

UNITED STATES TAX COURT
 WASHINGTON, DC 20217

MICHAEL BALICE,)	
)	
Petitioner,)	
)	
v.)	Docket No. 17799-18 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This is a collection due process (“CDP”) case brought under section 6330(d). It is set for trial at the Court’s session in Philadelphia beginning October 21, 2019. The Commissioner moved for summary judgment, Mr. Balice filed a response; and the Commissioner filed a reply. We will set the motion for argument at the October 21, 2019, trial session.

Background

Petitioner’s history with the IRS

The Commissioner’s motion shows that, for many years, petitioner Michael Balice has engaged in frivolous and unsuccessful litigation involving tax matters. See, e.g., Balice v. Commissioner, T.C. Memo. 2005-35; Balice v. Commissioner, T.C. Memo. 2005-161; Balice v. Commissioner, T.C. Memo. 2009-196.

In a deficiency case determining his income tax liabilities for 2007 and 2008, Mr. Balice took frivolous positions and was penalized for it. See Balice v. Commissioner, T.C. Memo. 2015-46, aff’d, No. 15-2366 (3d Cir. Feb. 5, 2016). Thereafter, in connection with its attempt to collect those liabilities, the IRS sent him a “Final Notice of Intent to Levy and Notice of Your Right to a Hearing under § 6330” (“CDP Levy Notice”) dated February 17, 2016. And six days later, on February 23, 2016, the Commissioner sent Mr. Balice a “Notice of Federal Tax

Lien Filing and Your Right to a Collection Due Process Hearing” (“CDP Lien Notice”) for the tax liabilities.

The CDP hearing request

Mr. Balice mailed to the IRS a Form 12153, “Request for a Collection Due Process Hearing” on March 23, 2016--i.e., 29 days after the CDP Lien Notice was mailed, but 35 days after the CDP Levy Notice had been mailed. He filled out the form (and its attachment) as a response to both the CDP Levy Notice and the CDP Lien Notice. In the place on the Form 12153 for the “Reason” he requested a CDP hearing, he wrote “See attached letter.” The letter he attached was a form letter (whose source we cannot tell) with bracketed matter that he left in, brackets and all, and with spaces for tax years which he wrote in by hand. The letter stated as follows (with bold and italic font rendered here as regular font):

This request for appeals consideration through a Collection Due Process hearing opportunity is for the purpose of invoking my right to have the Appeals Office review the lawfulness of the determinations and other actions which have been taken in my case regarding the tax years 2007, 2008, the lien that has been wrongfully issued for those years, and possibly, depending on those determinations, to discuss alternative collection and or payment options regarding the disputed tax and penalty amounts demanded of me by the Service. [I hereby withdraw any previously submitted appeal and or similar request that may have been deemed frivolous by the Service.] [The preceding sentence is bracketed in the original.]

This appeal is based upon the provisions of Title 26 U.S.C. § 6320, which states in part: * * *. [Quotation of section 6320 omitted in this order.]

I request under the rules of evidence for legal due process in legal proceedings like this administrative collection due process hearing opportunity, that a copy of the records that will be used by the Appeals Officer to secure or determine the Secretary’s verification that the “requirements of any applicable law or administrative procedure have been met”, pursuant to subsection (c)(1) above, be provided to me before the hearing so that I may be able to review those records and have the opportunity to rebut them by fact and or law at the hearing if necessary.

Pursuant to IRM § 8.6.1.2.1, I expect the location of my face-to-face conference to be the Internal Revenue Service office closest to my home. If

that office can not support the holding of this appeal conference, then I request that it be held in the closest I.R.S. office which can support one. Further, I plan to record the conference, and bring two witnesses.

Additionally, according to 26 USC § 6320(c), the provisions of § 6330(e) are to apply with regard to the collection actions being suspended while my appeal is pending: * * * [Quotation of section 6330(e) omitted in this order.]

Therefore, please prepare a letter to any third party recipient of any Notice of Levy, informing them that all collection activity has been suspended until the CDP hearing is concluded and a determination has been rendered, and that they will therefore NOT be legally required to perform under any Notice of Levy until they receive further notice from the I.R.S.

At these Collection Due Process hearings it is the duty of the Appeals Office to determine the lawful basis of any assessment or demand for tax or penalty amounts which are disputed by the taxpayer, and to consider alternative collection or payment options that may be offered by the taxpayer in the course of the hearing. It is this duty that my appeal is invoking in regards to the tax and penalties alleged by the I.R.S. to be owed by me for the disputed tax years, 2007, 2008. Additionally, I have very serious legal questions about whether or not the provisions of the statutes have been properly followed as proscribed under Title 26 U.S.C. Sections 1, 61, 6201, 6203, 6020, 6001, 6011, 6211, 6212, 6320, 6321, [6330, 6331], 6335, 6751, 7701, 1441, 1461, and 1463 among others. [The citation to sections 6330 and 6331 is bracketed in the original.]

Finally, if this request for CDP consideration by the appeals function is imperfect in any way, please explain with particularity any such defects, and provide me with all information necessary for me to perfect this request.

If you refuse to grant me this CDP hearing opportunity and provide all of the information requested herein, such failure or refusal must be considered to be a knowing and willful violation of my rights to due process and administrative appeal.

Therefore, upon such failure or refusal, all of my administrative remedies must be considered to be exhausted by this request. Further, any statements or legal claims made in this appeal letter regarding the cited statutes not

specifically rebutted in your response to this request must be considered true and correct.

Under penalty of perjury, I declare that the foregoing is true and correct to the best of my knowledge and belief.

Action by IRS Appeals

The Commissioner's motion explains that Appeals put Mr. Balice's CDP case "in suspense" because the collection of the tax at issue had been referred to the Department of Justice and was under DOJ's authority at that time. The motion explains that, when the suspense was lifted, IRS Appeals proceeded as follows:

37. On August 10, 2018, SO [Settlement Officer] Voysest determined that petitioner had not raised any non-frivolous arguments....

38. On August 10, 2018, SO Voysest disregarded petitioner's request for a CDP hearing because petitioner's request was frivolous and only filed to delay or impede the administration of the tax laws. Petitioner was not offered a CDP hearing by Appeals....

As far as we can tell from the papers submitted with the Commissioner's motion, Appeals did not have any communication with Mr. Balice before or after the suspense was lifted. The administrative records in CDP cases often include letters from Appeals to the taxpayer explaining the CDP process, soliciting proposals of collection alternatives, requesting financial information to support the appropriateness of such alternatives, and requesting delinquent returns. The Commissioner has alleged no such letters in this case.

Rather, on August 27, 2018, without having conducted a CDP hearing, IRS Appeals issued to Mr. Balice a "Notice of Determination Concerning Collection Action under Section 6320 and/or 6330", which sustained the filing of the Notice of Federal Tax Lien with respect to 2007 and 2008 income tax liabilities and the 2007 civil penalty. (Appeals did not issue a notice of determination as to the CDP Levy Notice, for which Mr. Balice's CDP request was not timely.)

Litigation

On September 10, 2018, Mr. Balice timely filed in this Court a petition challenging the notice of determination. The Commissioner moved for summary judgment, arguing that--

Petitioner's due process rights were not violated, even though he was not offered a CDP hearing because: (1) he had an opportunity to raise issues regarding the underlying liability and validity of the liens in other courts; (2) the settlement officer properly disregarded his CDP request because he only raised frivolous issues; and (3) no purpose would be served in remanding the case to Appeals where petitioner raised only frivolous arguments and the settlement officer lacked legal authority to compromise the liabilities which were previously referred to DOJ.

Discussion

A taxpayer's right to a CDP hearing is indeed limited, as the Commissioner argues, by section 6330(g), which provides that "if the Secretary determines that any portion of a request for a hearing under this section or section 6320 meets the requirement of clause (i) [i.e., it "is based on a position which the Secretary has identified as frivolous under subsection (c)" of section 6702] or (ii) [i.e., it "reflects a desire to delay or impede"] of section 6702(b)(2)(A), then the Secretary may treat such portion as if it were never submitted and such portion shall not be subject to any further administrative or judicial review." Presumably, if Appeals determines that all of the positions reflected in a taxpayer's CDP hearing request are frivolous or dilatory under this standard, then the taxpayer is not entitled to "any further administrative ... review", so he is not entitled to a CDP hearing.

However, as we observed in Thornberry v. Commissioner, 136 T.C. 356, 368 (2011):

Section 6330(g) permits the Secretary to treat only that portion of a request for an administrative hearing that is based on a position which the Secretary has identified as frivolous under section 6702(c) 3 or reflects a desire to delay or impede the administration of Federal tax laws as if it had not been submitted.

Furthermore,

If the Appeals Office determines that a portion of the taxpayer's request for an administrative hearing is based on a position identified by the Secretary as frivolous under section 6702(c) or reflects a desire to delay or impede the administration of Federal tax laws and issues a notice of determination to proceed with collection and the taxpayer timely petitions for review, we have jurisdiction under section 6330(d)(1) to review the determination. [*Id.* at 367.]

In this case our review of Appeals' determination would be assisted by more information about which positions reflected in Mr. Balice's CDP hearing request are "position[s] which the Secretary has identified as frivolous under subsection (c)" of section 6702.

It is not clear whether there could be anything frivolous or dilatory about calling on Appeals to conduct the "verification" required by sections 6320(c) and 6330(c)(1). Mr. Balice may be mistaken in his purported demand that the verification "be provided to me before the hearing", since the statute requires that it be obtained "at the hearing", sec. 6330(c)(1); but we do not yet see how this renders his position not just erroneous but "frivolous".

Moreover, the record here indicates that a portion of the liability at issue is penalty; and "[w]here the supervisory approval requirement of section 6751(b)(1) applies, the Appeals officer should obtain verification that such approval was obtained". *ATL & Sons Holdings, Inc. v. Commissioner*, 152 T.C. __, __ (slip op. at 12) (March 13, 2019); see *Rosendale v. Commissioner*, T.C. Memo. 2018-99, at *14. Section 6751 is mentioned in Mr. Balice's CDP hearing request; but as far as we can tell, the succinct recounting of verification in the August 2018 notice of determination--which post-dated our decision in *Graev v. Commissioner* ("*Graev III*"), 149 T.C. 485 (2017), supplementing and overruling in part 147 T.C. 460 (2016)--does not address compliance with section 6751(b)(1). (Nor does the Commissioner's motion or reply.) We cannot tell whether the Commissioner bears and has met a burden of production under section 7491(c).

If Mr. Balice was not in compliance with his filing and payment obligations, then he may have been ineligible for some or all collection alternatives; but we do not yet see how it was frivolous or dilatory for him to propose "to discuss alternative collection and or payment options".

If, for purposes of section 6330(g), only some "portion" or "portions" of Mr. Balice's CDP hearing request were frivolous or dilatory, but not the entire

request, then it would seem that Appeals may have abused its discretion in denying Mr. Balice a CDP hearing. When this case is called from the calendar, the parties should be prepared to discuss whether that is so and, if it is, what further proceedings are appropriate in this case.

It is therefore

ORDERED that, when or soon after this case is called from the calendar at the Court's Philadelphia trial session beginning October 21, 2019, the Court will hear argument from both parties on the Commissioner's motion for summary judgment.

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
September 24, 2019