330(c)(2)(B). And our jurisdiction under section 6330(d) is limited to issues properly raised at the CDP hearing. See secs. 301.6320-1(f)(2), Q&A-F3, 301.6330-1(f)(2); Q&A-F3, Proced. & Admin. Regs.; see also, e.g., Giamelli v. Commissioner, 129 T.C. 107, 112-114 (2007); Schuman v. Commissioner, T.C. Memo. 2019-137, at *8. Thus, if before making his request for a CDP hearing, petitioner had the opportunity to dispute the assessed penalties, he could not challenge the existence or amount of the penalties at his CDP hearing, and we have no authority to consider SO Dillon's refusal to consider that challenge here. See Estate of Sblendorio v. Commissioner, T.C. Memo. 2007-94, 2007 WL 1191255, at 3.

An opportunity to dispute a liability includes an opportunity for an Appeals conference either before or after the assessment of the liability. Secs. 301.6320-1(e)(3), Q&A-E2; 301.6330-1(e)(3), Q&A-E2, Proced. & Admin. Regs.; see also Lewis v. Commissioner, 128 T.C. 48, 61 (2007) (holding regulation a reasonable interpretation of statute). By the protest, petitioner, requested a conference to review all of the facts and circumstances surrounding the proposed assessments. We have summarized supra AO Ferguson's activity with respect to the protest, culminating in Appeals' rejection of the protest. And while the protest does "request a conference to review all of the facts and circumstances" it does not request that petitioner appear or otherwise be heard in person. In his deposition, Mr. Donovan states that the protest was transferred to the Sacramento Appeals Office "before a face-to-face conference could be scheduled". "Because of the transfer," he continues, "Mr. Simon's communications with Ms. Ferguson were limited to telephone calls and fax submissions, and Mr. Simon was denied the opportunity for a face-to-face hearing on his appeal." Mr. Donovan, however, does not claim that petitioner or his counsel requested a face-to-face hearing with Appeals.

In Estate of Sblendorio v. Commissioner, 2007 WL 1191255, the Commissioner moved for summary adjudication on the basis that, because the taxpayer had been offered and participated in a conference with Appeals concerning his liability for certain assessed penalties, he could not properly raise the underlying liability for the penalties in a section 6330 collection review proceeding. His liability for the penalty was the only issue petitioner had raised in the petition. The record showed that the taxpayer had submitted correspondence to Appeals and had participated in multiple telephone conversations with Appeals, presenting information and arguments in support for his request for abatement of the additions to tax. Appeals sustained the additions. We found that the taxpayer had been afforded a conference with Appeals in which he had the opportunity to dispute the underlying liability for the additions. We rejected his argument that, because there was no face-to-face meeting, "there was no 'hearing' as that term is commonly understood." The taxpayer had presented no evidence that he had requested an in-person hearing. "Moreover," we added, "a face-to-face hearing is not a prerequisite for Appeals consideration. Conferences with Appeals are informal. Sec. 601.106(c), Statement of Procedural Rules. The correspondence and telephone conversations between * * * [the taxpayer] and the Appeals officer * * * [were] sufficient to constitute a conference with Appeals." Id. at 3. There being no question but that the taxpayer was accorded a conference with Appeals, we held that he could not raise the underlying liability again in a CDP hearing or in a resulting hearing before the Court, and we granted the Commissioner's motion.

On the question of petitioner's prior opportunity to dispute the assessed penalties, the same answer applies here. The record shows extended communications between AO Ferguson and petitioner's counsel. Petitioner makes no particularized complaint about the Appeals process other than the absence of face-to-face hearing (for which there is no evidence of any request) and the delay in the process winding up. The proceedings with AO Ferguson were sufficient to constitute a conference with Appeals in which petitioner had the opportunity to dispute the assessed penalties. He was therefore precluded by sections 6330(c)(2)(B) and 301.6320-1(e)(3), Q&A-E2; 301.6330-1(e)(3), Q&A-E2, Proced. & Admin. Regs., from raising challenges to the underlying liabilities in his CDP hearing before SO Dillon. He is likewise precluded from raising challenges here. See Estate of Sblendorio v. Commissioner, 2007 WL 1191255, at 3.

III. Application of the Trustee's Payment

In mid-June 2016, respondent received the trustee's payment ($91,850), which he treated as an undesignated bankruptcy payment because it was

unaccompanied by any instruction as to the period to which it should be applied or whether it should be applied towards the trust fund taxes or the non-trust fund taxes. Respondent applied the payment to the tax period ending June 30, 2010, first to the non-trust fund portion of the unpaid tax and then the remaining $67,261 to the trust fund portion.

Petitioner raised the issue of application of the trustees' payment with SO Dillon. She confirmed that application as described, and she took no action to change it. Petitioner argues that SO Dillon should have reallocated the trustee's payment in the manner most favorable to him. He claims that, during the June 7 hearing,

> there was an extensive discussion * * * about Mr. Simon's intent that the bankruptcy payment be accepted by the IRS, together with an additional contribution from Mr. Simon in full satisfaction of all claims. While the IRS and Mr. Simon did not reach agreement on allocation during the hearing, the Court made it clear that it expected the parties to negotiate in good faith * * * .

Respondent answers that his application of the trustee's payment was consistent with his procedures for processing undesignated payments. See Internal Revenue Manual pt. 5.7.4.3 (June 26, 2012) (providing that undesignated payments should be applied in the best interest of the Government, and that absent statute or lien priority issues, consideration will be given to applying payments to non-trust fund portions of the liability before trust fund portions). Petitioner makes no argument that any designation for its application accompanied the trustee's payment, nor does he claim that he made the payment. Moreover, he concedes no agreement was reached at the June 7 hearing as to application of the bankruptcy trustee's expected payment. Certainly, in granting respondent's motion to dismiss for lack of jurisdiction, we had no authority to compel discussion of a dispute not then before us. The transcript of the June 7 hearing evidences nothing more than standard encouragement by the Court to the parties that they try and reach some accommodation, settling their dispute.

Whatever discretion SO Dillon had to cause a reallocation of the trustee's payment, petitioner has not shown that she acted arbitrarily or capriciously in leaving undisturbed the application of the payment.

We see no dispute as to material facts and conclude that it was no abuse of discretion for SO Dillon to leave application of the trustee's payment undisturbed.

IV. Collection Alternatives

Petitioner claims that SO Dillon declined to discuss any collection alternative during the CDP hearing, "having predetermined how * * * [she] was going to apply the [trustee's] payment * * * and refusing to consider anything except a payment plan from * * * [him] for the balance of the claim." He fails, however, to describe any collection alternative he advanced other than the installment agreement SO Dillon and Mr. Donovan discussed and, with respect to which, petitioner informed her: "[He] did not intend to make a proposal for a payment plan." SO Dillon did not decline to discuss collection alternatives. It is not an abuse of discretion for an Appeals officer to sustain a proposed collection action and not consider collection alternatives when the taxpayer has proposed none. Kendricks v. Commissioner, 124 T.C. 69, 79 (2005); Ragsdale v. Commissioner, T.C. Memo. 2019-33, at *34. SO Dillon did not abuse her discretion in failing to consider alternatives petitioner did not advance.

V. Interest

Petitioner argues: "It is manifestly unfair to charge interest during the period that the IRS delayed resolution of Mr. Simon's appeal." That may be so, and Congress has provided for the abatement of interest attributable to unreasonable errors and delays by the Internal Revenue Service. See sec. 6404(e). Nevertheless, petitioner makes no argument that he made a claim for interest abatement during his CDP hearing and, therefore, there is no determination with respect to interest abatement for us to review. See Day v. Commissioner, T.C. Memo. 2014-215, at *11, aff'd, 692 F. App'x 897 (9th Cir. 2017); Brecht v. Commissioner, T.C. Memo. 2008-213, 2008 WL 4222516, at *4.

VI. Conclusion

Because there is no genuine dispute as to any material fact and respondent is entitled to entry of a decision in his favor as a matter of law, we grant the motion. It is, therefore,

ORDERED that respondent's motion for summary judgment is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the tax periods ended: March 2010, June 2010, September 2010, and December 2010, as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated September 6, 2017.

(Signed) James S. Halpern
Judge

Entered: **NOV 14 2019**