

UNITED STATES TAX COURT
WASHINGTON, DC 20217

HERBERT ANDERSON DENTON &)
LYDIA B. DENTON,)
)
Petitioners,)
)
v.) Docket No. 9671-18 L.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

CLC

ORDER

This “collection due process” (“CDP”) case brought by petitioners Herbert Anderson Denton and Lydia B. Denton pursuant to section 6330(d) is scheduled to be tried at the Court’s upcoming session in New York City beginning April 1, 2019. Now before the Court is the Commissioner’s motion to dismiss for lack of jurisdiction, filed November 15, 2018 (Doc. 8). After reviewing the Commissioner’s original motion, we issued an order on January 28, 2019 (Doc. 9), pointing out what we perceived to be gaps in his presentation. In response to that order, the Commissioner supplemented his motion on February 28, 2019 (Doc. 11). His supplement fills in some of those gaps, corrects an error, and substantially changes its legal analysis. As to the year 2015, we will grant in part the motion as supplemented, and as to the year 2005 we will deny it without prejudice.

Based on what the Commissioner has shown, it now appears as follows:

Notice of levy for 2005 tax

For tax year 2005, the IRS asserts that it issued to the Dentons a “Final Notice of Intent to Levy and Notice of Your Right to a Hearing” (“CDP Levy Notice”) on February 5, 2009 (for which date the Commissioner cites a transcript entry (see Doc. 11, Ex. A) and notes on a Case Activity Record Print (Doc. 12,

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Ex. E) but does not proffer any copy of the CDP Levy Notice). For a notice sent on that date, a CDP Hearing request would have been due Monday, March 9, 2009. The earliest CDP hearing request for which we have any evidence (though not a copy of the request) was a Form 12153 in an “envelope postmarked 3/18/2009”. (See Ex. E, first entry for 07/07/2009.) On those asserted facts, the Dentons’ request was therefore not timely as to the 2005 CDP Levy Notice.

However, the Commissioner acknowledges that a “CDP hearing ... took place from February 2017 to April 2018,” during which “both 2005 and 2015 were considered by Appeals”. (Supp., Doc. 11 at 9.) And on May 1, 2018, IRS Appeals issued to the Dentons a “Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code”. (See Doc. 12, Exs. J and K.) It purports to pertain to the year 2005, with the caption “Tax period ended: 12/2005” (though, as we discuss below, the IRS asserts that it was issued by mistake, instead of an intended notice for 2015). If we assume that it was for 2005, as it says, the IRS contends that this notice cannot confer jurisdiction, because it was predicated on an untimely CDP hearing request, whereas Tax Court jurisdiction can be premised on a notice of determination only if that notice is issued after a CDP hearing held in response to a timely request for a hearing. However, this Court has held that we will not “look behind” a notice of determination and rule it invalid on the basis of “facts regarding procedures that were followed prior to the issuance of the notice of determination rather than on the notice of determination itself.” Lunsford v. Commissioner, 117 T.C. 159, 163 (2016), overruling Meyer v. Commissioner, 115 T.C. 417, 422-423 (2001)). Therefore, it appears possible that the May 2018 determination could form a basis for our jurisdiction over the 2005 levy notice.

Section 6330(d) requires that, in order for us to review IRS proposed collection, the taxpayer must have timely requested timely a CDP hearing before IRS Appeals, must have received a notice of determination (i.e., a notice of a collection determination by Appeals), and must file a petition in this Court within 30 days after that notice of determination was issued. The Dentons filed an original petition (i.e., a letter that we treated as a petition) to which they attached a copy of the notice of determination that purported to address 2005. They later filed an amended petition using our prescribed form. On the blank for line 3--“Provide the year(s) or period(s) for which the NOTICE(S) was/were issued”--they wrote “12/2005”. It appears that the IRS’s transcript for the Dentons’ 2005 income tax account still shows a balance due. (See Doc. 12, Ex. G.)

Therefore, we cannot say with confidence that we lack jurisdiction as to the CDP Levy Notice for the Dentons' 2005 tax year. As to that aspect of the petition, we will deny without prejudice the Commissioner's motion to dismiss.

Notice of lien filing for 2005 tax

For 2005 the IRS also issued to the Dentons a "Notice of Federal Tax Lien Filing and Your Right to a Hearing under IRC 6320" ("CDP Lien Notice"; Doc. 12, Ex. H). The date of its issuance, and therefore the date a CDP hearing request was due, is unclear; but the notice states, "You must request your hearing by 04/02/2009." As we have noted, there is evidence of a CDP hearing request for "postmarked 3/18/2009". The Commissioner cannot rule out the possibility that this CDP hearing request included a request for review of the CDP Lien Notice, and the Commissioner's supplement (Doc. 11 at 11) admits that "[i]f it did, such a request would be timely"--i.e., timely under any of the apparent possible due dates. For purposes of the Commissioner's motion, we therefore assume that the CDP hearing request was timely as to the CDP Lien Notice.

The Commissioner contends nonetheless that the petition should be dismissed as to the 2005 liens in any event because, under the terms of the lien notice as filed (Doc. 12, Ex. I), the 2005 lien was to be self-released if (as was the case) it was not refiled by 08/06/2018. The Commissioner contends that an August 2018 release of the lien for 2005 tax makes this case moot as to any 2005 CDP request founded on the CDP Lien Notice. That would apparently be true if all that the taxpayer requested during the CDP hearing was the release of the liens. But if the CDP hearing request asked for more relief (such as a collection alternative or a redetermination of liability), then the case might not be moot.

Moreover, because Appeals treated the CDP hearing request as untimely, "Appeals did not issue to Petitioners a notice of determination for 2005 on or about the year 2009." (Supp., Doc. 11 at 8.) The 2005 notice of determination that Appeals did issue in May 2018 mentioned only the CDP Levy Notice and made no determination as to the CDP Lien Notice. It would therefore seem that, as to the 2005 CDP Lien Notice, IRS Appeals has not yet issued a determination to conclude the agency-level CDP hearing and to provide a basis for this Court to review Appeals' action, nor even to dismiss the case on grounds of mootness.

This would seem to suggest that we lack jurisdiction as to the 2005 lien filing because the Commissioner had not made a determination as to the 2005 CDP Lien Notice by the date that the petition was filed; but since the Commissioner did

not explicitly so argue, and since some of the facts are unclear, we will deny the Commissioner's motion to dismiss without prejudice, as it pertains to the lien filing. See secs. 6320(c), 6330(c),(d).

Notice of levy for 2015 tax

For 2015 (unlike 2005) the relevant facts are clear, and our lack of jurisdiction is evident:

On January 17, 2017, the IRS issued to the Dentons a CDP Levy Notice for 2015, and on January 31, 2017, the Dentons timely requested a CDP levy hearing with Appeals for their 2015 tax year (Doc. 8, Ex. C).

No notice of determination purporting to relate to a proposed levy for 2015 had been issued to the Dentons before they commenced this case by filing their petition in May 2018. Neither their original petition nor their amended petition makes any explicit contention as to 2015. It is therefore clear that we do not have jurisdiction in this case over the proposed levy for 2015 tax.

Very recently--on February 20, 2019--IRS Appeals issued to the Dentons a Notice of Determination for 2015 (Doc. 12, Ex. K). That notice cannot retroactively confer on us jurisdiction in this case to entertain the 2015 levy issues.

We will therefore grant the Commissioner's motion as to 2015. (If the Dentons believe there is any error or defect in our ruling as to 2015, they can raise it orally in a motion for reconsideration, pursuant to Rule 162, when this case is called from the calendar on April 1, 2019.)

On the one hand it is certainly not our place to advise the Dentons whether or how to litigate their disputes with the IRS. But on the other hand, the pendency of a case like this one (i.e., where more than one tax year is at issue and the Court dismisses only one of those years for lack of jurisdiction) might lead a petitioner to assume that he might not need to file another petition for a new case in the same Court for the tax year initially raised but now dismissed (i.e., the 2015 tax year in this case). Consequently, we think it appropriate to suggest that the Dentons consider whether that could be a wrong assumption. The Dentons should take note of the Notice of Determination issued for 2015 on February 20, 2019, should decide whether it is in their interest to file now a separate suit challenging that notice, and should calculate the due date for such a suit. The first page of the notice states--

If you want to dispute this determination in court, you must file a petition with the United States Tax Court within a 30-day period beginning the day after the date of this letter

--i.e., 30 days beginning February 20, 2019.

To give effect to the foregoing, it is

ORDERED that the Commissioner's motion to dismiss for lack of jurisdiction, as supplemented, is granted in part, with regard to tax year 2015. It is further

ORDERED that the Commissioner's motion to dismiss for lack of jurisdiction, as supplemented, is denied in part without prejudice, with regard to tax year 2005. To the extent that either party believes that the factual or legal assumptions as to 2005 that are set out above are incorrect, they should be prepared to prove the correct facts and to articulate the actual law at the trial session beginning April 1, 2009.

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
March 6, 2019