

UNITED STATES TAX COURT
WASHINGTON, DC 20217

RUBEN T. VARELA,)	
)	
Petitioner,)	
)	
v.)	Docket No. 16994-18 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
)	
)	
)	
)	
)	

ORDER

This is a collection review case commenced by petitioner pursuant to section 6330(d)(1) and Rules 330 through 334.¹ In it, petitioner challenges a notice of Federal tax lien filed by respondent in respect of an assessed liability for a \$5,000 civil penalty under section 6702(a) for a frivolous tax submission of a Form 1040 for tax year 2005.

Presently pending before the Court is petitioner’s Motion For Leave To File Second Amended Petition, filed February 20, 2019.

Background

A. Petition

Petitioner timely filed a petition on August 28, 2018. See sec. 7502(a), (c). In paragraph 5 of the petition he alleges, inter alia, that he “did not file a frivolous return for the 2005 tax period” and that “[n]o valid assessment has been issued by

¹ All section references are to the Internal Revenue Code of 1986, as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure.

the IRS pertaining to the return for the 2005 tax period to sustain the proposed tax lien, and levy.”² In paragraph 6 of the petition he includes 42 subparagraphs to “state the facts upon which [he] rel[ies]” in support of the assignments of error in paragraph 5.

B. Amended Petition

On October 23, 2018, respondent filed his answer to the petition. Thereafter, on December 7, 2018, petitioner filed a Motion For Leave To File Amended Petition and lodged an amended petition. Respondent filed a Notice Of No Objection on December 28, 2018. However, because of the lengthy partial Government shutdown and the backlogs that it generated, the Court did not take action on petitioner’s motion until February 22, 2019, at which time the motion was granted and the amended petition was filed.

Petitioner alleged in paragraph 5 of the amended petition that he “did not file a frivolous return for the 2005 tax period” and that “[n]o valid assessment has been issued by the IRS pertaining to the return for the 2005 tax period to sustain the proposed tax lien.”³ In paragraph 6 of the petition he includes 88 subparagraphs to “state the facts upon which [he] rel[ies]” in support of the assignments of error in paragraph 5.

On April 3, 2019, respondent filed his answer to the amended petition.

C. Motion For Leave To File Second Amended Petition

On February 20, 2019, petitioner filed his Motion For Leave To File Second Amended Petition and lodged a second amended petition. On March 14, 2019, respondent filed a Notice Of Objection to the granting of petitioner’s motion. Thereafter, on April 3, 2019, petitioner filed a Reply To Notice Of Objection, and

² It should be noted that the tax lien is not “proposed”, as a notice of Federal tax lien was filed with the Orange County Recorder in California on or about October 25, 2017. It should also be noted that this case involves only a lien, as described in the opening paragraph of the preamble of this Order.

³ As previously noted, the tax lien is not “proposed” but has been filed. See n.2, supra. However, petitioner did eliminate reference in the quoted sentence to a levy, which is consistent with the fact that this case involves only a lien. Id.

on the following day he filed a Notice Of Objection To [Respondent's] Notice Of Objection.

Paragraph 5 of the second amended petition is substantively identical to paragraph 5 of the amended petition. However, paragraph 6 of the second amended petition contains 145 subparagraphs, in contrast to the 88 subparagraphs of paragraph 6 the amended petition.

Discussion

From the get-go petitioner has made quite plain his contentions that he did not file a frivolous return for 2005 and that respondent failed to make a valid assessment that would support the filing of the notice of Federal tax lien; and petitioner has pled what he regards as facts to support his assignments of error. However, in his second amended petition petitioner crosses the line from pleading facts to advocacy and argument, which is not the function of a pleading. Thus, from a notice-pleading perspective in what is a relatively straightforward and non-complex case, the assignments of error in paragraph 5 of the amended petition, together with the 88 subparagraphs of "facts" in paragraph 6 of the amended petition, are sufficient to apprise respondent regarding petitioner's contentions. See Rule 31(a), providing that "[t]he purpose of the pleadings is to give the parties and the Court fair notice of the matters in controversy and the basis for their respective positions." But even if, *arguendo*, there were something new in the additional 57 subparagraphs in paragraph 6 that petitioner seeks to plead pursuant to his Motion For Leave To File Second Amended Petition, respondent would be in no position to claim "surprise" at trial or at some other later date, having had to comb through those subparagraphs before preparing his response to such motion.

Petitioner should understand that the lien that is the focus of this case has been filed of record, and will remain filed of record during the pendency of this case. Accordingly, if petitioner's objective in commencing and prosecuting this case is a decision in his favor on the merits, then it is in his interest that the Court renders such a decision sooner rather than later. In short, petitioner needs to move on with this case.

Finally, mention should be made of petitioner's Notice Of Objection To [Respondent's] Notice Of Objection, filed April 4, 2019. Arguably, this filing could be recharacterized as a motion by petitioner to strike respondent's answer to amended petition, filed April 3, 2019. But were the Court to do so, the motion would be denied. See Estate of Jephson v. Commissioner, 81 T.C. 999, 1001

(1983), noting that motions to strike are not favored by the Federal courts, that a motion to strike should be granted only if the allegations in the pleading that the movant seeks to strike have no possible bearing on the controversy, and that if there is any doubt about the bearing of such allegations on the controversy, the motion should be denied.

Premises considered, it is hereby

ORDERED that petitioner's Motion For Leave To File Second Amended Petition, filed February 20, 2019, is denied.

(Signed) Robert N. Armen
Special Trial Judge

Dated: Washington, D.C.
April 9, 2019