

UNITED STATES TAX COURT
WASHINGTON, DC 20217

MICHAEL J. HOGAN,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 11229-15.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

On June 2, 2016, respondent filed a Motion for Partial Summary Judgment pursuant to Rule 121.¹ On August 16, 2016, petitioner filed a Response to Motion for Partial Summary Judgment in which he asserts that he objects to the granting of this motion.

A. Background

The record establishes and/or the parties do not dispute the following background information.

1. Petitioner’s Tax Returns and Criminal Case

Petitioner, who is pro se, resided in Florida when he filed his petition. The subject matter of this case relates to petitioner’s 1994 and 1995 tax years.

Petitioner did not timely file a Federal income tax return for 1994, nor did he request an extension of time to file. Petitioner’s 1994 Federal income tax return was due April 17, 1995. Petitioner prepared a 1994 Form 1040, U.S. Individual Income Tax Return, signed and dated on September 1, 1997, reporting only \$443 in taxable interest income, \$60 in dividend income, and \$3,999 in capital gain, resulting in \$0 tax due. The Internal Revenue Service (IRS or respondent) received petitioner’s 1994 return on September 2, 1997.

¹Rule references are to the Tax Court Rules of Practice and Procedure, and section references are to the Internal Revenue Code, as amended.

Petitioner also did not timely file a Federal income tax return for 1995, nor did he request an extension of time to file. Petitioner's 1995 Federal income tax return was due April 15, 1996.² Petitioner prepared a 1995 Form 1040, also signed and dated on September 1, 1997, reporting \$60 in dividend income, resulting in \$0 tax due. The IRS also received petitioner's 1995 return on September 2, 1997.

On April 15, 1998, a grand jury in the U.S. District Court for the Southern District of Ohio charged petitioner with ten criminal counts including: (1) one count of conspiring to "defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful Government functions of the Internal Revenue Service in the ascertainment, computation, assessment, and collection of the revenue" in violation of 18 U.S.C. section 371 and (2) one count of tax evasion for tax year 1995 in violation of section 7201. According to the indictment, petitioner utilized corporations he owned to conceal the receipt of taxable income and also failed to timely file Federal income tax returns for years including 1994 and 1995. On September 1, 1999, petitioner entered into a plea agreement in the U.S. District Court for the Southern District of Ohio, pleading guilty to the two counts discussed supra. The plea agreement required that petitioner file "accurate amended personal and corporate returns (as necessary) for calendar years 1990 through 1998" and also that he pay "all taxes, penalties, and interest owed with respect to those returns."

As a result of the plea agreement, petitioner prepared and filed amended Federal income tax returns for 1994 and 1995.³ Petitioner prepared a 1994 Form 1040X, Amended U.S. Individual Income Tax Return, signed and dated June 21, 2001. Petitioner reported an increase in taxable income of \$199,435, a total tax liability of \$61,459, estimated tax payments of \$71,429, and an overpayment of \$9,970, to be carried forward to 1995. The IRS received petitioner's 1994 Form 1040X on July 3, 2001.

Petitioner prepared a 1995 Form 1040X, signed and dated September 10, 2001, reporting an increase to his taxable income of \$505,516, a total tax liability of \$178,776, the prior year overpayment from 1994 of \$9,970, and tax due of \$168,806. Petitioner did not remit payment with the 1995 Form 1040X. The IRS received petitioner's 1995 Form 1040 X on September 13, 2001.

²See sec. 6702(a).

³For the explanation as to why he was reporting a change in income in each year in issue, petitioner wrote that the "IRS determined" that he should report income from the corporation of which he was a sole shareholder.

2. Prior Cases Before the Court

The IRS issued a notice of deficiency for income tax deficiencies, additions to tax, and penalties for petitioner's 1989 through 1996 tax years. In response to the notice of deficiency, petitioner filed a petition on December 1, 2003, in Docket number 20796-03. On June 7, 2005, the parties entered a stipulated decision. In the stipulated decision petitioner agreed that he was liable for the following:

<u>Year</u>	<u>Deficiency</u>	<u>Addition to tax sec. 6651(a)(1)</u>	<u>Fraud penalty sec. 6663(a)</u>
1994	\$64,977	\$16,244	\$50,574
1995	---	---	105,560

The IRS issued a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (notice of determination) dated July 31, 2006, sustaining a proposed levy against petitioner for tax years including 1994 and 1995. On July 31, 2006, petitioner filed a petition, in Docket number 14581-06 L, requesting review of respondent's decision to proceed with the levy. On December 31, 2008, the parties filed a Stipulation of Settled Issues (stipulation), agreeing to a number of issues, including that petitioner was liable for tax liabilities, penalties, and interest (calculated through November 15, 2008) totaling \$258,864 and \$324,105 for tax years 1994 and 1995, respectively. The stipulation also stated that petitioner was not precluded from seeking an interest abatement claim under section 6404(e) for tax years 1994 and 1995.

3. Interest Abatement Request

Petitioner sent a Form 843, Claim for Refund and Request for Abatement, signed and dated October 26, 2012, requesting abatement of interest under section 6404(e) for interest totaling \$521,223 for tax years 1994 and 1995. Petitioner attached to his Form 843 a statement in which he asserted that the IRS had caused a number of delays, including that he had filed his 1994 and 1995 Forms 1040 in 1997 and that "they were put in a drawer by IRS/CID agent Ted Bomersshine. Said returns were not filed by the IRS and processed until August 13, 2001." Petitioner did not assert any delays by the IRS prior to 1997, nor did he provide an explanation as to why he did not file his 1994 and 1995 returns until 1997. The IRS received petitioner's Form 843 on November 1, 2012.

By letter dated November 14, 2013, the IRS made an initial determination to deny petitioner's interest abatement request. Petitioner requested reconsideration of the initial determination by the IRS Office of Appeals (Appeals Office). The Appeals Office sent a Full Disallowance-Final Determination (final determination), dated October 28, 2014, disallowing petitioner's request for interest abatement for the following periods: (1) April 17, 1995, through

October 22, 2014, for tax year 1994 and (2) April 15, 1996, through October 22, 2014, for tax year 1995.

4. Petition and Motion For Partial Summary Judgment

In response to the final determination petitioner submitted a Petition For Review of Failure to Abate Interest Under Code Section 6404, dated April 25, 2014, which was filed by the Court on May 1, 2014. Petitioner requested review of the Appeals Office's denial of his request for interest abatement, asserting that the IRS had caused numerous delays in the resolution of his 1994 and 1995 tax matters, beginning when his returns were filed on September 2, 1997.

On June 2, 2016, respondent filed the motion for partial summary judgment. Respondent asserts that petitioner is not entitled to interest abatement for the following periods: (1) April 17, 1995, through September 2, 1997, for tax year 1994 and (2) April 15, 1996, through September 2, 1997, for tax year 1995.

In his response to this motion, petitioner filed an objection asserting that respondent's motion is a "distraction and diversion from this primary issue" and that "the original tax returns filed 9/2/1997 * * * had no taxable income, and thus no interest assessed. Any taxable income for my business was reported on the Corporate Form 1120 filed on 9/2/1997 for the appropriate years. It was only after the amended returns filed 7/2/2001, which merged my personal and business activity, included the business income and expenses, that there was any taxable income and corresponding interest assessed."

B. Discussion

Summary judgment serves to "expedite litigation and avoid unnecessary and expensive trials." Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Either party may move for summary judgment upon all or any part of the legal issues in controversy. Rule 121(a). Where the moving party properly makes and supports a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of such party's pleading" but must set forth specific facts, by affidavit or otherwise, showing that there is a genuine dispute of any material fact. Rule 121(d); see also Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

Respondent, as the moving party, bears the burden of proving that no genuine dispute exists as to any material fact and that respondent is entitled to judgment as a matter of law. See FPL Group, Inc. v. Commissioner, 115 T.C. 554, 559 (2000). In deciding whether to grant summary judgment, the factual materials and inferences drawn from them must be considered in the light most favorable to the nonmoving party. See id.

Under section 6404(e)(1) the Commissioner may abate the assessment of interest on any deficiency to the extent that any error or delay in payment is attributable to an officer or employee of the Internal Revenue Service's (IRS) being erroneous or dilatory in performing ministerial act.⁴ For purposes of section 6404(e)(1) "an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved".⁵ If the IRS declines a taxpayer's request to abate interest, section 6404(h) vests the Court with jurisdiction to determine whether the Secretary's failure to abate interest was an abuse of discretion, and to order an abatement if the taxpayer meets certain requirements not relevant in this case.

To prevail under section 6404(e), the taxpayer must: (1) identify an error or delay by the IRS in performing a ministerial act; (2) establish a correlation between the error or delay by the IRS and a specific period for which interest should be abated; and (3) show that he or she would have paid the tax liability earlier but for the error or delay. See Paneque v. Commissioner, T.C. Memo. 2013-48; Hancock v. Commissioner, T.C. Memo. 2012-31. If these factors are present, the taxpayer must also show that, in denying the taxpayer's interest abatement request, the Secretary abused his discretion, i.e., exercised his discretion arbitrarily, capriciously, or without sound basis in fact or law. Sec. 6404(h)(1); Lee v. Commissioner, 113 T.C. at 149; see Woodral v. Commissioner, 112 T.C. 19, 23 (1999).

A ministerial act is a procedural or mechanical act that does not involve the exercise of judgment or discretion by the Commissioner. Sec. 301.6404-2(b)(2), *Proced. & Admin. Regs.* A ministerial act does not include "[a] decision concerning the proper application of federal tax law (or other federal or state law)". Sec. 301.6404-2(b), *Proced. & Admin. Regs.*

⁴Sec. 6404(e)(1) applies to interest accruing with respect to deficiencies or payments for taxable years beginning after December 31, 1978. Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 1563(b), 100 Stat. at 2762. In 1996 Congress amended sec. 6404(e)(1)(A) and (B) to refer to "unreasonable" errors or delays in performing ministerial or managerial acts. Taxpayer Bill of Rights 2 (TBOR 2), Pb. L. No. 104-168, sec. 301(a), 110 Stat. at 1457. The amendments apply to interest accruing on deficiencies or payments for taxable years beginning after July 30, 1996. See *id.* sec. 301(c). For taxable years beginning on or before July 30, 1996, the Secretary may abate an assessment of interest under sec. 6404(e)(1) only when it is attributable to an error or delay by an officer or employee in performing a ministerial act. See *id.*; see also Hinck v. United States, 550 U.S. 501, 505 n. 1 (2007); Yeomans v. Commissioner, T.C. Memo. 2009-216, 2009 WL 2972865, at *8 n. 2. Because this case involves interest accruing with respect to deficiencies for petitioner's 1994 and 1995 tax years, sec. 6406(e)(1) applies prior to the amendment by TBOR 2.

⁵We note that interest abatement is permitted only 'where failure to abate interest would be widely perceived as grossly unfair'. See, e.g., Krugman v. Commissioner, 112 T.C. 230, 238-239 (1999) (quoting H.R. Rept. No. 99-426, at 844 (1985), 1986-3 C.B. (Vol. 2) 1, 844, and S. Rept. No. 99-313, at 208 (1986), 1986-3 C.B. (Vol. 3) 1, 208).

Petitioner has not set forth any specific facts, by affidavit or otherwise, showing that there is a genuine dispute of a material fact. Petitioner has not disputed that he did not file his 1994 and 1995 Federal income tax returns until September 2, 1997. Petitioner has not asserted nor provided evidence that respondent contacted him in writing about either of the years in issue prior to September 2, 1997. Petitioner also has not asserted nor provided evidence of any ministerial act prior to September 2, 1997. All of petitioner's assertions regarding delays caused by respondent relate to events occurring after he filed his delinquent returns on September 2, 1997. Thus, petitioner has not identified an error or delay by respondent in performing a ministerial act and he is not entitled to interest abatement for the time period in issue. See sec. 6404(e)(1); Paneque v. Commissioner, T.C. Memo. 2013-48; Hancock v. Commissioner, T.C. Memo. 2012-31; sec. 301.6404-2(b), Proced. & Admin. Regs. Thus, we conclude that respondent is entitled to judgment as a matter of law. See Rule 121(d); Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

Upon due consideration and for cause, it is

ORDERED that respondent's Motion for Partial Summary Judgment, filed June 2, 2016, is granted. Petitioner is not entitled to interest abatement for the following periods: (1) April 17, 1995, through September 2, 1997, for tax year 1994 and (2) April 15, 1996, through September 2, 1997, for tax year 1995.

(Signed) Peter J. Panuthos
Special Trial Judge

Dated: Washington, D.C.
March 16, 2017