

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

CLC

JAMES HOUK, )  
 )  
 Petitioner, )  
 )  
 v. ) Docket No. 22140-15 L.  
 )  
 COMMISSIONER OF INTERNAL REVENUE, )  
 )  
 Respondent )

**ORDER**

This “collection due process” (“CDP”) case is an appeal brought under 26 U.S.C. section 6330(d), seeking our review of a “Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330” dated July 31, 2015, by the Office of Appeals of the Internal Revenue Service (“IRS”). The notice upholds a decision by the agency to proceed with a levy to collect the petitioner’s unpaid Federal income tax liability for the year 2013. On February 14, 2017, respondent (the IRS) filed a motion for summary judgment. By our order of February 15, 2017, we ordered petitioner to respond to the motion by March 16, 2017. As of this date the Court has received no response from petitioners.

We will grant the IRS’s motion in part (as to “innocent spouse” relief and collection issues) and will deny it in part (as to the challenge to underlying liability) for the reasons stated herein.

**Background**

The IRS’s motion and the Court’s record in this case show the following facts, which petitioners have not disputed:

The IRS issued a levy notice on March 26, 2015, addressed to Mr. and Mrs. Houk, showing a balance due for 2013 of \$22,739.94.

**SERVED Apr 05 2017**

### Request for CDP hearing

In response to that notice, the Houks' representative timely submitted to the IRS a Form 12153, "Request for a Collection Due Process or Equivalent Hearing" and checked various boxes indicating an interest in having Appeals consider various issues:

1. A box was checked requesting "innocent spouse" relief under section 6015. An attachment to the Form 12153 stated, "The taxpayers meet all of the criteria of the IRC for innocent spouse relief. Relief is requested and should be granted in connection with this hearing." However, no Form 8857, "Request for Innocent Spouse Relief", was submitted with the request.

2. Boxes were checked on the Form 12153 requesting collection alternatives, including an offer in compromise ("OIC"). However, no OIC was submitted with the request.

3. The Form 12153 does not have a specific box that a taxpayer can check to indicate a challenge to the underlying liability. Rather, there is a box marked "Other", with the following text:

Reason (You must provide a reason for the dispute or your request for a CDP hearing will not be honored. Use as much space as you need to explain the reason for your request. Attach extra pages if necessary.)

That box was checked on the Houks' Form 12153, and an attachment requested, among other things, a hearing due to "doubts of liability and/or collectibility". The attachment later stated:

The taxpayers challenge the amount of the underlying tax liability for the tax period as they did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

### Agency-level CDP hearing

IRS Appeals received and reviewed the request for a hearing. On May 27, 2015, IRS Appeals sent to the Houks and their representative a letter, outlining the CDP process, requesting information, and scheduling a conference call for June 30,

2015. The conference call evidently took place as scheduled, but Appeals' "Case Activity Record Print" attached as Exhibit A-5 to respondent's motion is evidently missing pages and does not include the entries between 5/27/2015 and 7/21/2015. The record shows that consideration of the Houks' three issues was as follows:

1. Innocent spouse. There is no indication in our record that any further mention was made by petitioners concerning, nor any consideration given within Appeals or at the CDP hearing to, the subject of "innocent spouse" relief under section 6015.

2. Collection alternatives. IRS Appeals' letter of May 27, 2015, did explicitly inform the Houks that, in order for Appeals to consider a collection alternative such as an installment agreement or offer in compromise, the Houks must submit a completed income tax return for their 2014 tax year and a "Form 656 Offer in Compromise along with all required offer fees and supporting documentation" within 21 days.

On the day of the scheduled CDP telephone conference, the Houks' representative submitted to Appeals a Form 433-A, "Collection Information Sheet for Wage Earners and Self-Employed Individuals". During the CDP conference on June 30, 2015, IRS Appeals considered the Houks' request for collection alternatives and informed their representative that, based on the information provided on Form 433-A, the Houks had the ability make monthly payments of \$248; and that the Houks were not in compliance with their filing requirements.

At the conclusion of the CDP hearing, IRS Appeals gave the Houks until July 7, 2015, to provide financial information that Appeals had requested, including the 2014 tax return. (The supporting declaration submitted with respondent's motion states that Exhibit A-4 attached thereto is "Fax dated June 30, 2015 to Taxpayer requesting documents", but in fact Exhibit 4-A is a fax to Appeals from the Houks' representative.)

On July 7, 2015, Appeals received a fax from the Houks' representative requesting seven additional days to provide the requested documents--i.e., by July 14, 2015. However, the Houks and their representative did not thereafter provide the information, and they thus failed to provide to IRS Appeals the requested information that would have warranted a collection alternative.

3. Underlying liability. The subject of a challenge to the underlying liability is mentioned in a "Referral Request" to Appeals from an IRS unit called

“ACS Support”, which stated that “TP doubts liability”. Notes in the “Case Activity Record Print” of the recipient IRS Appeals officer state as follows (emphasis added):

It appears taxpayers could be disputing the underlying liability issue. Self-assessed- Taxpayers need to file an amended tax return [i.e., a Form 1040X] for the tax period in questioned.

Appeals’ letter of May 27, 2015, acknowledged that at the hearing Appeals must consider “[w]hether you owe the amount due”, but the letter did not explicitly request information related to the liability challenge. We see no allegation in respondent’s motion about, nor any evidence concerning, consideration of the liability challenge at the CDP hearing.

### Notices of Determination

On July 31, 2015, IRS Appeals issued a separate duplicate “Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330” to each of the Houks, sustaining the proposed levy. It resolved the Houks’ issues as follows:

1. Innocent spouse. The notices of determination make no mention of “innocent spouse” issues.
2. Collection alternatives. As to collection issues, the notices of determination acknowledge that the Houks “request a Collection Due Process Hearing due to doubts as to liability and/or collectability” (emphasis added), but the notice ruled: “You did not respond with an acceptable collection alternative resolution and you are not in compliance with your filing requirements.”
3. Underlying liability. The notices of determination state as follows concerning the Houks’ challenge to their underlying liability (emphasis added):

### ISSUES YOU RAISED

The POA raised the taxpayers request a Collection Due Process Hearing due to doubts as to liability ....

The taxpayers' 2013 tax liability was determined based on the documents they submitted with their original 2013 tax return. If any of

the figures were in error, the taxpayers should have submitted a Form 1040X [i.e., an amended return] to the designated Service Center.

\* \* \* \* \*

### Challenges to the Liability

While you were allowed to challenge the amount and existence of underlying liability, you did not present any relevant, non-frivolous documents for consideration.

The taxpayers' 2013 tax liability was determined based on the documents they submitted. If any of the figures were in error, the taxpayers should have submitted a Form 1040X to the designated Service Center.

### Tax Court proceedings

On August 31, 2015, Mr. Houk filed with this Court a timely but imperfect petition in the form of a letter that stated "I need a petition form and rules for filing a petition". On March 2, 2016, a form petition signed by both spouses was filed as an amended petition, disputing the IRS Appeals' determination. It states in its entirety:

We did not make \$82,511 in 2013 – Our accountant was in error – I did not know what I was signing when I signed the 2013 tax return for this amount. I did not know to sign or file a 1040X form or I would have. . . . According to bank deposits we earned about \$46,000 in 2013.

Thus, the petition challenges the Houks' underlying liability, but it made no mention of (1) any innocent spouse claim or (2) any error by IRS Appeals in declining a collection alternative.

Because the original petition had been signed only by Mr. Houk, the caption for this case was created with his name only. We find that, for purposes of Rule 60(a)(1), Mrs. Houk ratified the petition by signing the amended petition.

The IRS filed its motion for summary judgment on February 14, 2017. By order dated February 15, 2017, the Court ordered petitioners to respond by March

16, 2017. As of this date, the Court has received from Mr. Houk no response to the IRS's motion for summary judgment.

## Discussion

### I. General legal principles

A. Pleading requirements. Tax Court Rule 331(b)(4) provides: "A petition filed pursuant to this Rule ... shall contain ... [c]lear and concise assignments of each and every error which the petitioner alleges to have been committed in the notice of determination. Any issue not raised in the assignments of error shall be deemed to be conceded."

B. Summary judgment. Tax Court Rule 121, like Rule 56 of the Federal Rules of Civil Procedure, provides for summary judgment without trial. The party moving for summary judgment must present evidence to "show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b). To resist summary judgment, the non-moving party must "set forth specific facts showing that there is a genuine dispute for trial", but he has this obligation only "[w]hen a motion for summary judgment is made and supported as provided in this Rule". Rule 121(d). In ruling on a motion for summary judgment, factual inferences will be drawn in the manner most favorable to the non-movant (here, the Houks). See Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985).

### II. The Houks' three contentions

A. Innocent spouse. The Houks sent a Form 12153 to the IRS to request a CDP hearing before Appeals, and that form did raise the issue of "innocent spouse" relief under section 6015. While their form was adequate to raise the issue, we note that it was stated perfunctorily, with no hint of the unusual circumstances that would have to exist to entitle both married spouses to relief under section 6015. Our record does not show that any consideration or mention of this issue was raised thereafter. Most important, no assignment of error pertaining to this issue was raised in the complaint. We therefore hold that, pursuant to Rule 331(b)(4), the Houks conceded this issue.

B. Collection alternatives. The Houks' Form 12153 did indicate a desire for an OIC. The IRS's motion makes an affirmative showing that Appeals did not abuse its discretion declining to enter into an OIC with the Houks, because (the

motion shows) the Houks were ineligible for a collection alternative as a result of their failure to file their 2014 tax return. It is well established that it is not an abuse of discretion for Appeals to decline to accept an alternative when a taxpayer is not in compliance with filing requirements or fails to provide financial information to support an alternative. See Huntress v. Commissioner, T.C. Memo. 2009-161. Moreover, no assignment of error pertaining to this issue was raised in the complaint. We therefore hold that, pursuant to Rule 331(b)(4), the Houks conceded this issue.

C. Underlying liability. Section 6330(c)(1)(B) provides that a taxpayer who, like the Houks, did not receive a notice of deficiency for the liability at issue (and who did not have any other prior opportunity to challenge the liability) may challenge it in a CDP hearing. Appeals acknowledged, and respondent's counsel has not denied, that the Houks were entitled to challenge their self-reported 2013 income tax liability. The record is clear that, at every turn, the Houks have raised this issue--in their Form 12153 requesting the CDP hearing, in the CDP hearing, and in their petition commencing this Tax Court case.

However, at the conclusion of the CDP hearing, Appeals determined: "While you were allowed to challenge the amount and existence of underlying liability, you did not present any relevant, non-frivolous documents for consideration"; and respondent now moves for summary judgment on that basis.

Drawing all inferences in favor of the Houks, as we must under Rule 121, we deny the motion because we cannot tell whether Appeals gave the Houks a reasonable opportunity to present evidence in support of their liability challenge. The IRS's internal notes state that "It appears taxpayers could be disputing the underlying liability issue" (when in fact they had expressly done so) and explicitly show the opinion that the Houks "need to file an amended tax return", as if such a filing were a prerequisite for a liability challenge in a CDP hearing. The IRS's letter requesting information did not request anything related to their liability challenge. The omission of pages from Appeals' "Case Activity Record Print" make us unable to review whatever information that record might have contained about the liability challenge. And the notices of determination repeat Appeals' insistence on the non-filing of an amended return--stating twice that "the taxpayers should have submitted a Form 1040X" (i.e., an amended return)--so that, for all we can tell, Appeals ignored or even foreclosed a liability challenge in the absence of an amended return. If Appeals did so, it was an abuse of discretion. Consequently, respondent's motion fails to make a showing that there is no genuine dispute as to

underlying liability; and even in the absence of an opposition by the Houks, we should deny the motion to that extent.

It is therefore

ORDERED that the caption is amended to read: “James Houk and Marsha Houk, Petitioners v. Commisioner of Internal Revenue, Respondent”. It is further

ORDERED that the IRS’s motion for summary judgment filed February 14, 2017, is granted as to any innocent spouse claim and any collection alternative claim by the Houks. It is further

ORDERED that the IRS’s motion for summary judgment is denied in part as to the Houks’ challenge to their underlying liability. This case will proceed to trial on this issue.

**(Signed) David Gustafson**  
**Judge**

Dated: Washington, D.C.  
April 5, 2017