UNITED STATES TAX COURT
WASHINGTON, DC 20217

DORIS ANN WHITAKER,	)	
	)	
Petitioner,	)	**ALS**
	)	
v.	)	Docket No. 4899-18.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This is an "innocent spouse" case in which petitioner Doris Ann Whitaker seeks relief from joint liability for 2005 income tax, pursuant to section 6015(f). The Commissioner has filed a motion for summary judgment, which Ms. Whitaker has opposed. We will deny the motion without prejudice, and we will direct the parties to make further filings.

Background

Ms. Whitaker has not completed high school. She is employed as a nurse's aid. A federal income tax return was filed for her for 2005, which evidently reported all of her income. The 2005 tax liability attributable to her income was evidently more than satisfied by tax withholding from her wages, and a resulting 2005 overpayment was allowed and was credited against liabilities for previous years. One might suppose that Ms. Whitaker's 2005 liability would not be a live issue.

However, her 2005 return was a joint return that was filed electronically by a return preparer on behalf Ms. Whitaker and her husband. Income attributable to her then-disabled and drug-addicted husband was not reported on the return. Ms. Whitaker apparently knew that his income was not reported, but as the Commissioner explains--

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> Petitioner incorrectly interprets the filing status "married filing jointly" to mean "married filing separately". In other words, Petitioner believes that by filing a joint tax return, she was only filing a return for herself and that Husband had an obligation to file a separate tax return. Thus, as Petitioner understands, she is not responsible for any deficiency in tax attributable to Husband.

Not sharing Ms. Whitaker's misunderstanding about the nature of a joint return, the IRS determined that the husband had not reported his 2005 income and determined a joint income tax deficiency of $2,213--i.e., owed by both spouses. That liability was assessed in 2008 and has been dogging Ms. Whitaker ever since. With additions to tax and interest, the liability had grown to $3,739.67 as of January 2020.

Ms. Whitaker applied with the IRS for relief under section 6015 by submitting Form 8857, "Request for Innocent Spouse Relief". (Doc. 28 at 10.) Using its sensible grid of criteria (see Rev. Proc. 2013-24), the IRS determined, in a "Final Determination" (Doc. 1, attachment), that Ms. Whitaker is not entitled to relief under section 6015. Ms. Whitaker then filed her petition, asking this Court to review that determination pursuant to section 6015(e)(1).

After her case was continued on two occasions, Ms. Whitaker failed to respond to a request for admissions (Doc. 19) and failed to respond to the Commissioner's motion to dismiss the case for failure to prosecute (Doc. 23) and our order to show cause (Doc. 22), which we made absolute (see Doc. 24). Nonetheless, Ms. Whitaker requested another continuance on account of health problems. With the Court's encouragement, counsel for the Commissioner stated that the case is susceptible of being resolved by summary judgment, and we ordered a schedule for the filing and briefing of that motion. The Commissioner filed a motion for summary judgment that argues that "there remains no genuine issue of material fact for trial".

Discussion

I. Joint return principles

Section 6013(a) provides: "A husband and wife may make a single return jointly of income taxes". When they do, "the tax shall be computed on the

aggregate income and the liability with respect to the tax shall be joint and several". Sec. 6013(d)(3).

However, section 6015 describes circumstances in which one spouse may be relieved from that joint liability. Section 6015(f)(1) provides: that if, "taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency * * *, the Secretary may relieve such individual of such liability". If the Secretary denies relief, then "the individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual". Sec. 6015(e)(1)(A).

II. "All the facts and circumstances"

As we noted, the IRS makes its "innocent spouse" determinations in accordance with factors set out in a Revenue Procedure. The Tax Court "consults those same factors when reviewing the IRS's denial of relief", Pullins v. Commissioner, 136 T.C. 432, 439 (2011), "but is not bound by them", Sriram v. Commissioner, T.C. Memo. 2012-91, at *10. In this instance, Ms. Whitaker's misunderstanding about the nature of the joint return is one of "all the facts and circumstances" to which the statute refers. She apparently knew that her husband had income, but she did not know that she was filing a return of the sort that must report his income. Her education and resources may have contributed to that misunderstanding.

This fact may not fit tidily into any one of the factors in the Revenue Procedure, but it informs our judgment about what is equitable in this case. We would therefore take this fact into account, and we ask the parties to do so in their further filings in this case. For present purposes, this factor is sufficient to prompt us to hold, contrary to the Commissioner's assertion in his motion, that there is a genuine issue of material fact that prompts denial of his motion.

III. Record review

However, when we set up the schedule for summary judgment in our order of January 2, 2020 (Doc. 26), we did not have in mind the relatively recent amendment reflected in section 6015(e)(7). Prior to that amendment, we would have expected that, if we discern a disputed issue of fact in a motion for summary judgment, we would then deny the motion and hold a trial at which we would decide that disputed issue of fact. But now section 6015(e)(7) directs that the Secretary's "determination made under this section shall be reviewed de novo by

the Tax Court and shall be based upon-- (A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence." This might mean that we already have before us in the current record all of the evidence that we should review to decide the case--but we do not know that. The Commissioner's declaration (Doc. 28) does not state whether the documents it contains are the full administrative record.

This new "record rule" might also mean that, in this section 6015(f) context, we should decide motions under Rule 121 without applying typical summary judgment standards--i.e., that if we find disputed issues of fact, then we decide them. Cf. Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan, 671 F. Supp. 2d 88, 97 (D.D.C. 2009).

However, only one party (the Commissioner) filed a motion. We have the discretion to construe an opposition to a summary judgment motion as a cross-motion for summary judgment, but only where "the court provides adequate notice to the parties and adequate opportunity to respond to the court's motion", 11 James Wm. Moore et al., Moore's Federal Practice ¶ 56.10[4][a][I] (3d ed. 1997), and here we gave the Commissioner no such notice that we would treat Ms. Whitaker's opposition as a cross-motion.

It is therefore

ORDERED that the Commissioner's motion for summary judgment is denied without prejudice. It is further

ORDERED that, no later than June 19, 2020, the parties shall communicate with a view toward exhausting all possibilities of settling this case. We hope that some of what we have stated in this order may be helpful to that end. If by that date the parties are not able to submit a stipulation for entry of decision, then it is further

ORDERED that, no later than July 17, 2020, the Commissioner shall file (1) a certified administrative record and (2) a motion for summary judgment based thereon. It is further

ORDERED that, no later than August 14, 2020, Ms. Whitaker shall file (1) any objections she has to the administrative record that the Commissioner has filed, and (2) a response to his motion and a cross-motion for summary judgment. It is further

ORDERED that, no later than September 4, 2020, the Commissioner shall file a response and reply. It is further

ORDERED that, no later than September 25, 2020, Ms. Whitaker shall file a reply. It is further

ORDERED that the Clerk of the Court shall serve on Ms. Whitaker, with this order, a copy of the "clinic letter", most recently sent to her on November 22, 2019, that gives contact information for the tax clinics that may be able to help Ms. Whitaker in her handling of this case. We recommend to Ms. Whitaker that she consider asking one of the clinics for its assistance. If the parties believe that a conference among the parties and the Court would be helpful, they may initiate it by placing a call to the Chambers Administrator of the undersigned judge (202-521-0850) and leaving a message.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
May 15, 2020