

UNITED STATES TAX COURT
WASHINGTON, DC 20217

TUNG DANG & HIEU PHAM DANG,)	
)	
Petitioners,)	
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v.)	Docket No. 21100-17 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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ORDER

This is a collection review case involving the filing of a notice of Federal tax lien and a proposed levy in respect of petitioners’ outstanding income tax liabilities for the taxable (calendar) years 2008 and 2009. Pending before the Court is respondent’s Motion To Remand, filed January 3, 2018, and petitioners’ Motion For Judgment On The Pleadings, filed February 5, 2018. Each party opposes the granting of the other’s motion.

It bears mention at the outset that petitioners are represented by counsel who is admitted to practice before this Court and were represented by such counsel during the administrative phase of this case.

The present case is highly unusual in that petitioners appear to be virtually eager to pay their outstanding liabilities in full and ask only that respondent levy on an individual retirement account (IRA) owned by petitioner-husband in order that he might avoid the 10-percent additional tax on early distributions from a qualified retirement plan. See I.R.C. sec. 72(t)(2)(A)(vii), exempting from such 10-percent additional tax a distribution made on account of a levy under I.R.C. section 6331. The settlement officer (SO) whose Attachment accompanies the September 8, 2017 Notice Of Determination, which sustained both the filing of the

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notice of Federal tax lien and the proposed levy, did not consider petitioners' request, instead writing: "Levy of an IRA is a levy and not an alternative to a levy. It's not a collection alternative that can be considered by Appeals."

Respondent, in his aforementioned Motion To Remand, acknowledges that "[d]uring the CDP hearing, petitioners and their Power of Attorney requested that respondent collect the liabilities by levying on petitioner husband's Individual Retirement Account" but that the SO "incorrectly believed this request did not qualify as a 'collection alternative' and was thus outside the scope of Appeals CDP hearing jurisdiction." [Emphasis added.] Respondent goes on to state the following in his motion:

8. [The SO's] determination regarding Appeal's ability to consider the request was incorrect. Appeals should have evaluated petitioners' request to pay his liability via a levy on petitioner husband's Individual Retirement Account and determined whether it was in the best interests of the taxpayers and the government. [Emphasis added.]

9. Pursuant to Treas. Reg. 301.6330-1(e)(3) Q&A-E6, taxpayers can request a "substitution of assets" be considered as a collection alternative during a CDP hearing. Requesting respondent collect from a specific revenue source or asset is an acceptable "collection alternative" request and should be considered by Appeals.

Respondent goes on to state that "[t]he Internal Revenue Manual includes procedures for considering a taxpayer's request to levy from a retirement account. I.R.M. 5.11.6.3." And in his Response to petitioners' Motion For Judgment On The Pleadings, respondent argues that those procedures require a "complex analysis, even when the levy is requested by petitioners." Petitioners in rebuttal are dismissive of this argument:

Respondent's Motion to Remand is couched in terms of whether accepting payment in full via an IRA levy is "in the best interests of the taxpayers and the government," such that a request should be "considered" by Appeals. What's to consider? The only interest the government seems to have is to get paid. When a taxpayer points to their only asset that has enough money to make full payment and requests a levy, the IRS needs to act.

It's not as if the IRS objects to the use of the IRA as a source of payment. [The revenue officer] insisted that Petitioners voluntarily take an early distribution from the IRA to pay their taxes. So if it's not the source of the money that is the problem, why won't the IRS levy * * * ? [Emphasis added; footnotes omitted.]

No satisfactory reason for failing to do so appears in the record to date. Further, nothing in the record to date suggests that it is unreasonable for petitioners to “green light” a levy on their IRA in an effort to full pay their outstanding liabilities and, in the process, be spared imposition of the 10-percent I.R.C. section 72(t) additional tax. Further, nothing in the record to date suggests that such course of action would not be in the best interests of the taxpayers and the government. Nevertheless, in view of respondent’s admission that the settlement officer’s “determination regarding Appeal’s ability to consider the request was incorrect”, the Court will grant respondent’s Motion To Remand, subject to the conditions specified below. In the interim, the Court will direct respondent to advise the Court regarding his legal position whether if, after remand, respondent were to decline to levy on petitioners’ IRA and if the Court were to conclude that failure to levy constituted an abuse of discretion under the unique facts and circumstances of this case, respondent could be ordered by the Court to so levy, consistent with petitioners’ express desire.

Upon review of the record, and for cause, it is hereby

ORDERED that respondent’s Motion To Remand, filed January 3, 2018, is granted, and this case is remanded to respondent’s Appeals Office for consideration of petitioners’ request for a “substitution of assets”, i.e., levy on an IRA, as a collection alternative. It is further

ORDERED that respondent shall promptly offer petitioners an administrative hearing at the location closest to petitioners’ counsel’s office (or at such other place as may be mutually agreed upon, or in such manner as may be mutually agreed upon) at a reasonable and mutually agreed upon date and time, but no later than Friday, April 13, 2018, for consideration of petitioners’ request for a “substitution of assets”, as per the immediately preceding ORDERED paragraph of this Order. Such hearing shall be in-person at petitioners’ request, and such hearing shall be conducted by either an Appeals officer or an Appeals settlement officer having no prior involvement in this case. It is further

ORDERED that the parties shall, on or before Tuesday, May 22, 2018, file separate reports with the Court regarding the then-present status of this case; respondent shall also, on or before such date, file a supplemental notice of determination. If respondent's Appeals Office should decline to levy on petitioners' IRA, as per petitioners' express request, the supplemental notice of determination shall include a detailed explanation seeking to justify such failure and shall also discuss why it is appropriate to encourage a taxpayer to take a voluntary distribution from the taxpayer's IRA but to decline to levy on the taxpayer's IRA when the taxpayer expressly wishes respondent to do so. It is further

ORDERED that notwithstanding the remand of this case pursuant to the preceding ORDERED paragraphs, respondent shall, on or before April 20, 2018, file with the Court a response to this Order addressing the matter in the last sentence of the final paragraph of the preamble of this Order. Further, respondent shall attach to such response a plain-language transcript of petitioners' account for each of the taxable years at issue in this case. It is further

ORDERED that action on petitioners' Motion For Judgment On The Pleadings, filed February 5, 2018, is held in abeyance pending receipt of parties' separate reports and the supplemental notice of determination. It is further

ORDERED that jurisdiction over this case is retained by the undersigned.

(Signed) Robert N. Armen
Special Trial Judge

Dated: Washington, D.C.
March 20, 2018