UNITED STATES TAX COURT
WASHINGTON, DC 20217

DAVID BRUCE BOYETT & ROXANNE JOYCE BOYETT,	)	
Petitioners,	)	
v.	)	Docket No. 21630-17 L.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER AND DECISION

This collection review case is before the Court on respondent's Motion for Summary Judgment, filed February 6, 2018. Respondent seeks to sustain a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated September 8, 2017, upholding a proposed levy action for the taxable year 2015.[1] Although the Court directed petitioners to file a Response to respondent's motion, they failed to do so.

I. Background[2]

Petitioners timely filed a Federal income tax return for the 2015 tax year but failed to pay the balance due. Respondent assessed the reported tax liability, as well as related statutory additions, and sent to petitioners a notice of balance due. Petitioners failed to remit payment.

On March 20, 2017, respondent issued to petitioners a Notice CP90, Intent to seize your assets and notice of your right to a hearing, for the unpaid 2015 liabilities, then aggregating $13,187.77. Petitioners (through their authorized representative) timely submitted to the IRS Office of Appeals (Appeals Office) a Form 12153, Request for a Collection Due Process or Equivalent Hearing, in which they disputed the proposed levy action and expressed interest in a collection alternative in the form of an installment agreement, selected the box for "I Cannot Pay Balance", and indicated that a levy would cause a severe financial hardship.

The Appeals Office sent to petitioners a letter dated July 11, 2017, scheduling a telephone hearing for August 22, 2017, and, to the extent that petitioners wished to present a collection

[1]Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended, and Rule references are to the Tax Court Rules of Practice and Procedure.

[2]The record establishes and/or the parties do not dispute the following background facts.

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alternative, requesting financial information including Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, with supporting attachments documenting income, expenses, assets, etc. For an installment agreement, the letter also asked petitioners to indicate the amount that they were proposing and the date that they wished to make payments each month. The letter requested that such items be provided on or before August 15, 2017.

On August 22, 2017, petitioners' representative participated in an Appeals Office administrative hearing. Petitioners, however, had not submitted a Form 433-A or any other financial information. Nonetheless, during the hearing, petitioners' representative continued to voice interest in an installment agreement. The Settlement Officer (SO) assigned to the case explained that because the financial information had not been provided, an installment agreement could not be considered at that time. The SO further advised that a notice of determination would be issued, but the representative was also advised how petitioners could contact the IRS Compliance division if they wished to pursue alternative arrangements in the future.

On September 8, 2017, respondent issued to petitioners the aforementioned notice of determination sustaining the proposed levy action for 2015. Petitioners subsequently filed the petition commencing this case expressing disagreement with the notice of determination and asserting that they had repeatedly submitted the required documentation and that the proposed levy would create a financial hardship.

II. Discussion

Summary judgment serves to "expedite litigation and avoid unnecessary and expensive trials." Florida 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). The Court may grant summary judgment only if there are no genuine disputes or issues of material fact. Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

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

Under Rule 121(d), if an adverse party does not respond to a motion for summary judgment, then this Court may enter a decision where appropriate against that party. Petitioners have not responded to the motion for summary judgment. The Court could grant respondent's motion on that ground alone. In any event, as discussed below, the record in this matter shows that respondent is entitled to summary judgment on the merits of the case.

Section 6331(a) authorizes the Secretary to levy upon property and property rights of a taxpayer liable for taxes who fails to pay those taxes within 10 days after a notice and demand for payment is made. Section 6331(d) provides that the levy authorized in section 6331(a) may be made with respect to "unpaid tax" only if the Secretary has given written notice to the taxpayer 30 days before the levy. Section 6330(a) requires the Secretary to send a written notice to the taxpayer of the amount of the unpaid tax and of the taxpayer's right to an administrative hearing at least 30 days before the levy is begun.

The administrative hearing under section 6330 is conducted by the Appeals Office, which is charged with verifying that the requirements of any applicable law or administrative procedure have been met. Sec. 6330(c)(1), (3)(A). The taxpayer may raise at the hearing "any relevant issue relating to the unpaid tax or the proposed levy". Sec. 6330(c)(2)(A), (3)(B). The taxpayer may also raise challenges to the existence or amount of the underlying tax liability at a hearing if the taxpayer did not receive a statutory notice of deficiency with respect to the underlying tax liability or did not otherwise have an opportunity to dispute that liability. Sec. 6330(c)(2)(B); see Montgomery v. Commissioner, 122 T.C. 1 (2004). The Appeals Office must balance the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. Sec. 6330(c)(3)(C).

This Court has jurisdiction under section 6330 to review the Commissioner's administrative determinations. Sec. 6330(d). Where the underlying tax liability is properly at issue, the Court reviews the determination de novo. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Where the underlying tax liability is not at issue, as is the case here, the Court reviews the determination for abuse of discretion. Id. at 182. Whether an abuse of discretion has occurred depends upon whether the exercise of discretion is without reasonable basis in fact or law. Freije v. Commissioner, 125 T.C. 14, 23 (2005).

Petitioners' initial hearing request indicated that they were interested in negotiating an installment agreement and that they were unable to pay the balance, which can signal a need for currently not collectible status. Financial hardship was also mentioned.

Both installment agreements and offers in compromise are forms of collection alternatives. As a prerequisite for consideration or approval by the IRS of such types of collection alternatives, or of the administrative relief afforded by currently not collectible status, it is generally incumbent upon the taxpayer to provide requested financial information to permit evaluation of ability to pay. See secs. 6159, 7122; Kindred v. Commissioner, 454 F.3d 688, 697 (7th Cir. 2006); Olsen v. United States, 414 F.3d 144, 151 (1st Cir. 2005). Similarly, IRS guidelines with respect to collection alternatives direct that the taxpayer must be in current compliance with filing and estimated payment obligations. E.g., McLaine v. Commissioner, 138 T.C. 228, 243 (2012); Giamelli v. Commissioner, 129 T.C. 107, 115-116 (2007). Moreover, it is not an abuse of discretion for the Appeals Office to decline to consider an installment agreement or offer in compromise where no specific collection alternative proposal is ever placed before the reviewing officer. See, e.g., Kindred v. Commissioner, 454 F.3d at 696; Kendricks v. Commissioner, 124 T.C. 69, 79 (2005).

The record reflects that petitioners and their representative failed to submit the financial information that the Appeals Office needed to evaluate their eligibility for a collection alternative. Although petitioners claim in their petition to have submitted documentation, there is nothing in the record to support that statement, and they failed to respond to the motion for summary judgment. Conversely, it is clear that the SO provided ample warning, instruction, and opportunity for petitioners and their representative to remedy the situation, so as to satisfy the conditions and open the door for collection alternatives. Caselaw highlights the lack of abuse of discretion in analogous scenarios. See, e.g., Murphy v. Commissioner, 125 T.C. 301, 315 ("An appeals officer does not abuse her discretion when she fails to take into account information that she requested and that was not provided in a reasonable time."); Dinino v. Commissioner, T.C. Memo. 2009-284 (noting consistency with IRS guidelines stating that, for purposes of good case management, no more than 14 days should be allowed for submission of financial information); Gazi v. Commissioner, T.C. Memo. 2007-342 ("There is no requirement that the Commissioner wait a certain amount of time before making a determination as to a proposed levy."); see also sec. 301.6330-1(e)(3), Q & A–E9, Proced. & Admin. Regs.

The Court is satisfied that the Appeals Office properly verified that the requirements of all applicable laws and administrative procedures have been met and balanced the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. In sum, the Appeals Office did not abuse its discretion in this case.

Upon due consideration and for cause, it is

ORDERED that respondent's Motion for Summary Judgment, filed February 6, 2018, is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action for the taxable year 2015, as determined in the notice of determination, dated September 8, 2017, upon which this case is based.

(Signed) Daniel A. Guy, Jr.
Special Trial Judge

ENTERED: **APR 12 2018**