UNITED STATES TAX COURT
WASHINGTON, DC 20217

KARSON C. KAEBEL,	)	
	)	
Petitioner(s),	)	**CZ**
	)	
v.	)	Docket No. 18362-18 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 respondent's notice to petitioner of respondent's intent to levy to collect petitioner's unpaid 2011 Federal income tax. Respondent has moved for summary adjudication in his favor (motion) and petitioner objects to our granting the motion (objection).

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 section 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.

SERVED Nov 25 2019

Background

The following facts are gathered from the pleadings, the motion, the documents attached to the motion, and the objection.

Events Leading to Determination

Petitioner filed no Federal income tax return for 2011, and respondent filed a substitute for return for petitioner pursuant to section 6020(b). Based on the substitute for return, respondent mailed a statutory notice of deficiency in tax to petitioner in July 2014 (statutory notice). The statutory notice was addressed to petitioner at his last address known to respondent. The statutory notice took the form of a Letter 3219(SC/CG)(08-1999) signed: "Commissioner, By [signature], S1STSIGA, Bill R. Banowsky, Service Center, Ogden Service Center". Petitioner filed no petition in response to the statutory notice

Petitioner made no payment in response to the statutory notice, and, in December 2014, respondent issued to petitioner a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320 (NFTL) relating to his unpaid 2011 income tax (December 2014 notice). That notice informed petitioner of his right to file a Form 12153, Request for a Collection Due Process (CDP) or Equivalent Hearing, to appeal respondent's filing of the NFTL. Petitioner filed no Form 12153 in response to the December 2014 notice.

Continuing his actions to collect the unpaid 2011 tax, in April 2017, respondent issued a Notice of Intent to Levy and Notice of Your Right to a Hearing (levy notice), notifying petitioner that, due to his failure to pay his 2011 tax liability, respondent would levy petitioner's property. The levy notice further informed petitioner of his right to a CDP hearing to appeal the proposed levy action.

In response, petitioner timely requested a CDP hearing. In his request, petitioner stated he was disputing the proposed tax and penalties; requested a face-to-face hearing, which he intended to record; and stated his interest, if convinced that he owed the tax, in discussing collection alternatives.

Petitioner's hearing request was assigned to Settlement Officer (SO) Nathan Villanueva, who informed petitioner by letter in March 2018 that he could not dispute his underlying liability for the 2011 unpaid tax and additions to tax because he had been given the opportunity to do so when he was sent notice of the NFTL

and he had failed to exercise that opportunity. SO Villanueva scheduled a telephone conference with petitioner and informed him that he was not eligible for a face-to-face hearing. He informed petitioner that, in order to be eligible for a collection alternative, he must provide a completed Form 433-A, Collection Information Statement, file tax returns for 2012 through 2016, and provide proof of being current with estimated tax payments. He added that, if petitioner were to provide the unfiled returns and proof of tax deposits, he would consider his request for a face-to-face hearing.

Following additional communication with petitioner by mail, Appeals Team Manger Jean West sent petitioner the determination, which summarizes Appeal's determination as follows. "You did not participate in the collection due process hearing you requested. You failed to provide requested proof of compliance for unfiled Income Tax Returns and the financial information requested by Appeals, therefore we are unable to consider a collection alternative. The proposed levy action is sustained. The basis for this decision is further explained in the enclosed attachment." The enclosed attachment is SO Villanueva's summary and recommendation, in which he chronicles his communications with petitioner and verifies that "the requirements of any applicable law or administrative procedure were met."

He reports that petitioner in correspondence claimed that he never received a statutory notice of deficiency (SNOD) and questioned whether one had actually issued. He answers that Appeals determined that the statutory notice was issued to petitioner, he had a copy of the statutory notice, and that he, personally,

> verified the Service sent the taxpayer the required SNOD letter via certified mail. The Certified Mailing List (CML) was reviewed confirming the SNOD was mailed to his address of record as noted previously. The assessment is valid as proper notice was issued. Copy of the SNOD and CML are in the administrative appeals file.

He further reports that IRS records confirmed the proper issuance of a notice and demand for payment, NFTL filing, and notice of a right to a CDP hearing. He adds:

> An assessment was properly made for each tax and period listed on the CDP notice. Notice and demand for payment was mailed to your last known address. There was a balance due when the Notice of Intent to Levy was issued or when the NFTL filing was requested. I

> had no prior involvement with respect to the specific tax periods either in Appeals or Compliance. I reviewed the Collection file, IRS records and information you provided. My review confirmed that the IRS followed all legal and procedural requirements, and the actions taken or proposed were appropriate under the circumstances.

Pleadings, Motion, and Objection

Petitioner timely petitioned the Court to review the determination. Petitioner assigns the following errors to the determination. "Respondent failed to provide Petitioner with the requested documents or files. Petitioner was not granted a face-to-face hearing. Petitioner was not granted the opportunity to challenge the liability of the assessed. I have received a Levy Notice for year 2011 but I never received a Notice of Deficiency." By the answer, respondent denies that he erred as assigned.

Respondent moves for summary judgment on the grounds that Appeals did not abuse its discretion in determining to sustain respondent's notice of levy with respect to petitioner's unpaid 2011 income taxes. Respondent argues that petitioner was precluded from raising at his CDP hearing challenges to the existence or amount of the underlying tax liability because, respondent continues, petitioner received both the statutory notice and notice that the NFTL had been filed, each of which provided him with opportunities to dispute his tax liability. See secs. 6320(c) and 6330(c)(2)(B). He further argues that SO Villanueva's decision to sustain the collection action was proper, given that petitioner did not submit a completed Form 433-A or file tax returns for 2012 through 2016. Also, petitioner was not entitled to a face-to-face hearing. See sec. 301.6330-1(e), Admin. & Proced. Regs.

In the objection, petitioner argues that respondent improperly denied him a face-to-face hearing that could be recorded and that the statutory notice was "not verified to be authorized by a duly authorized delegate of the Secretary as required by several sections of the Internal Revenue Code." Petitioner claims: "The Notice of Deficiency * * * was issued by "S1STSIGA", in small print above the name of BILL R BANOWSKY * * * . We have no idea who "S1STSIGA" is, [or] who on behalf of BILL R BANOWSKY" signed his name." Petitioner claims that he never received the statutory notice and should have been provided a copy by SO Villaneuava. He asks the Court to remand the case to Appeals "to obtain and discuss verification that IRS followed all of the statutory procedural procedures

that IRS is required to follow before assessing and collection [sic] taxes from Petitioner."

Discussion

I. Introduction

Sections 6320 and 6330 provide a taxpayer the right to notice and the opportunity for an Appeals hearing before the Commissioner can collect unpaid taxes by means of a lien or levy against the taxpayer's property. If a taxpayer requests a CDP hearing, the Appeals or Settlement officer conducting the hearing must verify that the requirements of any applicable law or administrative procedure have been met. Secs. 6320(c), 6330(c)(1). The taxpayer may raise at a hearing any relevant issue relating to the unpaid tax or the collection action, including appropriate spousal defenses, challenges to the appropriateness of collection actions, and offers of collection alternatives. See sec. 6330(c)(2)(A). The taxpayer may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any period if he did not receive a statutory notice for that liability or did not otherwise have an opportunity to dispute it. See sec. 6330(c)(2)(B). Section 6330(d)(1) allows a taxpayer to petition this Court for a review of a determination made under section 6320 or 6330 and grants us jurisdiction with respect to the matter upon the timely filing of a petition.

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).

The motion, which is supported by exhibits, is on its face, and as supported by the exhibits, sufficient for us to grant it. We will address petitioner's objections.

II. Petitioner's Objections

A. Underlying Liability

Petitioner's underlying liability is his liability for the unpaid 2011 income tax and additions to tax. As stated, 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 sec. 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 had the opportunity to dispute the underlying liability, he could not raise a challenge the existence or amount of the liability at his CDP hearing, and we have no authority to consider SO Villaneuava's refusal to consider that challenge here. See Estate of Sblendorio v. Commissioner, T.C. Memo. 2007-94, 2007 WL 1191255 at 3.

If a taxpayer has previously received notice of his right to a CDP hearing with respect to the same tax and tax period, he has had an opportunity to raise a challenge the existence and amount of the underlying tax liability and may not do so in a subsequent CDP hearing. See sections 301.6320-1(e)(3), Q&A-E7, and 301.6330-1(e)(3), Q&A-E7, Proced. & Admin. Regs.; see also Daniel v Commissioner, T.C. Memo. 2009-28.

Petitioner claims that he never received the statutory notice. That may be, but the December 2014 notice of filing a NFTL that respondent issued to petitioner relates to the same unpaid tax liability for 2011 that is the subject of this proceeding. And since the December 2014 notice gave petitioner the opportunity to raise a challenge to his underlying tax liability, he could not raise that challenge before appeals in respect to the levy notice, nor can he raise it here. See Daniel v. Commissioner, T.C. Memo. 2009-28. SO Villaneuava did not err in so determining.

B. Face-to-Face Hearing

We have held on numerous occasions that a CDP hearing is not a formal adjudication and that a face-to-face hearing therefore is not mandatory. See Katz v. Commissioner, 115 T.C. 329, 337 (2000); Davis v. Commissioner, 115 T.C. 35, 41 (2000); Silva v. Commissioner, T.C. Memo. 2015-229, at *11. A CDP hearing may take the form of a face-to-face meeting, a telephone conference, or written communications between the taxpayer and Appeals. Sec. 301.6320-1(d)(2), Q & A-D6, Proced. & Admin. Regs.; see Katz v. Commissioner, 115 T.C. at 337-338.

SO Villaneuava told petitioner that he would consider his request for a face-to-face hearing if he submitted unfiled returns and proof of tax deposits. Those documents were necessary if petitioner was going to make a serious proposal for a

collection alternative. Petitioner did not comply with the demand. Under those circumstances, he was not entitled to a face-to-face hearing and SO Villaneuava did not abuse his discretion in denying petitioner's request. See e.g., Silva v. Commissioner, at *11. Petitioner did not exercise his opportunity for a telephone hearing, but, had he, he would not have been entitled to record the hearing. See, e.g., Walker v. Commissioner, T.C. Memo. 2018-22, at *34 (citing Calafati v. Commissioner, 127 T.C. 219, 229 (2006)).

C. Remand

Petitioner asks that we deny the motion and remand the case to Appeals to obtain and discuss verification that, in determining to proceed with collection, Appeals verified that any applicable law or administrative procedure has been followed. See sec. 6330(c)(1), (3)(A). He complains that he has no copy of the statutory notice and that SO Villaneuava did not provide him with a copy. He questions the validity of the statutory notice because he does not know whether the official signing it had the authority to do so.

SO Villaneuava considered and rejected petitioner's claim that no SNOD had been sent to him. He had before him the statutory notice and concluded that assessment of the unpaid 2011 tax was valid "as proper notice was issued". Petitioner does not claim that he asked SO Villaneuava for a copy of the statutory notice, nor does he claim that, during his CDP hearing, he raised any challenge to the validity of the notice other than his claim, rebutted by SO Villaneuava's verification, that the statutory notice existed and had been sent to him.

In another CDP case, before us on cross motions for summary judgment, involving the taxpayer's claim that the SNOD was not issued by an authorized delegate of the Secretary (where, coincidently, Mr. Banowsky was the IRS official signing the SNOD), we said: "The case law recognizes a 'presumption of official regularity' supporting the proposition that public officers, absent evidence of the contrary, have properly discharged their official duties by following prescribed procedures. Campbell v. Commissioner, T.C. Memo. 2019-127, at *14 (citations omitted). We added: "During the * * * hearing petitioner did not challenge the capacity of the Ogden Service Center to issue the notice of deficiency, and he presented no facts or argument of any kind concerning the issuing officer's authority." We added:

> Absent any argument by petitioner or irregularity on the face of the notice, the SO could rely on the presumption of official regularity to

conclude that the signature on the notice was that of a duly authorized IRS officer. See Perlmutter v. Commissioner, 44 T.C. 382, 399 (1965) (applying the presumption to the authority of an IRS officer to issue a notice of deficiency), aff'd, 373 F.2d 45 (10th Cir. 1967). The SO did not abuse his discretion in verifying the assessment without consulting IRS delegation orders.

The situation here is sufficiently analogous that we conclude that, even without evidence that SO Villaneuava consulted delegation orders, he did not abuse his discretion in verifying that a proper SNOD had been sent and that, as a result, a proper assessment of tax was made.

III. 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 that petitioner's motion for summary judgment is denied. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the taxable year 2011, as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated August 15, 2018, upon which this case is based.

(Signed) James S. Halpern
Judge

Entered: **NOV 25 2019**