UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

GERARD JACKSON & MARY ANNE JACKSON,	)	
Petitioners,	)	
v.	)	Docket No. 3661-18 L.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER AND DECISION

This "collection due process" ("CDP") case is brought by petitioners Gerard and Mary Anne Jackson, pursuant to 26 U.S.C. section 6330(d), asking this Court to review the determination by the Office of Appeals of the Internal Revenue Service ("IRS Appeals") to sustain a notice of Federal tax lien to collect the Jacksons' unpaid income tax for the years 2014 and 2015. The Jacksons contend that IRS Appeals abused its discretion by (a) denying an Installment Agreement on the grounds that the Jacksons did not make required estimated tax payments toward their then-accruing 2017 income tax liability, and (b) failing to engage in the "balanc[ing]" analysis required by section 6330(c)(3)(C). The Commissioner has moved for summary judgment pursuant to Rule 121. We discern no "genuine dispute as to any material fact", Rule 121(b), and we will grant the motion.

Background

Unpaid liabilities

Mr. Jackson is an attorney. By 2017 the Jacksons had outstanding, unpaid balances of income tax and penalties due for the following five years in the following amounts:

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2009	$47,781	(Doc. 7, Ex. E, p. 2)
2011	49,846	(Doc. 7, Ex. E, p. 2)
2012	19,970	(Doc. 7, Ex. E, p. 2)
2014	44,386	(Doc. 7, Ex. B)
2015	44,089	(Doc. 7, Ex. B)

In addition, the Jacksons had failed to make estimated payments for the two subsequent years--2016 and 2017:

For 2016 the Jacksons allege, and we assume, that they timely filed their 2016 return, pursuant to an extension, in October 2017. On that return they self-reported a 2016 liability of $17,781, whereas for that year they had made estimated tax payments of only $500 and had also made a $1,000 payment with the return, which obviously did not cover their reported liability. (Doc. 7, Ex. G.)

By late 2017 the Jacksons estimated (on a Form 433-A, "Collection Information Statement for Wage Earners and Self-Employed Individuals" submitted to IRS Appeals) that their 2017 income liability would be approximately $3,800; but for 2017 the Jacksons never made any estimated tax payments. (Doc. 7, Ex. H, p. 5)

Lien filing for 2014 and 2015

In July 2017 the IRS filed, in the Office of the Clerk of Burlington County, New Jersey, a "Notice of Federal Tax Lien" ("NFTL") against the Jacksons for their outstanding income tax liabilities for 2014 and 2015. (Doc. 7, Ex. A) At the same time the IRS advised the Jacksons of the filing of that NFTL by sending them a "Notice of Federal Tax Lien Filing and Your Right to a Hearing Under I.R.C. § 6320". (Doc. 7, Ex. B)

CDP proceeding

The Jacksons sent to the IRS a Form 12153, "Request for a Collection Due Process Hearing" (which the IRS concedes was timely). (Doc. 7, Ex. C) On that form the Jacksons indicated that they wanted an installment agreement. (The Form 12153 also stated that the Jacksons wanted the lien withdrawn or subordinated (because they said the lien was unnecessary to protect the IRS's interests), but they did not raise this issue in their petition, nor assert it in their

briefing of the motion for summary judgment, and we deem the issue of withdrawal of the lien to have been abandoned.)

On November 15, 2017, Settlement Officer ("SO") Garafola in IRS Appeals sent the Jacksons a letter (Doc. 7, Ex. F) that scheduled their CDP hearing (by telephone conference to occur in December 2017) and that stated, among other things--

> For me to consider alternative collection methods such as an installment agreement * * *, you must provide * * * [p]roof that estimated tax payments are paid in full for the year to date.

SO Garafola and the Jacksons exchanged information and corresponded about the Jacksons' financial situation and the possible terms of an installment agreement. On December 19, 2017, the Jacksons proposed an installment agreement calling for payments of $2,000 per month. (Doc. 7, Ex. K)

However, on December 21, 2017, SO Garafola advised the Jacksons that no installment agreement could be entered into for 2014 and 2015 because the Jacksons had not paid their estimated tax for the current year.

Notice of Determination and Tax Court petition

IRS Appeals issued to the Jacksons a "Notice of Determination Concerning Collection Action under Section 6320 and/or 6330" dated January 23, 2018. (Doc. 7, Ex. M.) The notice sustained the filing of the lien with respect to tax years 2014 and 2015. The notice concluded as follows:

> Summary of determination
> The filing of the notice of federal tax lien is sustained as there were legitimate balances due when the lien was filed and the taxes remain outstanding. All the legal and procedural requirements prior to the filing o[f] the Federal Tax Lien have been met. The decision to file the lien has been sustained. This balances the need for efficient collection of the tax with your concern that the action be no more intrusive than necessary.

The preceding language also appeared in the memorandum attached to the notice, under the caption "Balancing Analysis". The attached memorandum also stated: "[T]he Settlement Officer explained that she could not grant the requested

installment agreement [because] * * * there are also no estimated tax payments for the 2017 tax year."

On February 20, 2018, the Jacksons timely mailed a petition to this Court, seeking our review of IRS Appeals' determination. On November 29, 2018, the Commissioner filed a motion for summary judgment. The Jacksons filed an opposition to the motion, and the Commissioner replied.

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 proving 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 Jacksons. 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. It is agreed that the Jacksons proposed an installment agreement for tax years 2014 and 2015 but did not make payment of their estimated taxes for the then-current year, 2017.

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. After receiving such a notice, the taxpayer may request an administrative hearing before Appeals. Sec. 6320(a)(3)(B), (b)(1). Administrative review is carried out by way of a hearing before IRS Appeals pursuant to section 6330(b) and (c); and, if the taxpayer is dissatisfied with the outcome there, he can file with the Tax Court a petition for review under section 6330(d), as the Jacksons have done.

For the agency-level CDP hearing before IRS Appeals, the pertinent procedures are set forth in section 6330(c). Those procedures 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). The Commissioner's motion shows that SO Garafola obtained the necessary verification, and the Jacksons do not contend otherwise. We therefore do not discuss further the verification requirement.

Second, a taxpayer may contest the existence and amount of the underlying tax liability if he did not have a prior opportunity to dispute the tax liability. Sec. 6330(c)(2)(B). The Jacksons did not dispute their underlying ability before IRS Appeals and make no contention in this case as to the underlying liability.

Third, the taxpayer may "raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy," including challenges to the appropriateness of the collection action and offers of collection alternatives. Sec. 6330(c)(2)(A). As an alternative to collection by levy, the Jacksons proposed an installment agreement, which IRS Appeals declined. We discuss this issue below in part III.

Fourth, at the CDP hearing IRS Appeals is to consider "whether any proposed collection action [here, the filing of the NFTL] 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). We discuss this balancing below in part IV.

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 Jacksons have done.

III. Collection alternative

When we review IRS Appeals' denial of a collection alternative, such as an installment agreement, we review for 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 agreement; rather, we decide whether IRS Appeals' determination to decline the agreement 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, SO Garafola declined to enter into an installment agreement for the Jacksons' 2014 and 2015 income tax liabilities because the Jacksons had failed, despite her request, to come into compliance with their obligation to make estimated tax payments for the then-current year, 2017. In so doing, SO Garafola followed the guidance of the Internal Revenue Manual. See IRM pt. 5.14.1.4.2(4) 5.14.1.4.2(3) (Sept. 19, 2014) ("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 Appeals to decline to accept a collection alternative when a taxpayer is not in compliance with current tax obligations. See, e.g., Huntress v. Commissioner, T.C. Memo. 2009-161. But the Jacksons complain that, by following this rule, SO Garafola failed even to exercise her discretion and thus abused that discretion. If this were correct, then it would be an inherent abuse of discretion for the IRS to establish any general requirements for collection alternatives. One could always argue that an SO's decision based on any such rule would constitute an abuse of discretion because the SO simply followed the rule rather than exercising discretion in deciding whether to agree to the proposed collection alternative by reference to other considerations.

We disagree. As we stated in Friedman v. Commissioner, T.C. Memo. 2015-196, at *10-*11:

> 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 installment agreements proposed by taxpayers who are not even currently in compliance is not arbitrary, capricious, or without sound basis in fact or law. SO Garafola stood on firm ground when she invoked that principle to decline the installment agreement that the Jacksons proposed.

IV. Balancing

As we noted above, at the CDP hearing IRS Appeals is to consider whether the "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). The Jacksons seem to argue that there was a wholesale failure to do this balancing. They state: "The Court is requested to note that it is not reviewing the merits (if any) of SO Garafola's balancing test and conclusion: the administrative record (by which the current appeal is being reviewed) shows that there was no such consideration at all." (Doc. 11 at 4; emphasis in original.) However, as we noted above, SO Garafola's memorandum attached to IRS Appeals' Notice of Determination did include a section entitled "Balancing Analysis", so there was at least a purported balancing, whose merits we might review. But in fact the Jacksons' actual contention appears to be simply that since SO Garafola failed to entertain their installment agreement proposal for 2014 and 2015 (because they had not paid estimated taxes for 2017), she thereby "fail[ed] to undertake the balancing test under Sec. 6330(c)(3)(C) when presented with a specific offer on an installment agreement".

Thus, the Jacksons assume that we first review IRS Appeals' declining of the installment agreement pursuant to section 6330(c)(2)(A)(iii) ("offers of collection alternatives") and then review it again pursuant to section 6330(c)(3)(C) ("balanc[ing]"). But their contention reflects a misunderstanding of the balancing that the statute requires. The statute required IRS Appeals to balance intrusiveness against the need for tax collection not in evaluating the proposed installment agreement but in evaluating the "proposed collection action"--i.e., the filing of the NFTL. Such balancing discerns whether the lien filing is unnecessarily intrusive, not whether denial of an installment agreement is intrusive.

Of the means of collection available to the IRS, a lien is generally less intrusive than a levy. The execution of a levy constitutes the agency's active seizing of the taxpayer's assets, whereas the filing of a lien simply announces the taxpayer's liability and establishes the agency's place in the queue of the taxpayer's creditors. The lien, being more passive, will often be the less intrusive "collection action".

Of course, the filing of a lien might be intrusive in some circumstances, such as where the lien would interfere with the sale of an asset. Such a lien might be perversely intrusive where it kept the taxpayer from selling an asset in order to pay the tax liability. If IRS Appeals failed to balance that intrusiveness against the

need to collect tax, then the taxpayer might plausibly argue that the lien filing was unreasonably intrusive and that IRS Appeals' determination reflected an abuse of discretion that would make us unable to sustain the lien filing.

However, the Jacksons have made no argument that the filing of the notice of lien was intrusive. On the contrary, though they argue that "Tax lien sales would have been unduly intrusive", they evidently acknowledge the propriety of the filing of the notices of lien by asserting that "[t]he existence of the Federal tax lien(s) as filed of record fully protected the Government's interest." (Doc. 11 at 10.) They did not show any reason that the filing of the notice of tax lien was excessively intrusive.

It is therefore

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

ORDERED AND DECIDED that the IRS may proceed with the collection of petitioners' Federal income tax for 2014 and 2015 as described in the "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code" dated January 23, 2018.

(Signed) David Gustafson
Judge

ENTERED: **FEB 01 2019**