

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

DRC

ROBERT L. ROBINSON, )  
)  
Petitioner, )  
)  
v. ) Docket No. 15255-16SL.  
)  
COMMISSIONER OF INTERNAL )  
REVENUE, )  
)  
Respondent. )

**ORDER AND DECISION**

This matter is before the Court to decide on respondent's motion for summary judgment, filed September 27, 2017, pursuant to Rule 121.<sup>1</sup> Respondent contends that no genuine dispute exists as to any material fact and that the determination of the Internal Revenue Service (IRS) Office of Appeals (Appeals) approving the filed notice of Federal tax lien (NFTL) with respect to (1) petitioner's unpaid Federal income tax liability for the 2010 taxable year and (2) petitioner's unpaid trust fund recovery penalty liabilities for the taxable periods ending September 30, 2011, December 31, 2011, June 30, 2012, September 30, 2012, December 31, 2012, and June 30, 2013 (periods at issue) should be sustained as a matter of law.

By Order dated September 28, 2017, the Court ordered petitioner to file a response to respondent's motion no later than October 30, 2017. On December 1, 2017, petitioner filed a response to respondent's motion. This case was called from the calendar for the trial session of the Court at Winston-Salem, North Carolina, on December 4, 2017. Petitioner and counsel for respondent appeared and were heard regarding the status of this case, including respondent's motion for

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

**SERVED Nov 27 2018**

summary judgment. Counsel for respondent also filed a supplement to his motion.<sup>2</sup> The Court took respondent's motion, as supplemented, under advisement. As of the date of this order and decision, petitioner has not responded to respondent's supplement to his motion for summary judgment despite an order of this Court allowing him to do so.

### Background

#### I. Petitioner's Underlying Income Tax Liability for 2010

Petitioner timely filed his Federal income tax return for 2010 (2010 return), reporting tax due of \$8,050. At the time of filing he received a payment credit of \$4,045 for his 2010 withholdings and a refundable credit of \$400, as reported on the 2010 return. He made no other payments at the time of filing. On May 23, 2011, due to petitioner's underpayment of self-reported tax on the 2010 return, the IRS assessed the tax, together with an addition to tax for failure to pay the reported liability under section 6651(a)(2) and applicable interest.<sup>3</sup>

#### II. Petitioner's Underlying Trust Fund Recovery Penalty Liabilities for the Periods at Issue

From September 14, 2003, until June 30, 2013, petitioner was employed as the executive director of the Raleigh Business & Technology Center (RBTC). During his employment with RBTC petitioner directed or authorized payment to RBTC's creditors and had the authority to sign and authorize the transmittal of

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<sup>2</sup>When counsel for respondent filed his motion for summary judgment, he was under the impression that petitioner did not submit a timely appeal of the Letter 1153 that the IRS had issued, proposing to assess against petitioner trust fund recovery penalties for the periods at issue. His supplement clarified that petitioner in fact had timely filed an appeal of the Letter 1153. For further discussion of petitioner's appeal of the Letter 1153, see p. 3 *infra*. His supplement also confirmed that there was supervisory approval of the initial determination made by the IRS revenue officer to assess against petitioner the trust fund recovery penalties for the periods at issue.

<sup>3</sup>On October 3, 2011, and October 1, 2012, the IRS assessed additional additions to tax under section 6651(a)(2) for failure to fully pay the reported liability.

RBTC's employment tax returns. He was a responsible party for paying the employment taxes withheld by RBTC and any excise taxes collected by RBTC. As relevant here, RBTC failed to pay employment taxes for the periods at issue.

### III. IRS' Collection Actions

When petitioner failed to pay his self-reported 2010 income tax liability despite the IRS' providing him with notice and demand for the balance due, the IRS sent petitioner on March 26, 2012, a notice of intent to levy.

When RBTC failed to pay employment taxes for the periods at issue despite the IRS' providing RBTC with notice and demand for the balances due, the IRS sent petitioner as a responsible party on August 25, 2014, a Letter 1153, proposing to assess under section 6672 trust fund recovery penalties against him for the periods at issue. The letter also advised petitioner that he had a right to appeal or protest the proposed action. The letter was sent to petitioner by certified mail to his last known address. Petitioner signed for the letter upon delivery.

Petitioner timely submitted an appeal of the proposed trust fund recovery penalty assessment by letter dated October 17, 2014. In his letter petitioner explained that his supervisor at RBTC "was the sole person responsible for creating the IRS payroll debt". Petitioner's appeal was assigned to IRS Appeals Officer Phillip Dunn (AO Dunn). On the basis of his review of the IRS revenue officer's case file, petitioner's October 17, 2014, letter, a December 11, 2014, email from petitioner, and his conference notes,<sup>4</sup> AO Dunn determined that petitioner was a responsible party who willfully failed to pay the outstanding employment taxes of RBTC because petitioner (1) was the executive director of RBTC, (2) determined which creditor to pay and when to pay them, (3) participated in RBTC's day-to-day management, (4) was authorized to prepare and sign checks, and (5) had knowledge of RBTC's outstanding employment tax liabilities and continued to pay other creditors before paying the employment tax liabilities. On December 11, 2014, AO Dunn sent petitioner a letter to that effect.

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<sup>4</sup>On December 11, 2014, AO Dunn apparently held a telephone conference with petitioner to discuss his appeal.

On January 28, 2015, a representative from Appeals sent petitioner a letter stating that if he disagreed with AO Dunn's determination he could seek judicial review in the United States Court of Federal Claims or the United States District Court after properly filing an administrative claim for refund.<sup>5</sup>

On February 23, 2015, the IRS assessed against petitioner the trust fund recovery penalties for the periods at issue. When petitioner failed to pay these liabilities despite the IRS' providing him with notice and demand for the balances due, the IRS sent him on March 30, 2015, a notice of intent to levy.

On November 3, 2015, the IRS and petitioner entered into a partial payment installment agreement relating to all of his outstanding liabilities under which petitioner agreed to pay \$100 per month towards the liabilities and the IRS would file a NFTL to protect its interest. Such NFTL was filed on November 6, 2015. On November 12, 2015, the IRS sent petitioner a Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320 (lien notice), advising him of the filed NFTL and of his right to request a hearing to appeal the collection action and to discuss payment method options.

In response to the lien notice petitioner timely submitted Form 12153, Request for a Collection Due Process or Equivalent Hearing (CDP hearing request). As the reason for his disagreement with the lien notice petitioner checked the boxes on his CDP hearing request for "Installment Agreement" and "I Cannot Pay Balance". Additionally, in further support of his disagreement with the lien notice petitioner explained how his supervisor at RBTC had misused his authority, embezzled funds, and caused RBTC's employment tax liabilities. On his CDP hearing request petitioner also checked the box for lien discharge, stating "my supervisor obstructed the payments". On his CDP hearing request he made no mention of or disputed his 2010 income tax liability.

Petitioner's CDP hearing request was assigned to IRS Appeals Settlement Officer Sylvia Perez (SO Perez). On March 18, 2016, SO Perez sent petitioner a letter acknowledging receipt of his CDP hearing request and scheduling a

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<sup>5</sup>The letter is actually dated January 28, 2014, but that cannot be the correct date because AO Dunn's review of petitioner's appeal of the Letter 1153 did not begin until October 2014. We presume the date of the letter should be January 28, 2015.

telephone CDP hearing on April 19, 2016. She also outlined the issues she had to consider during the hearing and informed petitioner of the following:

My review of your file indicates that your account has been placed under the Installment agreement plan by the Collection Office. This will ensure that collection actions are not pursued as long as you continue to send in the monthly payment consecutively as agreed. Therefore, we encourage you to make payments as agreed. Any failure on your part to timely file and pay subsequent returns will cause your account to be reactivated.

I have enclosed Form 12256, Withdrawal of Request for Collection Due Process Hearing, for you review. Your signature on the Withdrawal indicates that you agree with the case resolution and that you no longer want to participate in a Collection Due Process Hearing with Appeals. If you agree, please sign and date the agreement and return it to me by April 8, 2016. \* \* \*

Before the scheduled telephone hearing petitioner sent SO Perez a letter, dated April 5, 2016, requesting a lien withdrawal and reiterating that the collection actions pertaining to RBTC's employment tax liabilities were "carefully impeded by" his supervisor there. In his letter petitioner made no mention of or disputed his 2010 income tax liability, and he did not return Form 12256.

On April 19, 2016, the telephone CDP hearing was held as scheduled. During the hearing petitioner stated that he had no dispute with the partial payment installment agreement that was already in place but believed that the trust fund recovery penalties for the periods at issue were due to a conspiracy and he should not be liable for them. SO Perez explained that on the basis of her review of the case information and transcripts, he was precluded from challenging the trust fund recovery penalties because a Letter 1153 had been issued to him. During the hearing petitioner neither raised any other issues nor requested consideration of other collection alternatives.

SO Perez determined that petitioner failed to establish that he met the criteria for lien withdrawal and that therefore the filed NFTL should be sustained. On June 9, 2016, Appeals sent petitioner a notice of determination to that effect.

On July 5, 2016, petitioner timely filed a petition with this Court for review of the notice of determination. On April 12, 2017, pursuant to the Court's order for an amended petition and payment of the filing fee, petitioner filed an amended petition. In his amended petition petitioner, just like in his CDP hearing request, seeks to challenge only his liability for the trust fund recovery penalties for the periods at issue. And in his response to respondent's motion for summary judgment he does the same, requesting "reconsideration from the US Tax Court to withdraw the lien".

## Discussion

### I. General Legal Principles

#### A. Summary Judgment

The purpose of summary judgment is 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 the moving party shows through "the pleadings \* \* \* any other acceptable materials, together with the affidavits and declarations, if any, \* \* \* 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); see also Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). The burden is on the moving party to demonstrate that there is no genuine dispute as to any material fact; consequently, factual inferences will be viewed in a light most favorable to the party opposing summary judgment. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985); Jacklin v. Commissioner, 79 T.C. 340, 344 (1982). The nonmoving party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d); Sundstrand Corp. v. Commissioner, 98 T.C. at 520. Petitioner has failed to demonstrate that there is a dispute as to any material fact. Consequently, a decision may be rendered as a matter of law.

Under section 6321, a lien arises in favor of the United States on all property and property rights of a person who is liable for taxes (including additions to tax, interest, additional amounts, or assessable penalties) after a demand for payment has been made by the IRS and the person neglects or refuses to pay. The lien arises when the assessment is made. See sec. 6322. The IRS files a NFTL to

preserve priority and put other creditors on notice. See sec. 6323. Pursuant to section 6320(a), the IRS must provide the person written notice of the filing of the NFTL and of the person's right to an administrative hearing on the matter.

If an administrative hearing is requested in a lien case, the hearing is to be conducted by Appeals. Sec. 6320(b)(1). At the hearing the Appeals officer conducting it must obtain verification that the requirements of applicable law and administrative procedure have been met. Secs. 6320(c), 6330(c)(1). The taxpayer may raise at the hearing any relevant issue including spousal defenses, challenges to the appropriateness of the collection action, and collection alternatives. Secs. 6320(c), 6330(c)(2)(A). A taxpayer may contest the existence or amount of the underlying liability at the hearing if the taxpayer did not receive a notice of deficiency with respect to the liability or did not otherwise have an earlier opportunity to dispute the liability. Secs. 6320(c), 6330(c)(2)(B); sec. 301.6330-1(e)(3) Q&A-E2, Proced. & Admin. Regs.; Kuykendall v. Commissioner, 129 T.C. 77, 80 (2007); Shere v. Commissioner, T.C. Memo. 2008-8, slip op. at 10. Following the hearing the Appeals officer must determine among other things whether the collection action is appropriate. In reaching the determination the Appeals officer must take into consideration: (1) whether the requirements of applicable law and administrative procedure have been met, (2) all relevant issues raised by the taxpayer, and (3) whether the collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that collection be no more intrusive than necessary. Secs. 6320(c), 6330(c)(3); see also Lunsford v. Commissioner, 117 T.C. 183, 184 (2001).

Sections 6320(c) and 6330(d)(1) grant this Court jurisdiction to review the determination made by Appeals in a lien case. Where the underlying liability is properly at issue, the Court reviews any determination regarding the underlying liability de novo. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Where the underlying liability is not properly at issue, we review Appeals' determination for abuse of discretion; that is, whether the determination was arbitrary, capricious, or without a sound basis in fact or law. Hoyle v. Commissioner, 131 T.C. 197, 200 (2008); Murphy v. Commissioner, 125 T.C. 301, 308 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Goza v. Commissioner, 114 T.C. at 182.

Petitioner's complaint throughout the CDP hearing process was directed only towards his liability for the trust fund recovery penalties for the years at issue (and he did not raise the issue of his self-reported income tax liability for 2010). And now before this Court, he merely continues to do the same. However, the law

is clear: if a taxpayer had an earlier opportunity to dispute the liability, he may not contest the liability in a CDP hearing (or thereafter in this Court). See secs. 6320(c), 6330(c)(2)(B); sec. 301.6330-1(e)(3) Q&A-E2, Proced. & Admin. Regs.;

Kuykendall v. Commissioner, 129 T.C. at 80; Goza v. Commissioner, 114 T.C. at 180-182; Shere v. Commissioner, slip op. at 10.

The undisputed facts confirm that petitioner received Letter 1153 relating to the trust fund recovery penalties for the periods at issue, he timely submitted an appeal of Letter 1153, and his appeal was considered but resolved adversely to him. Receipt of a Letter 1153 constitutes a prior opportunity to dispute the taxpayer's liability. Anderson v. Commissioner, T.C. Memo. 2016-219, at \*10-\*11; Solucorp, Ltd. v. Commissioner, T.C. Memo. 2013-118, at \*9; Morgan v. Commissioner, T.C. Memo. 2011-290, 2011 WL 6762929, at \*3; McClure v. Commissioner, T.C. Memo. 2008-136, 2008 WL 2120973, at \*3-\*4. Thus, his underlying liability for the trust fund recovery penalties for the periods at issue is not properly before this Court. Additionally, neither is his self-reported income tax liability for 2010 as he does not contest that liability. Accordingly, we will review Appeals' determination for abuse of discretion only.

On the basis of our review of the record, we find that SO Perez considered all of the requisite factors under section 6330(c)(3) when making her determination. Indeed, petitioner does not contend otherwise and that thus the determination was arbitrary, capricious, or without a sound basis in fact or law.

Besides, it cannot be said that an abuse of discretion was committed regarding the rejection of petitioner's request for lien withdrawal. The IRS' authority to withdraw a lien under section 6323(j) is discretionary. A filed NFTL may be withdrawn if it is determined that (1) the filing was premature or not in accordance with administrative procedures, (2) the taxpayer has entered into an installment agreement to satisfy the liability, unless such agreement provides otherwise, (3) the withdrawal will facilitate collection, or (4) with the consent of the taxpayer or the National Taxpayer Advocate, withdrawal would be in the best interests of the taxpayer and the United States. Sec. 6323(j); Hillsman v. Commissioner, T.C. Memo. 2008-240, slip. op. at 8.

The filing of the NFTL against petitioner was not premature. Petitioner has not presented any evidence that the NFTL was filed prematurely or contrary to administrative procedure. Nor did petitioner submit any evidence to demonstrate that lien withdrawal would facilitate collection. Indeed, petitioner had entered into

a partial payment installment agreement before commencing the CDP hearing process. Such agreement, however, will not lead to the full satisfaction of petitioner's liabilities for which the lien was imposed. Consequently, the IRS was justified in keeping the NFTL in place. See Akonji v. Commissioner, T.C. Memo. 2012-56. We conclude that it was not an abuse of discretion for SO Perez to determine that petitioner failed to establish he met the criteria for lien withdrawal and that therefore the filed NFTL should be sustained.

Petitioner has not given a sufficient basis to deny summary adjudication in respondent's favor pursuant to Rule 121. Respondent having shown that there is no genuine dispute of material fact and that he is entitled to judgment as a matter of law, it is hereby

ORDERED that respondent's motion for summary judgment, filed September 27, 2017, and as supplemented on December 4, 2017, is granted. It is further

ORDERED and DECIDED that respondent may proceed with the collection action with respect to petitioner's unpaid income tax liability for the 2010 taxable year and the unpaid trust fund recovery penalties for the taxable periods ending September 30, 2011, December 31, 2011, June 30, 2012, September 30, 2012, December 31, 2012, and June 30, 2013, as described in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated June 9, 2016, upon which this case is based.

**(Signed) Tamara W. Ashford**  
**Judge**

ENTERED: **NOV 27 2018**