

UNITED STATES TAX COURT
WASHINGTON, DC 20217

EAST BANK CENTER, LLC,)	
)	
Petitioner,)	
)	
v.)	Docket No. 7194-17L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case is calendared for trial at the Chicago, Illinois, trial session commencing October 29, 2018. Pending before the Court is respondent's Motion for Summary Judgment, which was filed with a memorandum and the declarations of attorney, settlement officer, and revenue officer in support thereof (collectively, Motion) on August 9, 2018. Petitioner filed a Response to Motion for Summary Judgment on August 22, 2018, objecting to the granting of the Motion. For the reasons discussed below, we will deny respondent's Motion.

Background

The parties do not dispute the following background information. On August 10, 2015, respondent's Collection Division issued a Letter 1058, Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing, to petitioner for its unpaid Form 941, Employer's Quarterly Federal Tax Return, liability for the period ended March 31, 2015. On September 9, 2015, petitioner timely submitted a Form 12153, Request for a Collection Due Process or Equivalent Hearing, as well as a Form 656, Offer in Compromise, and a Form 433-B, Collection Information Statement for Businesses, with related documents.

Petitioner's offer in compromise was sent to respondent's centralized offer in compromise unit in Oklahoma City, Oklahoma, for processing. Revenue Officer (RO) Knight was assigned the case. After reviewing petitioner's 2013 and 2014 Form 1065, U.S. Return of Partnership Income, as well as its 2015 profit and

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loss statement, RO Knight determined that petitioner's offer in compromise was not in the best interest of the government as petitioner did not have the ability to remain current with future tax obligations and fund normal operating expenses. RO Knight faxed petitioner his conclusion to reject its offer in compromise on April 27, 2016.

The case was subsequently forwarded to respondent's Office of Appeals (Appeals). The case was assigned to Settlement Officer (SO) Kammers to conduct petitioner's CDP hearing. As part of the CDP hearing, SO Kammers reviewed RO Knight's conclusion as well as petitioner's 2015 Form 1065, which became accessible on respondent's computer system on or about September 26, 2016. On March 6, 2017, Appeals issued petitioner a notice of determination rejecting its offer in compromise as not in the best interest of the government because financial analysis showed that it could not fund the offer, remain current with future tax obligations, and meet the business' normal operating expenses. The notice of determination also stated that petitioner's 2015 Form 1065 suggested that petitioner had significant ability to pay.

Petitioner timely sought review by this Court of the notice of determination. On September 15, 2017, the parties, concluding that the foregoing findings in the notice of determination were contradictory, jointly moved for a remand of the case for a supplemental hearing. On September 19, 2017, the Court granted the motion and the case was remanded to Appeals for a supplemental hearing.

The case was again assigned to SO Kammers. In order to evaluate petitioner's economic viability, SO Kammers accessed petitioner's 2016 Form 1065 on respondent's internal computer system. SO Kammers used the financial information contained therein to calculate petitioner's ability to pay, and determined that it could fully pay its liabilities through an installment agreement. On January 26, 2018, Appeals issued petitioner a supplemental notice of determination rejecting its offer in compromise on the ground that it could fully pay the liability by means of an installment agreement.

Discussion

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted where there is no genuine issue of material

fact and a decision may be rendered as a matter of law. Rule 121(a) and (b).¹ The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences are viewed in a light most favorable to the nonmoving party. Rule 121(d); Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985); Jacklin v. Commissioner, 79 T.C. 340, 344 (1982).

This is a collection due process case where we are called upon to review Appeals' determination to proceed with a proposed levy to collect petitioner's unpaid Form 941 liability for the period ended March 31, 2015. Where the validity of the underlying tax liability is not properly at issue, we review the Commissioner's determination for an abuse of discretion. Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181 (2000). "When a case is remanded to Appeals and supplemental determinations are issued, the position of the Commissioner that we review is the position taken in the last supplemental determination." Kelby v. Commissioner, 130 T.C. 79, 86 (2008). Petitioner has not sought to dispute the underlying tax liability. Therefore, we shall review whether SO Kammers abused her discretion in rejecting petitioner's offer in compromise on the grounds that petitioner could fully pay its liability by means of an installment agreement, as stated in the supplemental notice of determination.

The record as currently developed does not demonstrate to our satisfaction that respondent is entitled to a decision in his favor as a matter of law. It is undisputed that SO Kammers, in connection with the supplemental hearing, reviewed petitioner's 2016 Form 1065 and used the financial information therein as her basis to determine petitioner's ability to pay. An Appeals officer's use of a tax return in this manner would appear to contravene Internal Revenue Manual (IRM) pts. 8.23.3.3(5) and (6) (Aug. 18, 2017). In these circumstances, we conclude that summary adjudication is not appropriate. Accordingly, we shall deny respondent's Motion.

The foregoing considered, it is

¹Rule references are to the Tax Court Rules of Practice and Procedure.

ORDERED that respondent's Motion for Summary Judgment, filed August 9, 2018, is denied.

(Signed) Joseph H. Gale
Judge

Dated: Washington, D.C.
September 12, 2018