Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided. JRB

UNITED STATES TAX COURT
WASHINGTON, DC 20217

HAROLD M. BEHN,

Petitioner(s),

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. 11337-19 L.

ORDER

This collection due process (CDP) case is before the Court on respondent's Motion for Summary Judgment, filed October 3, 2019, pursuant to Rule 121.[1] Respondent seeks to sustain a Notice of Determination Concerning Collection Actions under IRC Sections 6320 or 6330, dated June 4, 2019 (notice of determination), upholding the filing of a Notice of Intent to Levy and Notice of Your Right to a Hearing issued June 26, 2018 (levy notice). Petitioner's Notice of Objection to Motion for Summary Judgment (petitioner's objection) was filed on January 10, 2020.

Background

The following is based on the parties' pleadings, respondent's motion for summary judgment, including the attached declaration and exhibits, and petitioner's objection. Petitioner resided in California when the petition was timely filed. Petitioner is a retired, disabled veteran of the United States Army who served multiple combat tours in Iraq.

On June 26, 2018, respondent issued a levy notice to petitioner, seeking to collect unpaid income tax liabilities for tax years 2002 through 2006, 2008 through 2012, and 2013 through 2014. Petitioner thereafter timely submitted a Form 12153, Request For a Collection Due Process or Equivalent Hearing for tax years 2002 through 2018. In the CDP hearing request, he expressed interest in an installment agreement and checked "I Cannot Pay Balance." Petitioner stated his belief that five years contained in the levy notice "were eliminated by the Tax Court as

[1]Unless otherwise indicated, subsequent section references are to the Internal Revenue Code (Code) in effect at all relevant times and all Rule references are to the Tax Court Rules of Practice and Procedure. Monetary amounts are rounded to the nearest dollar.

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currently uncollectible for reason of economic hardship."[2] With the Form 12153, petitioner included a Form 433D requesting a direct debit payment plan of $300 per month.

On July 20, 2018, respondent called petitioner and informed him that he was only eligible for a CDP determination for tax year 2014 because for all other tax years requested he had either already received an appeal or the request was untimely. On that date, respondent also issued to petitioner a letter informing him that tax years 2002 through 2006 and 2008 were not eligible for a CDP determination because petitioner had already received an appeal related to those tax periods. Respondent attached to his motion a Form 5402-c dated August 13, 2018, indicating that tax years 2005, 2009, 2011, and 2013 were not eligible for a CDP determination because the CDP request for those years was received more than one year after issuance of a CDP Notice. On August 14, 2018, respondent sent petitioner a letter informing him that respondent had received his CDP request for tax year 2014.

On October 15, 2018, a settlement officer (SO) of the IRS Office of Appeals (Appeals Office) sent petitioner a letter informing him that a telephone conference had been scheduled for November 19, 2018. In the October 15 letter, the SO indicated that in order to consider a collection alternative petitioner would need to provide, among other documents, (1) a completed copy of the Collection Information Statement (Form 433-A), (2) his signed tax returns for the 2012, 2015, and 2017 tax years, (3) proof of estimated tax payments, (4) bank and income statements for April through September 2018, and (4) supporting documents to substantiate his expenses.

The CDP hearing was held via conference call as scheduled on November 19, 2018. Petitioner did not dispute the underlying liability for tax year 2014 during the CDP hearing. The SO reiterated to petitioner that the letter of October 15, 2018, had instructed him to submit any delinquent returns, proof of estimated tax payments, a completed financial statement, and supporting documents by November 5, 2018. The SO noted that petitioner had failed to submit this information. The SO further informed petitioner that in order to qualify for an installment agreement, he needed to file his 2012 tax return and make estimated tax payments for the upcoming tax year. Petitioner provided financial information from 2017 and expressed confusion regarding the necessity to provide current financial information.

During the CDP hearing, the SO conducted a preliminary analysis based on the incomplete information in her possession and determined that petitioner had gross pension income of $4,284 with allowable expenses of $1,770 per month. The SO determined that petitioner could afford payments of $2,514 per month. Petitioner argued that the SO had not taken into consideration the $1,800 per month he pays in spousal support. The SO asserted that this spousal support was not a valid expense for the purposes of the financial analysis because petitioner is not divorced, the spousal support is not court ordered, and petitioner does not claim his spouse on his tax returns. Petitioner attempted to submit a notarized statement indicating that he had made an oath to make spousal support payments for the rest of his life. The SO rejected

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[2]Tax years 2002 through 2006 and 2008 were the subject of a previous Tax Court settlement in which the petitioner agreed to have these tax years placed in currently not collectible status.

the notarized statement suggesting that it did not constitute valid substantiation for spousal support. The SO sustained the levy based on the fact that petitioner was not in compliance with his filing obligations.

On November 20, 2018, petitioner told the SO that he had spoken with the Taxpayer Advocate Service, which advised him that he was entitled to speak with an Appeals manager regarding the determination. On November 21, 2018, the petitioner spoke with the SO's manager. The manager confirmed that the SO would revisit petitioner's expenses including spousal support. Later that day, the SO called petitioner and advised him that she was unable to allow the $1,800 voluntary spousal support payment until she received proof it was a required payment. The SO repeated her request that petitioner provide his current financial information. Petitioner did not do so.

A notice of determination was issued on June 4, 2019. Petitioner timely filed a petition with this Court.

In his objection and various letters, petitioner states that this case stems from the fact that he did not understand that his account was only temporarily on hold as a result of the stipulated decision in Docket No. 17013-11L, when his account was placed in Currently Not Collectible status. Petitioner states that because of the stipulated decision in that case, he thought that he was no longer liable for taxes related to tax years 2002 through 2006 and 2008. Petitioner states that he did not understand that the amount owed for those tax years would continue to grow due to interest and penalties. Tax years 2002 through 2006 and 2008 are not properly before the Court in this case.

Discussion

Summary judgment serves to "expedite litigation and avoid unnecessary and expensive trials." Florida Peach Corp. v . Commissioner, 90 T.C. 678, 681 (1988). This Court may grant summary judgment only if there are no genuine disputes or issues of material fact and the moving party is entitled to judgment as a matter of law. See Rule 121(b); Naftel v. Commissioner, 85 T.C. 527, 528-529 (1985). In deciding whether to grant summary judgment, we view the factual materials and the inferences drawn from them in the light most favorable to the nonmoving party. Id. The party opposing summary judgment must set forth specific facts which show that a question of genuine material fact exists and may not rely merely on allegations or denials in the pleadings. Rule 121(d); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Grant Creek Water Works, Ltd. v. Commissioner, 91 T.C. 322, 325 (1988).

In reviewing the IRS determination in a CDP case, if the validity of the underlying liability is at issue, the Court reviews the IRS' determination de novo. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Petitioner did not challenge his underlying liability during the CDP hearing, and he has not challenged it in his petition. This issue is therefore deemed conceded. See Rule 331(b)(4) ("Any issue not raised in the assignments of error shall be deemed to be conceded."). Where (as here) the underlying liability is not properly at issue, the Court reviews the IRS determination only for abuse of discretion. Goza v. Commissioner, 114 T.C. at 182. Abuse of discretion exists when a determination is 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).

In deciding whether the SO abused her discretion in sustaining the proposed collection action, we consider whether the SO: (1) properly verified that the requirements of any applicable law or administrative procedure had been met, (2) considered any relevant issues petitioner raised, and (3) determined whether the "proposed collection action balances the need for the efficient collection of taxes with the legitimate concern * * * that any collection action be no more intrusive than necessary." Sec. 6330(c)(3).

The record shows that the SO verified that the requirements of applicable law and administrative procedure were met. The SO stated in the notice of determination that she had reviewed petitioner's account transcripts and confirmed that assessments were properly made for each tax period listed on the CDP notice. Petitioner did not allege in his petition that any assessment was improper, and this issue is therefore deemed conceded. See Rule 331(b)(4); Pierson v. Commissioner, 115 T.C. 576, 580 (2000) (deeming conceded issues not raised in the taxpayer's petition).

Section 6159 authorizes the Commissioner to enter into written agreements allowing taxpayer to pay tax installment payments if he deems that the "agreement will facilitate full or partial collection of such liability." The decision to accept or reject installment agreements lies within the discretion of the Commissioner. Thompson v. Commissioner, 140 T.C. 173, 179 (2013); sec. 301.6159-1(a), (c)(1)(i), Proced. & Admin. Regs. This Court gives due deference to the determination that the IRS makes in the exercise of this discretionary authority. See Woodral v. Commissioner, 112 T.C. 19, 23 (1999); Marascalco v. Commissioner, T. C. Memo. 2010-130, aff'd, 420 F. App'x 423 (5th Cir. 2011). We will not substitute our judgment for that of the IRS, recalculate a taxpayer's ability to pay, or independently determine what would have been an acceptable collection alternative. See O'Donnell v. Commissioner, T.C. Memo. 2013-247; see also Murphy v. Commissioner, 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Speltz v. Commissioner, 124 T.C. 165, 179-180 (2005), aff'd, 454 F.3d 782 (8th Cir. 2006). If the Appeals Office followed all statutory and administrative guidelines and provided a reasoned, balanced decision, the Court will not reweigh the equities. Thompson v. Commissioner, 140 T.C. at 179; cf. Gurule v. Commissioner, T.C. Memo. 2015-61 (the Court may consider whether the Appeals officer's decision to reject an installment agreement was the result of a failure to properly consider the taxpayer's financial information in the record).

Among other issues, petitioner argues that the SO abused her discretion by not considering spousal support in calculating petitioner's ability to pay. It is unclear to the Court whether the SO's denial of spousal support based on the fact that it was not court ordered is appropriate. Under California law, a person is not liable for support of the person's spouse when the two are living separately by agreement unless support is stipulated in the agreement. See Cal. Fam. Code sec. 4302; Verdier v. Verdier, 36 Cal. 2d 241, 245 (1950) (where husband and wife are living apart by agreement, to establish husband's failure to provide for her support, it is essential that wife establish a continuing duty to provide support by allegation of an agreement in which such support is stipulated, since performance of agreement discharges husband's duty of support); In re Caldwell's Estate, 67 Cal. App. 2d 652 (1945) (both verbal and written property

settlement agreements between spouses who had separated, providing that each party was released from all demands for any share in the other's earnings or accumulations, but that husband's liability to support wife should not be affected, did not release husband from obligation to support). Petitioner claims to have made a voluntary agreement to support his spouse while living separately. Such a legal obligation would affect the petitioner's expense calculation.

In a CDP case, the Court may remand the case to the Appeals Office when the Court determines that a further hearing would be necessary or productive. Kelby v. Commissioner, 130 T.C. 79, 86 n.4 (2008); Lunsford v. Commissioner, 117 T.C. 183, 189 (2001). "[T]he further hearing is a supplement to the taxpayer's * * * original hearing, not a new hearing." Kelby v. Commissioner, 130 T.C. at 86. After a further hearing, the Commissioner may issue a supplemental notice of determination, which constitutes the position of the Commissioner for purposes of the Court's subsequent review. Id.

Petitioner repeatedly expressed confusion regarding IRS information requests, but was not given an in-person hearing. Petitioner's objection, in which he strongly opposes summary judgment, persuades us that he should be provided an opportunity to present evidence regarding spousal support which should be considered by the Appeals officer. He should also be able to present issues relating to his continuing disabilities and other issues related to his case. For the aforementioned reasons, we conclude that respondent is not entitled to judgment as a matter of law. We further conclude that this matter should be remanded to the Appeals Office for action consistent with this order. See Kelby v. Commissioner, 130 T.C. at 86 n.4; Lunsford v. Commissioner, 117 T.C. at 189. The Court expects that petitioner will fully cooperate with the Appeals Office and promptly provide forms, documents, and other relevant information.

For cause, it is

ORDERED that respondent's Motion for Summary Judgment, filed October 3, 2019, is denied. It is further

ORDERED that this case is hereby remanded to the IRS Appeals Office for the purpose of affording petitioner a further administrative hearing. It is further

ORDERED that the parties shall, on or before September 30, 2020, file with the Court, either jointly or separately, a status report regarding the then present status of this case.

(Signed) Peter J. Panuthos
Special Trial Judge

Dated: Washington, D.C.
April 2, 2020