

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

DANALEE HILL,)
)
 Petitioner,)
)
 v.) Docket No. 7578-16 L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER

This is a “collection due process” (“CDP”) case brought pursuant to section 6330(d), in which petitioner Danalee Hill challenges the attempt by the Internal Revenue Service (“IRS”) to collect, by means of the filing of a notice of intent to levy, a \$5,000 penalty (plus interest) assessed pursuant to section 6702(a) (for “Frivolous Tax Submissions”). The case is scheduled to be tried at the Court’s San Francisco session beginning March 27, 2017. Respondent, the Commissioner of the IRS, filed on January 25, 2017, a motion for summary judgment pursuant to Rule 121. Some of the factual predicate for the Commissioner’s motion is not “supported as provided in this rule”, Rule 121(d), sent. 3; and patent legal questions are not addressed in the motion. We will therefore not require Ms. Hill to file a response but will deny the motion, so that the case will proceed to trial as scheduled.

Background

The Commissioner’s motion shows that Ms. Hill was assessed a \$5,000 penalty for filing a frivolous income tax return for the year 2012 (presumably some version of Form 1040). The supposedly frivolous return is apparently not included in the Commissioner’s submission, and we do not know the allegedly frivolous position reflected on that return.

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The IRS evidently gave notice of the assessment and demanded payment; and when Ms. Hill did not pay, the IRS issued to her a notice of intent to levy. (Ex. C.) In response to that notice, she timely submitted to the IRS a Form 12153 (“Request for Collection Due Process or Equivalent Hearing”; Ex. D.) Ms. Hill checked various boxes on Form 12153, and covered the face of the form with handwritten notations, words, and symbols, none of which we can understand. To the form she attached four pages of similarly indecipherable writing. The written matter does not appear to assert typical tax protestor contentions.

The Commissioner’s motion shows that IRS Appeals solicited various information from Ms. Hill but that she did not provide it. IRS Appeals eventually issued a notice of determination (Ex. A) that sustained the notice of proposed levy. The notice of determination stated that Ms. Hill’s Form 12153 “was not legible and had frivolous remarks written throughout the document [and] therefore, Appeals was unable to determine if you disputed your liability.” For purposes of Rule 121, however, we assume that the pro se CDP request did dispute Ms. Hill’s liability for the section 6702 penalty.

The notice of determination later issued by the IRS on March 16, 2016, states that, in compliance with the “verification” requirement of section 6330(c)(1), “Transcripts verified through analysis that assessment was made on the applicable CDP notice period(s) per IRC § 6201 and the notice and demand for payment letter was mailed to your last known address, within 60 days of the assessment, as required by IRC § 6303.” The notice made no mention of any verification of the IRS’s compliance with section 6751(b)(1) (requiring supervisory approval of the penalty determination). The notice of determination sustained the proposed notice of levy.

On March 30, 2016, the Court received from Ms. Hill an envelope that showed her name and address and that included several pages of the notice of determination on which she had made handwritten annotations that we cannot understand. The Court filed her submission as a timely petition. She later filed a petition form that she similarly covered with handwritten notes and to which she attached several pages of equivalent markings, none of which is comprehensible. We treated that submission as an amended petition.

The Commissioner has moved for summary judgment, asserting that Ms. Hill failed to provide information to show her eligibility for a collection alternative.

Discussion

I. Burden of production and proof

The Commissioner has not disputed that Ms. Hill is eligible to challenge the underlying liability in this CDP case (see sec. 6330(c)(2)(B)), but Appeals said in its notice of determination that it “was unable to determine if you disputed your liability”. In his motion for summary judgment, however, the Commissioner did not show that there is no genuine dispute of fact on this subject. We think, on the contrary, that Ms. Hill’s indecipherable writings evince an urgency consistent with attempting to dispute her liability. We therefore hold, for purposes of the Commissioner’s motion, that Ms. Hill did raise a dispute as to liability.

That being the case, the Commissioner bears at trial the burden of production (see sec. 7491(c)) and the burden of proof (see sec. 6703(a)) on the issue of Ms. Hill’s liability, because the liability at issue is for section 6702 penalties. And in this pretrial context under Rule 121, we look to the Commissioner to make a showing of every element of the case that he must prove at trial. He did not do so.

II. Frivolous return

The particular penalty at issue in this case is imposed by section 6702(a)(1), which provides: “A person shall pay a penalty of \$5,000 if * * * such person files” a frivolous return. Thus, the Commissioner must show that Ms. Hill’s 2012 return bears a frivolous position. He has not undertaken to do so, since neither the 2012 return nor any concrete information about its substance appears in the record of this case.

III. Supervisory approval

Section 6751(b)(1) provides:

No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.

The Secretary has not yet designated any “higher level official” for this purpose, so the statute requires approval by the “immediate supervisor”. To show compliance with this provision, the Commissioner must show (1) the identity of the individual who made the “initial determination”, (2) an approval “in writing”, and (3) the identity of the person giving approval and his or her status as the “immediate supervisor”.

The Commissioner sets out none of this in his motion. The IRS has prescribed a Form 8248 that is used to reflect supervisory approval, see Graev v. Commissioner, 147 T.C. No. 16 (2016), but the Commissioner’s motion includes no such document, nor any other information about supervisory approval of the penalty.

We cannot say that the Commissioner has made a showing that he is entitled to prevail on the issue of Ms. Hill’s liability for the penalty under section 6702(a). We will therefore not require Ms. Hill to respond to the motion. Instead, it is

ORDERED that the Commissioner’s motion for summary judgment is denied. This case will proceed to trial as scheduled.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
January 30, 2017