UNITED STATES TAX COURT
WASHINGTON, DC 20217

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MARC S. BARNES & ANNE M. BARNES,	)
	)
Petitioner(s),	)
	)
v.	) Docket No. 6330-19 L.
	)
COMMISSIONER OF INTERNAL REVENUE,	)
	)
Respondent	)

O R D E R

In this collection due process (CDP) case, petitioners seek review pursuant to I.R.C. §§ 6320(c) and 6330(d)(1) of the determination by the Internal Revenue Service (IRS or respondent) to uphold the filing of a notice of Federal tax lien (NFTL). Respondent has moved for summary judgment under Tax Court Rule 121, contending that there are no disputed issues of material fact and that his determination to sustain the collection action was proper as a matter of law. Petitioners filed a timely response objecting to the granting of the motion and contending that petitioners' liability for 2003, the tax year remaining in question, was discharged in bankruptcy. We will ask petitioners to supplement their response and ask respondent to file a reply.

On June 3, 2008, the IRS issued petitioners a notice of deficiency for 2003 and they timely petitioned this Court. Proceedings in this Court were temporarily stayed when petitioners filed for Chapter 11 bankruptcy. The IRS participated in petitioners' bankruptcy but did not file a proof of claim for the 2003 taxable year.

Following the Bankruptcy Court's confirmation of a plan of reorganization the stay was lifted. On March 21, 2012, the Court issued its Opinion (T.C. Memo. 2012-80) finding petitioners liable for a deficiency, additions to tax, and an accuracy-related penalty for 2003. On August 1, 2012, the IRS assessed the 2003 liability. Petitioners did not pay the liability upon notice and demand for payment.

In an effort to collect this liability the IRS filed an NFTL and on November 28, 2017, sent petitioners a timely Notice of Federal Tax Lien Filing and Your

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Right to a Hearing. Petitioners timely requested a CDP hearing and their case was assigned to a settlement officer (SO) with the IRS Office of Appeals. During the hearing petitioners contended (among other things) that the 2003 liability had been discharged in bankruptcy. The SO concluded that the bankruptcy did not include the 2003 tax year because petitioners' 2003 liability was not determined by this Court, or assessed by the IRS, until after the Bankruptcy Court had confirmed the plan of reorganization. After rejecting petitioners' request for collection alternatives the SO closed the case and on March 13, 2019, issued a notice of determination sustaining the NFTL filing with respect to the 2003 tax year. Petitioners timely petitioned the Court for redetermination.

On February 12, 2020, respondent filed a motion for summary judgment. On July 12, 2020, petitioners filed a response in which they represent that the Bankruptcy Court held a hearing on June 4, 2019, to consider their motion for entry of a discharge in bankruptcy, to which they believed themselves entitled because they had made all payments called for by the reorganization plan. The Bankruptcy Court entered an order of discharge four days later.

Petitioners represent that, during the June 4, 2019, hearing, they asked the Bankruptcy Court to consider: (1) whether their 2003 liability was discharged in the bankruptcy proceeding, even though the liability had not yet been assessed; and (2) whether an injunction issued by the Bankruptcy Court bars the IRS from attempting to collect that liability. Petitioners represent that the Bankruptcy Court currently has these two questions under advisement. They ask that we defer ruling on respondent's motion until the Bankruptcy Court has addressed those questions.

Where the validity of the taxpayer's underlying tax liability is properly at issue, we review the IRS' determination de novo. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Where the taxpayer's underlying liability is not before us, we review the IRS' decision for abuse of discretion only. See id. at 182. A taxpayer may dispute his underlying liability in a CDP case if he did not receive a valid notice of deficiency or otherwise have a prior opportunity to contest his liability. I.R.C. § 6330(c)(2)(B).

Petitioners are precluded from disputing the amount of their underlying tax liability for 2003 because they received a notice of deficiency and litigated their liability (unsuccessfully) in this Court. See I.R.C. § 6330(c)(2)(B). However, if the SO's determination was based on an erroneous view of the law and petitioners' liability for 2003 was "discharged in bankruptcy, then we must reject respondent's

views and find that there was an abuse of discretion." <u>Swanson v. Commissioner,</u> 121 T.C. 111, 119 (2003).

Petitioners allege a dispute of material fact as to whether their 2003 liability was discharged in bankruptcy and/or whether an injunction issued by the Bankruptcy Court bars further IRS collection activity for that year. Petitioners represent that they have asked the Bankruptcy Court for a ruling on these questions, but they have not produced any motion, court filing, transcript of proceedings, or other document that corroborates their representation. We will ask petitioners to supply documents that shed light on the questions (if any) currently being considered by the Bankruptcy Court. After they have supplied that information, we will ask respondent to file a reply to petitioners' response, expressing his view as to whether (among other things) it is necessary or desirable to stay further proceedings in this case until the Bankruptcy Court has addressed these questions.

In consideration of the foregoing, it is

ORDERED that petitioners shall submit, on or before August, 17, 2020, a status report accompanied by a declaration to which shall be attached any documents that shed light on the questions (if any) currently being considered by the Bankruptcy Court that may affect collection of petitioners' 2003 tax liability. It is further

ORDERED that respondent shall file, on or before August 31, 2020, a reply to petitioners' Opposition to Motion for Summary Judgment, filed July 12, 2020.

(Signed) Albert G. Lauber
Judge

Dated: Washington, D.C.
      July 21, 2020