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UNITED STATES TAX COURT
WASHINGTON, DC 20217

DEBRA L. ZALK SPITULNIK & CHARLES ALAN SPITULNIK,	)	
Petitioners,	)	
v.	)	Docket No. 21687-18 L.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER AND DECISION

This "collection due process" ("CDP") case is brought by petitioners Debra L. Zalk Spitulnik and Charles Alan Spitulnik, pursuant to 26 U.S.C. section 6330(d), asking this Court to review the determination by the Internal Revenue Service ("IRS") to deny the Spitulniks' proposed Installment Agreement ("IA") for outstanding tax liabilities for 2008, 2009, and 2012. (Doc. 1.) In the Spitulniks' petition they contend that: (1) the IRS Office of Appeals ("IRS Appeals") abused its discretion by failing to consider petitioners' medical expenses when determining to deny the proposed IA (Doc. 1), and (2) the IRS abused its discretion by filing a Notice of Federal Tax Lien ("NFTL") in Montgomery County on October 17, 2017 (see Doc. 6, Ex. 1-R at 11).

With regard to the NFTL, the IRS withdrew the NFTL on November 27, 2017, so we consider the issue resolved. With regard to the IA, the Commissioner has moved for summary judgment pursuant to Rule 121 on the grounds that the Spitulniks were not tax compliant for 2017 and thus the proposed IA could not be approved, irrespective of the Spitulniks' medical expenses or any other circumstances. We discern no "genuine dispute as to any material fact", Rule 121(b), and we will grant the Commissioner's motion.

SERVED Nov 26 2019

Background

The material facts are undisputed and are as follows:

Unpaid liabilities

During the relevant years, Mr. Spitulnik was an attorney and Mrs. Spitulnik was a teacher. The Spitulniks filed their income tax returns (self-reporting their tax liabilities) for 2008, 2009, and 2012; however, the Spitulniks did not fully pay their tax liabilities for those years, and by October 2017, the outstanding, unpaid balances were approximately $58,000 for 2008, $108,000 for 2009, and $1,800 for 2012. (Id. at 12.)

Lien filing for 2008, 2009, and 2012

On October 17, 2017, the IRS filed, in the Office of the Clerk of Montgomery County, Maryland, an NFTL against the Spitulniks for the outstanding income tax liabilities for 2008, 2009, and 2012. (Id. at 12.) On October 26, 2017, the IRS mailed to the Spitulniks a "Notice of Federal Tax Lien Filing and Your Right to a Hearing under IRC 6320". (Id. at 14.)

On November 20, 2017, petitioners timely mailed a Form 12153, "Request for a Collection Due Process Hearing", requesting a CDP Hearing, an IA, a Lien Withdrawal, and Innocent Spouse Relief ("ISR"). (Id. at 21.) (The ISR is being addressed in a separate case before this Court and will not be discussed in this order). The Spitulniks attached to the Form 12153 a letter describing various medical conditions, financial hardships resulting from same, and difficulties they faced in managing their financial obligations. (Id. at 23.) On November 27, 2017, the IRS determined that the Spitulniks "met one or more of the elements" of section 6323(j)" and thus withdrew the NFTL. (Id. at P.17.) Over the next several months, the Spitulniks and IRS Appeals worked to schedule a CDP hearing for the 2008, 2009, and 2012 tax years.

CDP hearing

On August 7, 2018, Appeals Officer ("AO") Erwin sent the Spitulniks a letter that scheduled their CDP hearing (by telephone conference to occur on September 7, 2018) and that explained, among other things, that for AO Erwin to consider an IA, the Spitulniks would need to provide proof that they were current as to their 2017 and 2018 tax obligations; specifically, the Spitulniks needed to

submit $31,486 in estimated payments towards their 2017 tax account--estimated payments because the 2017 return was on extension and not yet filed--and any estimated payments required for 2018. (Id. at 56.)

AO Erwin and the Spitulniks rescheduled the CDP hearing to be held September 21, 2018. On September 19, 2018, AO Erwin received correspondence from the Spitulniks as to their financial situation but no record as to their compliance with the estimated tax payments for 2017 or 2018 as indicated in the August 7 letter. On September 21, 2018, AO Erwin and the Spitulniks held a telephonic CDP hearing during which the Spitulniks informed AO Erwin they submitted a $17,000 estimated payment for 2017 (Doc. 8, p. 5), and AO Erwin notified the Spitulniks that they could not qualify for an IA as to their 2008, 2009, and 2012 liabilities because they had failed to show tax compliance regarding all estimated payments for 2017 (the previously mentioned $31,486) and 2018. (Id. at 40.)

Notice of Determination and Tax Court petition

On October 3, 2018, IRS Appeals issued to the Spitulniks a "Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330". (Doc. 6, Ex. 1-R at 2.) The notice addressed the NFTL and provided as follows:

> **Summary of determination**
> The Appeals Office determined the Notice of Federal Tax Lien was appropriately issued at the time; however, it was subsequently released by the IRS Compliance Department effective November 27, 2017. Please see the enclosed attachment for additional details. (Boldface in original.)

In a memorandum attached to the notice, the IRS addressed its determination to deny the IA as follows:

> The Appeals Officer was unable to finalize terms of an installment agreement because you did not provide proof of payment compliance for 2017 + 2018 to be eligible for a collection alternative in Appeals.
>
> The Appeals Officer emphasized timely filing and paying the 2017 tax return by the extended due date of October 15, 2018 as well as reviewing 2018 payment compliance as outlined in the August 7, 2018 conference hearing correspondence. If additional 2018 estimated payments are

> required, the Appeals Officer recommended making those timely and then contacting the IRS Collection Division directly towards resolution of your balances due.

(Id. at 7.) It seems that the Spitulniks may dispute their noncompliance (underpayment) for 2017 and may contend that after an overpayment for 2018 was applied to satisfy their 2017 liability, they were in compliance. If that is their contention, it is not demonstrated but rather is contradicted by an IRS transcript for 2017 (dated July 31, 2019) that they attached to their opposition. That transcript does indeed show the application of a 2018 overpayment to their 2017 account, but even after that application (effective April 15, 2019) the transcript shows an unpaid balance for 2017 in the amount of $10,689.51.

On November 2, 2018, the Spitulniks timely filed a petition with this Court, seeking review of the IRS's determination to file an NFTL and IRS Appeals' determination to deny the proposed IA. (Doc. 1.) The pleadings were closed on February 4, 2019. On July 18, 2019, the Commissioner filed a motion for summary judgment. (Doc. 6.) On August 2, 2019, the Spitulniks filed a response (Doc. 8), and on August 12, 2019, the Commissioner replied (Doc. 10).

Discussion

I. Summary judgment principles

We may grant summary judgment 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); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). The moving party (here, the Commissioner) bears the burden of showing that there is no genuine dispute as to any material fact, and factual inferences will be viewed in the manner most favorable to the nonmoving party (here, the Spitulniks). Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985). Facts are viewed in the light most favorable to the nonmoving party. See Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

In this case, the material facts are not in dispute. With regard to the NFTL, it is agreed the IRS withdrew the NFTL, and we consider the issue resolved. With regard to the IA, it is agreed that: (1) the Spitulniks proposed an IA for their outstanding tax liabilities for the years 2008, 2009, and 2012, (2) the Spitulniks were not tax compliant for 2017 at that time, and (3) the proposed IA was denied.

II. Collection Due Process principles

When a taxpayer fails to pay any Federal income tax liability after demand, section 6321 imposes a lien in favor of the United States on all the property of the delinquent taxpayer, and section 6323 authorizes the IRS to file notice of that lien. However, the IRS must provide written notice of a tax lien filing to the taxpayer within five business days, and after receiving such a notice the taxpayer may request an administrative hearing, generally referred to as a CDP hearing, before IRS Appeals. Sec. 6320(a)(3)(B), (b)(1). When Appeals issues its determination, the taxpayer may "petition the Tax Court" for review of such determination", pursuant to section 6330(d)(1), as the Spitulniks have done.

The pertinent procedures for the CDP hearing are set forth in section 6330(c) and generally require IRS Appeals to consider four sets of issues. First, the appeals officer must obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met. Sec. 6330(c)(1). We discuss this issue below in part III.

Second, in some circumstances a taxpayer may "raise at the hearing challenges to the existence or amount of the underlying tax liability". Sec. 6330(c)(2)(B). However, the Spitulniks self-reported the liabilities at issue and did not challenge such liabilities at their CDP hearing or in their petition before this Court (Doc. 1), so underlying liability is not properly at issue. (But see part III below.)

Third, the taxpayer may "raise at the hearing any relevant issue relating to the unpaid tax," including offers of collection alternatives such as an IA. Sec. 6330(c)(2)(A). We discuss this issue below in part IV.

Fourth, at the CDP hearing IRS Appeals is to 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." Sec. 6330(c)(3)(C). If this balancing requirement was ever at issue here, it is no longer at issue because the NFTL has been withdrawn and there is no "proposed collection action" pending.

III. Verification

The Spitulniks make three arguments in apparent connection with "verification" under section 6330(c)(1). First, they allege that the IRS violated due process by filing the NFTL. The Commissioner alleges that AO Erwin obtained the requisite verification that applicable laws and administrative procedures were met and that the filing of the NFTL was appropriate. But in either case, the NFTL was withdrawn before IRS Appeals issued its notice of determination, and we consider the issue resolved.

Second, the Spitulniks complain that "the IRS has not independently verified that the amounts stated by Petitioners were correct or, if it has conducted such independent verification it has not provided Petitioners with that information." As we noted above, section 6330(c)(2)(B) provides that a taxpayer may, in some circumstances, "raise ... challenges to the ... amount of the underlying tax liability"; but the statute states that it is the taxpayer who must "raise" this issue. IRS Appeals had no duty to disprove the liabilities that the Spitulniks themselves had reported on their returns, and the Spitulniks did not raise any liability challenge before Appeals or in their petition.

Third, the Spitulniks seem to contend that the facts about their 2017 liability show that they are in compliance as to that year, so that non-compliance could not have been a valid reason for denying their IA. However, for two reasons we think they have not shown a defect in verification: (1) It was on October 3, 2018, that IRS Appeals issued the notice of determination that we review here, whereas the overpayment credit from 2018 to the 2017 liability was made effective April 15, 2019 (the date on which the 2018 return was due) and could not have been made before the 2018 return was filed. Section 6330(c)(1) required IRS Appeals to verify the current facts, not to wait six months to see what might happen in the next year. We cannot fault IRS Appeals' verification for not foreseeing future events. (2) Even after the application of the reported 2018 overpayment, the Spitulniks' 2017 liability had not been fully paid; rather, as late as July 31, 2019, the unpaid balance still exceeded $10,000. By any measure, Appeals correctly verified that the Spitulniks were not in compliance as to 2017.

IV. Collection alternative

When we review IRS Appeals' denial of a collection alternative, such as an IA, we review for an abuse of discretion. That is, we do not substitute our own judgment for that of IRS Appeals and decide de novo whether we would have

recommended entering into the IA; rather, we decide whether IRS Appeals' determination to decline the IA 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).

Here, IRS Appeals declined to enter into an IA for the Spitulniks' 2008, 2009, and 2012 income tax liabilities because the Spitulniks had failed, despite IRS Appeal's request, to come into compliance with their obligation to make estimated tax payments for the then-current years of 2017 (the due date being on extension) and 2018. In so doing, IRS Appeals followed the guidance of the Internal Revenue Manual. (See IRM pt. 5.14.1.4.2(4) ("Taxpayers must be in compliance with all filing and payment requirements prior to approval of installment agreements").

We have frequently held that it is not an abuse of discretion for IRS Appeals to decline to accept an alternative when a taxpayer is not in compliance with current tax obligations. See, e.g., Huntress v. Commissioner, T.C. Memo. 2009-161. In regard to estimated tax payments and proposed IAs, we stated in Friedman v. Commissioner, T.C. Memo. 2015-196, *10-*11 that:

> The decision to reject a collection alternative for taxpayers who are delinquent with their estimated tax payments is not an abuse of discretion. Orum v. Commissioner, 412 F.3d 819, 821 (7th Cir. 2005), aff'g 123 T.C. 1 (2004); see also sec. 6159(b)(4)(B) (providing that the Secretary may alter, modify or terminate an installment agreement if the taxpayer fails "to pay any other tax liability at the time such liability is due"). As explained in Orum, it does no good for taxpayers to use money owed for one year to pay another year's tax liability. Elimination of all of a taxpayer's debts can be accomplished only "if current taxes are paid while old tax debts are retired." Orum v. Commissioner, 412 F.3d at 821.

The IRS's principle of declining IAs proposed by taxpayers who are not currently in compliance with estimated tax payments is not arbitrary, capricious, or without sound basis in fact or law. Nor is it an abuse of discretion for IRS Appeals to deny an in-person hearing (and instead to conduct the hearing by telephone and correspondence) where the taxpayer who proposes an IA is not in compliance with his current obligations. See Stockton v. Commissioner, T.C. Memo. 2009-186.

In the Spitulniks' case they were not in compliance for their current tax obligations, and thus an in-person hearing was denied and the IA was denied. This does not mean the Spitulniks are precluded from achieving compliance with their

current tax obligations and proposing another IA for 2008, 2009, and 2012 (or from proposing an IA for 2008, 2009, 2012, and 2017); however, the denial of the IA in this case was not an abuse of discretion.

It is therefore

ORDERED that the Commissioner's motion for summary judgment is hereby granted. It is further

ORDERED AND DECIDED that the "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330" dated October 3, 2018, issued by respondent's Office of Appeals to petitioners, denying petitioners' proposed installment agreement, is hereby sustained.

(Signed) David Gustafson
Judge

ENTERED NOV 26 2019