

UNITED STATES TAX COURT
WASHINGTON, DC 20217

MN

CARY MICHAEL GREENBERG & CYNTHIA)
ANN GREENBERG,)
)
Petitioner(s),)
)
v.) Docket No. 9023-13 L.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER AND DECISION

On April 25, 2013, petitioners filed a petition to review respondent's notice of determination under section 6320,¹ which sustained respondent's Notice of Federal Tax Lien (NFTL) with respect to petitioners' unpaid Federal income tax liabilities for 2008, 2009, and 2010 (collectively, unpaid Federal income tax liabilities). On July 7, 2014, respondent filed a motion for summary judgment and a declaration by Settlement Officer Linda Horton and various other exhibits in support. By order dated July 9, 2014, this Court ordered petitioners to file a response to respondent's summary judgment motion on or before August 1, 2014. Petitioners failed to file a response to respondent's motion.

We have reviewed the motion and the documents submitted in support of the motion. We are satisfied that the material facts are not in dispute, and for the reasons summarized below, respondent is entitled to a decision sustaining the filing of the NFTL.

Respondent's motion requests summary adjudication in his favor under Rule 121. Generally, summary judgment is designed to expedite litigation and avoid unnecessary and expensive trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678,

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

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681 (1988). Under Rule 121(b), summary judgment may be granted with respect to all or any part of the legal issues presented “if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law.” See Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff’d, 17 F.3d 965 (7th Cir. 1994).

The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences will be drawn in a manner most favorable to the party opposing summary judgment. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985). Although facts are viewed in the light most favorable to the nonmoving party, Naftel v. Commissioner, 85 T.C. 527, 529 (1985), the nonmoving party may not rest upon allegations and denials in that party’s pleadings. The nonmoving party must set forth specific facts showing that there is a genuine dispute as to any material fact. Rule 121(d); Dahlstrom v. Commissioner, 85 T.C. at 820-821.

Petitioners did not contest their unpaid Federal income tax liabilities in their petition. Instead, they allege that the NFTL was filed in error and are requesting it be withdrawn. Petitioners failed to respond to respondent’s motion for summary judgment. Consequently, we review the motion and supporting affidavit and exhibits to decide whether to grant the motion. Our review confirms that there is no material issue of fact fairly in dispute and that respondent is entitled to summary disposition as a matter of law.

Between October 4, 2010, and March 27, 2012, petitioners entered into several installment agreements for the purpose of paying their unpaid Federal income tax liabilities. However, they failed to make the agreed payments and defaulted. Respondent subsequently determined to file an NFTL and mailed to petitioners the NFTL. In response, petitioners timely filed a Form 12153, Request for a Collection Due Process or Equivalent Hearing, in which petitioners contended that the NFTL had been improperly filed and should be withdrawn.²

²On or about August 2, 2010, respondent sent to petitioners a Final Notice - Notice of Intent to Levy and Notice of Your Right to a Hearing (levy notice) with respect to petitioners’ 2008 Federal income tax liability. On or about August 29, 2012, respondent sent a levy notice with respect to petitioners’ 2009 and 2010 Federal income tax liabilities. Petitioners refused or did not claim the levy notices. The levy notices are not at issue in this case.

Respondent issued to petitioners a letter dated November 30, 2012, acknowledging that respondent had received petitioners' Form 12153 and scheduling a telephone conference for January 10, 2013.³

Settlement Officer Linda Horton was assigned to conduct petitioners' hearing under section 6320. Petitioners did not contact Ms. Horton on the specified date for the telephone conference but did on the day after. During the telephone conference petitioners contended that respondent's employee told them that no lien would be filed if they made an \$11,000 payment to reduce their unpaid Federal income tax liabilities to less than \$50,000. Ms. Horton could not find any notation in petitioners' account history to corroborate this contention. However, she explained to petitioners that the IRS normally will not file a NFTL if the outstanding balance is less than \$50,000 and the taxpayer has not defaulted on an installment agreement. The taxpayers defaulted on their installment agreement on May 26, 2012.

Petitioners also inquired about the accuracy of their outstanding balances for the years at issue. Ms. Horton verified that the account balances for the unpaid Federal income tax liabilities were correct and that respondent had applied all of petitioners' payments to the outstanding balances. Ms. Horton concluded that the lien filing should be sustained and prepared petitioners' case for closing. On March 26, 2013, respondent's Appeals Office issued the notice of determination sustaining the filing of the NFTL.

Section 6330(c), (d), (e), and (g) generally governs the conduct of a hearing under section 6320. Sec. 6320(c). In a section 6320 hearing, the hearing officer must obtain verification that the requirements of applicable law or administrative procedure have been met. Sec. 6330(c)(1). The taxpayer may raise any relevant issue relating to the unpaid tax or the lien at issue in the hearing. Sec. 6330(c)(2). However, the taxpayer may not raise an issue regarding the existence or amount of the underlying tax liability for any tax period with respect to which the taxpayer

³Petitioners also requested a hearing regarding the 2009 and 2010 levy notice. Respondent determined that the request was untimely since it was not within 30 days of the issue of the notice. However, petitioners were offered an equivalent hearing with regard to the levy notices. Petitioners requested a new installment agreement as a collection alternative. They subsequently signed Form 433-D, Installment Agreement, agreeing to a direct debit monthly payment in the amount of \$535.

received a notice of deficiency or otherwise had an opportunity to dispute the tax liability. Sec. 6330(c)(2)(B). Following the hearing, the hearing officer must make a determination whether the collection action at issue may proceed. In making that determination, the hearing officer must take into consideration the verification presented and any relevant issues raised by the taxpayer and must determine whether the proposed collection action balances the need for the efficient collection of taxes with any legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. Sec. 6330(c)(3); Wadleigh v. Commissioner, 134 T.C. 280, 287-288 (2010).

Sections 6320 and 6330(d)(1) grant this Court jurisdiction to review the determination made by the Appeals Office in connection with a hearing under section 6320. Unless the underlying tax liability is properly in dispute, see sec. 6330(c)(2)(B), we review the determination of the Appeals Office for abuse of discretion, see Lunsford v. Commissioner, 117 T.C. 183, 185 (2001); Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 182 (2000). An abuse of discretion occurs if the Appeals Office exercises its discretion “arbitrarily, capriciously, or without sound basis in fact or law.” Woodral v. Commissioner, 112 T.C. 19, 23 (1999). Petitioners do not dispute their underlying tax liabilities. Accordingly, we review respondent’s determination for an abuse of discretion. See Lunsford v. Commissioner, 117 T.C. at 185.

Pursuant to section 6321, the United States Government (United States) obtains a lien against “all property and rights to property, whether real or personal” of any person liable for Federal tax upon demand for payment and failure to pay. See Iannone v. Commissioner, 122 T.C. 287, 293 (2004). The lien arises automatically on the date of the assessment and persists until the tax liability is satisfied or becomes unenforceable by reason of lapse of time. Sec. 6322; Iannone v. Commissioner, 122 T.C. at 293. Pursuant to section 6323, the United States may file a notice of the lien that arises under section 6321 to protect the government’s interest in a taxpayer’s property against the claims of other creditors. Filing an NFTL validates the Government’s lien against a subsequent purchaser, holder of a security interest, mechanic’s lienor, or judgment lien creditor. See sec. 6323(a); Berkery v. Commissioner, T.C. Memo. 2011-57.

Section 6323(j)(1) provides that the Commissioner may withdraw a NFTL before the underlying tax liability is paid if the Commissioner determines that: (1) the NFTL was filed prematurely or not in accordance with Internal Revenue Service procedures; (2) the taxpayer agreed to an installment agreement; (3) withdrawal of the NFTL will facilitate collection of the liability; or (4) withdrawal is in the best interests of both the taxpayer and the United States. The decision of

whether to withdraw the NFTL is within the discretion of the Commissioner. See sec. 6323(j); sec. 301.6323(j)-1, Proced. & Admin. Regs.

In Crisan v. Commissioner, T.C. Memo. 2007-67, the Commissioner filed an NFTL against the taxpayers after the parties had begun negotiating an installment agreement. The taxpayers alleged that the Commissioner made representations to the taxpayers that no further collection action would be taken while they were negotiating the installment agreement. Like petitioners, the taxpayers in Crisan argued that the NFTL had been filed erroneously because they had entered into an installment agreement. We held that the implementation of an installment agreement did not preclude the Commissioner from filing an NFTL, nor was the Commissioner required to withdraw the NFTL after the installment agreement became effective. In Ramirez v. Commissioner, T.C. Memo. 2005-179, the taxpayer had entered into an installment agreement after the filing of an NFTL and contended that he should be released from the NFTL. In that case we likewise held that the installment agreement did not preclude the Commissioner from maintaining a lien until the balance of the taxpayer's taxes was paid.

In short, section 6323(j)(1) is permissive, and nothing in it requires respondent to withdraw an NFTL because of an installment agreement. Even in instances where the taxpayer shows that withdrawal of the NFTL will facilitate collection of the unpaid tax liability, the Commissioner's decision to withdraw the NFTL is permissive, not mandatory. See sec. 6323(j); Hughes v. Commissioner, T.C. Memo. 2011-294. Petitioners have not alleged any fact showing that the NFTL was filed prematurely or not in accordance with IRS procedures. Petitioners have not argued that withdrawal of the NFTL is in their best interest and that of the United States; in fact, petitioners have previously defaulted on an installment agreement with respondent, a history of noncompliance that supports a conclusion that the NFTL is necessary to protect the United States' interest in collecting the tax liabilities that petitioners owe.

We conclude that the settlement officer properly determined that the requirements of applicable law and administrative procedure were met. The settlement officer concluded that respondent's decision to file and not withdraw the NFTL appropriately balanced the need for efficient collection of taxes with petitioners' concerns regarding the intrusiveness of the collection action. Petitioners did not respond to the motion for summary judgment and have not otherwise advanced any arguments or set forth specific facts that would allow us to conclude that the determination to sustain respondent's decision to file the NFTL was arbitrary, capricious, or without sound basis in fact. Accordingly, we hold that

the Appeals Office did not abuse its discretion in upholding respondent's decision to file and not withdraw the NFTL at issue here.

Because the material facts are not in dispute and respondent is entitled to a decision as a matter of law, it is hereby

ORDERED that respondent's Motion for Summary Judgment, filed on July 7, 2014, is granted. It is further

ORDERED AND DECIDED that respondent may proceed with the collection action as determined in the Notice of Determination Concerning Collection Action(s) Under Sections 6320 and/or 6330 upon which this case is based.

**(Signed) L. Paige Marvel
Judge**

ENTERED: **SEP 05 2014**