UNITED STATES TAX COURT
WASHINGTON, DC 20217 **PA**

XAVIER PITTMON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 11152-18 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER AND DECISION

In this collection due process ("CDP") case, petitioner seeks review pursuant to section 6330(d)(1)[1] of the determination by the Internal Revenue Service ("IRS" or "respondent") to uphold a notice of intent to levy. Respondent has moved for summary judgment under Rule 121, contending that there are no material facts in dispute and that his determination to sustain the proposed collection action was proper as a matter of law. We agree and will therefore grant the motion.

Background

The following facts are drawn from the parties' pleadings and motion papers, including the declarations and exhibits attached thereto. See Rule 121(b). Petitioner resided in Texas when he filed his petition.

A. Petitioner's Returns for 2012, 2013, 2014, and 2015

Petitioner filed a Form 1040, U.S. Individual Income Tax Return, for each of the 2012, 2013, 2014, and 2015 tax years, reporting tax due of $15,019, $11,955, $39,540, and $48,880, respectively. Petitioner failed to pay the amounts due shown on these tax returns. Based on the returns, respondent made the following assessments:

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

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		Additions to Tax		
Year	Tax	Sec. 6654	Sec. 6651(a)(1)	Sec. 6651(a)(2)
2012	$15,019	$232.00	---	$600.76
2013	11,955	215.00	---	478.20
2014	39,540	239.00	$7,117.20	2,965.50
2015	48,880	164.52	---	488.80

As of July 2017, petitioner's outstanding liability for 2012, 2013, 2014, and 2015 was $149,795.85, including interest.

B. Respondent's Collection Efforts and CDP Proceedings

On July 24, 2017, in an effort to collect this outstanding liability, respondent sent petitioner a Notice LT11, Notice of Intent to Levy and Notice of Your Right to a Hearing (the "Notice").

On August 16, 2017, petitioner timely mailed respondent a request for a CDP hearing by submitting Form 12153, Request for a Collection Due Process or Equivalent Hearing (the "CDP Hearing Request"), along with a letter from petitioner's representative. In the CDP Hearing Request, petitioner indicated the reasons he disagreed with respondent's proposed levy by checking boxes for "Installment Agreement," "Offer in Compromise," and "I Cannot Pay Balance" in the form's "Collection Alternative" row. Petitioner also checked the box "Other," with the following explanation: "The taxpayer cannot full [sic] pay their tax liabilities and needs additional time to determine the most appropriate tax resolution option to properly resolve their federal tax matters."

The case was assigned to a settlement officer in the IRS Appeals Office in Holtsville, New York. The settlement officer reviewed petitioner's administrative file and confirmed that the tax liabilities in question had been properly assessed and that all other requirements of applicable law and administrative procedure had been met. On March 8, 2018, the settlement officer mailed petitioner a letter confirming respondent's receipt of the CDP Hearing Request. The letter explained that, for the settlement officer to consider alternative collection methods, petitioner needed to submit, within 14 days, a completed Form 433-A, Collection Information Statement, and "[p]roof that estimated tax payments are paid in full for the year to date." The letter further explained that an offer in compromise could not be accepted unless "estimated tax payments are paid in full for the year to date"

and that no collection alternative could be considered without the requested Form 433-A and proof of estimated tax payments. The letter also scheduled a telephone hearing for March 28, 2018,[2] to discuss petitioner's reasons for disagreement with respondent's proposed collection action or any alternatives to the collection action.

On March 26, 2018, petitioner's representative left a voicemail with the settlement officer requesting a rescheduling of the hearing. After attempting unsuccessfully to reach petitioner's representative, the settlement officer arranged with the representative's receptionist to reschedule the hearing for April 16, 2018. On April 16, 2018, petitioner's representative again requested a rescheduling and stated he did not have the financial documentation the settlement officer had requested. The parties agreed to reschedule the hearing for May 1, 2018.

The hearing took place as planned on May 1, 2018, but the requested financial documentation was not provided. The settlement officer noted that she would not be able to consider collection alternatives without the requested documentation--i.e., Form 433-A and proof of fully-paid 2018 estimated tax payments. In light of the extensions already provided to reschedule the hearing, the settlement officer declined petitioner's representative's request for additional time to submit the information and informed him that a notice of determination would be issued sustaining the proposed levy.

On May 11, 2018, respondent issued petitioner a Notice of Determination Concerning Collection Action(s) ("Notice of Determination"), which sustained respondent's proposed levy for all relevant years. In the Notice of Determination, the settlement officer confirmed that (1) the tax assessment was properly made for each year at issue; (2) the notice and demand for payment was mailed to petitioner's last known address; (3) there was a balance due when respondent's Notice was issued; and (4) that she had no prior involvement with respect to the tax periods at issue in the case. The settlement officer also noted that petitioner did not dispute his underlying tax liability and concluded that no collection alternative could be considered, because petitioner did not provide the requested financial information.

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[2]The letter invited petitioner to contact the settlement officer within two weeks from the date of the letter if the proposed hearing date did not work for petitioner.

C. Tax Court Proceedings

On June 5, 2018, petitioner timely petitioned the Court for review of respondent's determination to sustain the proposed collection action. The petition noted as follows: "I do not agree with the IRS' collection action. I do not agree with the IRS' penalties. The collection action will create an economic hardship."

Respondent has since filed a Motion for Summary Judgment (the "Motion") contending that there are no material facts in dispute and that respondent's determination to sustain the proposed collection action was proper as a matter of law. Petitioner filed a response to the Motion, and respondent has filed a reply to petitioner's response. We will now address the Motion.

Discussion

A. Summary Judgment Standard

The purpose of summary judgment is to expedite litigation and avoid costly, time-consuming, and unnecessary trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). The Court may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.39 965 (7th Cir. 1994). In deciding whether to grant summary judgment, we construe factual materials and inferences drawn from them in the light most favorable to the nonmoving party (here, petitioner). Id. at 520. However, the nonmoving party may not rest upon mere allegations or denials in his pleadings, but instead must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d); see also Sundstrand Corp. v. Commissioner, 98 T.C. at 520.

B. Standard of Review

Section 6330(d)(1) does not prescribe the standard for the Court to apply in reviewing an IRS administrative determination in a CDP case. The framework for that review is set out in our cases. When the validity of the underlying tax liability is properly at issue in a collection review proceeding, the Court will review the matter de novo. Giamelli v. Commissioner, 129 T.C. 107, 111 (2007). But, when the underlying liability is not properly before us (as here[3]), we review the IRS'

[3]See infra section C ("Underlying Liability Not Properly At Issue").

determination for abuse of discretion. Id.; Goza v. Commissioner, 114 T.C. 176, 182 (2000). That is, we do not substitute our own judgment for that of IRS Appeals and decide de novo whether we would have reached the same determination as the IRS Appeals; rather, we decide whether IRS Appeals' determination is arbitrary, capricious, or without sound basis in fact or law. Murphy v. Commissioner, 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); see also Estate of Duncan v. Commissioner, 890 F.3d 192, 197 (5th Cir. 2018), aff'g T.C. Memo. 2016-204; Keller v. Commissioner, 568 F.3d 710, 716 (9th Cir. 2009), aff'g in part T.C. Memo. 2006-166.

In deciding whether an IRS settlement officer has abused her discretion in sustaining a proposed levy, we consider whether she: (1) properly verified that the requirements of any applicable law or administrative procedure have been met, (2) considered any relevant issues petitioner raised, and (3) determined whether "any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of * * * [petitioners] that any collection action be no more intrusive than necessary." See sec. 6330(c)(3); CreditGuard of Am., Inc. v. Commissioner, 149 T.C. 370, 379 (2017).

In reviewing any determination under section 6330(c)(2), including challenges to the underlying liability, our review is limited to the administrative record--i.e., we consider only issues the taxpayer properly raised during the section 6320/6330 hearing. Secs. 301.6320-1(f)(2), Q&A-F3, 301.6330-1(f)(2), Q&A-F3, Proc. & Admin. Regs.; Giamelli v. Commissioner, 129 T.C. at 115. For this purpose, the administrative record is defined in section 301.6330-1(f)(2), Q&A-F4, Proced. & Admin. Regs., which provides:

> The case file, including the taxpayer's request for hearing, any other written communications and information from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative, memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3), will constitute the record in the Tax Court review of the Notice of Determination issued by Appeals.

C. Underlying Liability Not Properly At Issue

In the petition, petitioner noted that he "do[es] not agree with the IRS' penalties." In addition, petitioner's response to the Motion alleges that "the additions to tax amounts are excessive for tax years 2012, 2013, 2014, and 2015" and that the tax liabilities assessed for those years do not include expenses that "may have been left off tax returns 2012, 2013, 2014, and 2015." It appears that petitioner is disputing at least a portion of the underlying liability for the years at issue. We must therefore consider whether petitioner's challenge to the underlying liability is properly before us.

As we have held before, a taxpayer may not dispute the underlying liability in this Court unless the issue was previously raised in the taxpayer's CDP hearing before Appeals. Giamelli v. Commissioner, 129 T.C. at 113-115. A review of the record before Appeals in this case shows that petitioner did not challenge his underlying liability in that forum. Neither petitioner's CDP Hearing Request nor the settlement officer's case activity record from the CDP proceedings contain any indication that petitioner or his representative raised any objection concerning the underlying tax liability, either with respect to the additions to tax under sections 6651(a)(1), 6651(a)(2), and 6654 or with respect to any purported expenses that were not reflected in the relevant returns. Nor has petitioner provided any documentation to the contrary on these points in the proceedings before us.[4]

Petitioner's response to the Motion appears to contend that his CDP Hearing Request did not object to his underlying tax liability, because "the form [did] not have a place to check to contest tax liability." As respondent notes, however, Form 12153 provides space to state any "Other" reason for disagreement with a proposed levy. The Form also sets out examples of "Other reasons" for requesting a hearing--each of which dispute the underlying tax liability or penalties.[5] Thus,

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[4]Moreover, petitioner's claim that deductible expenses "may have been left off tax returns 2012, 2013, 2014, and 2015" was not raised in the petition and is therefore deemed to be conceded. See Rule 331(b)(4) ("Any issue not raised in the assignments of error shall be deemed to be conceded."); see also CreditGuard of Am., Inc. v. Commissioner, 149 T.C. 370, 379 (2017); Poindexter v. Commissioner, 122 T.C. 280, 284-285 (2004).

[5]Page 4 of Form 12153 provides the following examples of "Other reasons" for requesting a CDP hearing: "I am not liable for (I don't owe) all or part of the

Form 12153 provided petitioner adequate space and opportunity to challenge the tax liabilities and penalties assessed for the years at issue. Petitioner simply failed to contest those liabilities in the CDP Hearing Request or at the hearing before Appeals.[6]

In short, since petitioner did not challenge his underlying tax liability or the penalties assessed by respondent at the CDP hearing before Appeals, those issues are not properly before us. See Giamelli v. Commissioner, 129 T.C. at 113-115. We next turn to reviewing the issues that were placed before Appeals.

D. Review of IRS Appeals Office's Determination and Consideration of Collection Alternatives

A review of the record before Appeals shows that respondent's settlement officer satisfied each of the requirements of section 6330(c) in determining to sustain the proposed collection action.

First, the settlement officer confirmed that all requirements under applicable law or administrative procedure had been met. See section 6330(c)(1), (3). The settlement officer verified that an assessment was properly made for each tax liability and tax year listed in the CDP notice, that a notice and demand for payment was properly mailed to petitioner's last known address, and that there was a balance due for petitioner's account when respondent's Notice was issued. The settlement officer also verified that she had no prior involvement with respect to the tax liabilities or tax years at issue.

Second, the settlement officer considered--based on the materials petitioner and his representative placed before her--all relevant issues raised by petitioner in the hearing before Appeals. See section 6330(c)(2), (3). With respect to petitioner's request for a collection alternative, the settlement officer concluded that no collection alternative could be considered, because petitioner did not provide a Form 433-A or any documentation that estimated taxes had been fully paid for the 2018 tax year, despite the more than two months of additional time

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taxes"; * * * "I do not believe I should be responsible for penalties"; * * * "I have already paid all or part of my taxes."

[6]We note that the additions to tax under sections 6651(a)(1), 6651(a)(2), and 6654 are not subject to the penalty approval process set out in section 6751(b).

made available to provide the documentation. Petitioner argues that he provided documentation of his estimated tax payments for the 2018 tax year by attaching to his response to the Motion respondent's Notice CP80, which shows a $31,000 credit on his Form 1040 account as of February 17, 2020. However, as respondent notes, petitioner's account transcript for 2018 shows that the $31,000 in estimated tax payments were made on October 18, 2018 ($21,000) and April 22, 2019 ($10,000)--both dates after the date of respondent's Notice of Determination. Thus, the transcript confirms that petitioner failed to provide the settlement officer with documentation that his estimated taxes had been paid for 2018 to aid in her determination whether to sustain the proposed collection action. Petitioner also argues that "[e]conomic hardship was brought up in the collection due process" and should have been considered by the settlement officer. However, the administrative record contains no mention of this issue, which appears to have been first raised in the petition.

Lastly, the record shows that the settlement officer properly "balance[d] the need for the efficient collection of taxes with the legitimate concern of * * * [the petitioner] that any collection action be no more intrusive than necessary." See section 6330(c)(3)(C). Petitioner's response to the Motion contends that respondent did not properly consider the impact of respondent's proposed collection action on petitioner's business and employees, particularly given petitioner's use of high interest rate loans to continue operations. But, as respondent points out, the settlement officer cannot be faulted for failing to consider matters that were not placed before her and on which the record contains no evidence.

We have consistently held that it is not an abuse of discretion for a settlement officer to reject collection alternatives and sustain a proposed collection action when a taxpayer has failed to put a specific offer on the table, has failed, after being given sufficient opportunities, to submit the required forms and supporting financial information, and has failed to show compliance with current obligations. See, e.g., McLaine v. Commissioner, 138 T.C. 228, 243 (2012); see also, e.g., Orum v. Commissioner, 412 F.3d 819, 821 (7th Cir. 2005), aff'g 123 T.C. 1 (2004).[7] Petitioner failed to provide the requested form and financial information in this case, despite the settlement officer's warnings that such a

[7]See generally Wong v. Commissioner, T.C. Memo 2020-32, at *11-*12 (collecting authorities); Huntress v. Commissioner, T.C. Memo 2009-161, at *12*-*13 (same).

failure would prevent any consideration of a collection alternative. Accordingly, we find that the settlement officer did not abuse her discretion by closing the case and sustaining respondent's proposed collection action. We conclude that no material facts are in dispute, and respondent is entitled to judgment as a matter of law.

We note that petitioner is free to submit to the IRS at any time, for its consideration and possible acceptance, a collection alternative in the form of an offer-in-compromise or an installment agreement, supported by the necessary financial information.

Accordingly, upon due consideration, it is hereby

ORDERED that respondent's Motion for Summary Judgment is granted. It is further

ORDERED AND DECIDED that the Notice of Determination Concerning Collection Action(s) Under Sections 6320 and/or 6330 of the Internal Revenue Code, dated May 11, 2018, upon which this case is based is sustained.

(Signed) Emin Toro
Judge

ENTERED: **JUN 02 2020**