

UNITED STATES TAX COURT
WASHINGTON, DC 20217

BI JIAN ZHANG,)	
)	
Petitioner,)	
)	
v.)	Docket No. 4956-19 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER & DECISION

This is a collection due process (“CDP”) case brought pursuant to section 6330(d). Now before us is the Commissioner’s motion for summary judgment (Doc. 7). We originally denied the motion (see Doc. 18) because we perceived factual disputes in the parties’ filings. However, after considering the parties’ pretrial memoranda (Docs. 19-20) and hearing argument on January 13, 2020, we determined to vacate sua sponte our denial and to grant the Commissioner’s motion.

Background

Some of the facts have been agreed to by the parties, in a stipulation (“Stip.”) filed January 15, 2020. For purposes of the Commissioner’s motion, we assume (without finding) additional facts asserted by petitioner Bi Jian Zhang.

Forms 1099 and tax returns

Mr. Zhang owns a C Corporation called “HKE” that operates a restaurant whose customers pay by credit card. The processors of the credit card payments report those payments on Forms 1099K. During 2013, some of the processors mistakenly reported payments as if made to Mr. Zhang, rather than to HKE; but Mr. Zhang properly attributed the payments to HKE, properly reported them on

HKE's corporate income tax return (Form 1120), and properly refrained from reporting them on his personal income tax return (Form 1040).

SNOD

The IRS examined Mr. Zhang's personal return. The IRS noted the absence of credit card payments that had been attributed to him on some of the processors' Forms 1099, and incorrectly concluded that these payments were unreported income of Mr. Zhang. The IRS therefore determined a deficiency in Mr. Zhang's income tax.

On July 29, 2015, the IRS issued to Mr. Zhang a statutory notice of deficiency ("SNOD") pursuant to section 6212(a). (Stip. 8; Ex. 7-R.) However, he asserts (and we assume) that he did not receive it. He therefore could not and did not challenge the SNOD by filing a petition in the Tax Court pursuant to section 6213(a), and the IRS therefore assessed the tax deficiency against him.

Previous levy-based CDP hearing

The IRS sent Mr. Zhang a notice of proposed levy pursuant to section 6330(a) (Ex. 9-J), and in response to it he requested a CDP hearing before the IRS Office of Appeals (Stip. 10; Ex. 10-J). Mr. Zhang asserts, and we assume, that Appeals wrongly concluded that HKE had not filed its 2013 income tax return on Form 1120, and Appeals therefore wrongly rejected his contentions that he did not owe the tax. Mr. Zhang also asserts, and we assume, that Appeals failed to properly schedule a telephone hearing and deprived Mr. Zhang of the opportunity to complete his CDP hearing based on the levy notice. We therefore assume that Appeals abused its discretion in the handling of Mr. Zhang's levy-based CDP hearing.

In March 2018 Appeals issued a notice of determination (Stip. 13; Ex. 13-J) by which it sustained the notice of proposed levy. The notice of determination stated (incorrectly, we assume) that Mr. Zhang was "precluded from raising the liability during this CDP Hearing". Mr. Zhang did not, pursuant to section 6330(d)(1), file a petition in the Tax Court to challenge the levy-based notice of determination.

Lien-based CDP hearing

On July 5, 2018, the IRS issued to Mr. Zhang a Notice of Federal Tax Lien for unpaid taxes related to tax year 2013. (Stip. 2; Ex. 1-J.) Mr. Zhang timely requested a CDP hearing with respect to the lien notice. (Stip. 3, Ex. 2-J.) The lien-based CDP hearing took place on November 13, 2018. (Stip. 4.) At that hearing Mr. Zhang again attempted to challenge his underlying liability for his 2013 taxes, on the grounds that the credit card payments attributed to him in the SNOD were not income to him but rather were income that HKE had properly reported. (Mr. Zhang raised other issues as well; but in the parties' "Stipulation of Certain Settled Issues" filed January 15, 2020, those issues have been settled, and we need not address them further.)

Appeals' "Case Activity Record Print" (Ex. 5-R at "2 of 3") shows Appeals' conclusion that the SNOD had been properly mailed and that Mr. Zhang was precluded from challenging his underlying liability:

The [Appeals] Officer explained that you were precluded from raising the liability because you had 2 prior opportunities to do so. First when you were issued the statutory notice [of deficiency] and second when you were in Appeals regarding the Notice of Intent to Levy.

Notice of determination and petition

On February 12, 2019, Appeals issued a notice of determination sustaining the lien filing. (Stip. 5, Ex. 4-J.) The notice of determination did not address Mr. Zhang's liability challenge.

On March 11, 2019, Mr. Zhang timely filed his petition with this Court.

The Commissioner moved for summary judgment, arguing that the prior "opportunity" provision of section 6330(c)(2)(B) forecloses Mr. Zhang's liability challenge; and Mr. Zhang objected to the motion.

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, Mr. Zhang). Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985).

In this case, the facts as construed most favorably to Mr. Zhang can be stated simply. First, the IRS issued an SNOD that Mr. Zhang did not receive, so he did not file with this Court a petition challenging the SNOD. Second, the IRS then issued to Mr. Zhang a notice of proposed levy, in response to which he requested a CDP hearing. At that levy-based hearing Mr. Zhang challenged his liability, but Appeals did not entertain his challenge; and when Appeals issued its notice of determination sustaining the proposed levy, Mr. Zhang did not file a petition with this Court. Third, the IRS then issued a notice of lien filing, in response to which Mr. Zhang requested his second CDP hearing. At that lien-based hearing Mr. Zhang challenged his liability, but Appeals did not entertain his challenge; and when Appeals issued its notice of determination sustaining the lien filing, Mr. Zhang did file a petition with this Court.

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 that determination, pursuant to section 6330(d)(1), as Mr. Zhang has 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. In light of the parties' stipulation of settled issues, three of these CDP issues are not in dispute here--i.e., (1) 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); (2) the taxpayer may "raise at the hearing any relevant issue relating to the unpaid tax," including offers of collection alternatives, sec. 6330(c)(2)(A); and (3) 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). We do not address these issues further.

The controversy in this case involves the provision that, 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). We now turn to that issue.

III. Mr. Zhang’s liability challenge

A. SNOD as prior “opportunity”

A liability challenge may sometimes be raised in an agency-level CDP hearing (and in the subsequent Tax Court case), pursuant to section 6330(c)(2)(B):

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. [Emphasis added.]

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).

B. Non-receipt of an SNOD

However, even when an SNOD is duly issued and correctly mailed, that SNOD does not preclude the taxpayer from challenging his liability at the CDP hearing if (in the words quoted above) “the person did not receive any statutory notice of deficiency”. Mr. Zhang asserts (and we assume) that he did not receive the SNOD. Consequently, Appeals erred in his first CDP hearing (at which he challenged the levy notice) when it purported to preclude him from challenging his

liability. On these assumed facts, that action by Appeals constituted an abuse of its discretion.

C. Remedy for erroneous preclusion

If, after receiving the March 2018 notice of determination, Mr. Zhang had then filed a petition with this Court challenging that determination, and if the Court had found that he had not in fact received the July 2015 SNOD, then in the Tax Court's CDP case the Court would have entertained his liability challenge, since he had not in fact had a prior opportunity. But he did not file such a petition.

Rather, he waited until he received a second collection notice--this time, a notice of lien filing--and again attempted to challenge the liability at his second CDP hearing.

D. "Otherwise"

By the time of Mr. Zhang's second, lien-based CDP hearing, the situation had changed. It was still true (on the facts we assume) that the July 2015 SNOD did not give him a prior opportunity to challenge his liability. But at the time of the second CDP hearing in November 2018, an additional question presented itself: Apart from the SNOD, had Mr. Zhang "otherwise ha[d] an opportunity to dispute such tax liability"? Appeals correctly noted that he did have another such opportunity—i.e., in the first agency-level CDP hearing "when you were in Appeals regarding the Notice of Intent to Levy" in 2017.

Mr. Zhang disputes this conclusion by pointing to the obvious fact that Appeals declined to hear his liability challenge at the first CDP hearing--but this does not end the analysis. On the assumed facts, Appeals' refusal at the first CDP hearing was an abuse of its discretion. Appeals is not entitled to preclude a liability challenge by someone who did not actually have a prior opportunity. However, the remedy for such an error (i.e., the very remedy that Mr. Zhang now seeks, although belatedly) was to file a Tax Court petition in which he could have challenged Appeals' determination--and in response to which the Tax Court could have corrected Appeals' assumed error (either by a de novo trial of the liability issue or by a remand to Appeals with instructions to consider the liability challenge).

That is, even though Appeals declined to entertain the liability challenge during the levy-based CDP hearing, Appeals' adverse determination (Ex. 13-J) in

March 2018 at the conclusion of that levy-based hearing gave Mr. Zhang an “opportunity to dispute such liability” in the Tax Court. He failed to take advantage of that opportunity, but he did have that opportunity nonetheless.

Consequently, when he later appeared before Appeals for his lien-based CDP hearing in November 2018, Appeals correctly held that his prior levy-based CDP hearing--with its opportunity for Tax Court review--had given him a prior “opportunity” to dispute the liability, and that this prior opportunity precluded a liability challenge at the subsequent lien-based CDP hearing.

If the facts assumed here are correct, then Mr. Zhang’s situation is very sympathetic, and his 2013 liability would apparently be a good candidate for an administrative remedy such as audit reconsideration (over which we have no jurisdiction or oversight). If such a remedy is not promptly forthcoming, then we note that, if Mr. Zhang were to pay the tax in dispute, section 6330(c)(2)(B) would not bar him from filing a timely administrative claim for refund and, if it were denied, timely litigating that refund claim in the U.S. 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). But this Court does not have authority to grant a remedy.

We will therefore grant the Commissioner’s motion for summary judgment.

Mr. Zhang’s oral motion for reconsideration

At the conclusion of oral argument on the Commissioner’s motion for summary judgment, we indicated orally that we would be granting the motion and we scheduled the case for trial. When the case was later called for trial, the parties advised the Court that all the issues that might have been the subject of trial were now resolved in their “Stipulation of Certain Settled Issues”. Petitioner’s counsel asked us to reconsider our indicated decision as to the Commissioner’s motion, and proffered, in support of his request, additional evidence. That evidence consisted of Exhibits 26-P through 50-P. The exhibits were attached to a proposed stipulation that the Commissioner had not signed. Thus, the document is not a stipulation (and petitioner did not assert that it is). However, it is

ORDERED that the Clerk of the Court shall file Mr. Zhang’s document containing Exhibits 26-P through 50-P as exhibits in support of his response (Doc. 11) to the Commissioner’s motion for summary judgment. It is further

ORDERED that our order of November 13, 2019 (Doc. 18), is hereby vacated and set aside. It is further

ORDERED that the Commissioner's motion for summary judgment (Doc. 7) is granted, and that Mr. Zhang's oral motion for reconsideration is denied. It is further

ORDERED AND DECIDED that the determinations set forth in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, issued to petitioner on February 12, 2019, with respect to petitioner's taxable year 2013, upon which this case is based, are sustained.

**(Signed) David Gustafson
Judge**

ENTERED: **JAN 30 2020**