T.C. Memo. 2020-150

UNITED STATES TAX COURT

TUNG DANG AND HIEU PHAM DANG, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 21100-17L. Filed November 9, 2020.

Steve Milgrom, for petitioners.

Emerald G. Smith and Jeffrey L. Heinkel, for respondent.

MEMORANDUM OPINION

MARVEL, Judge: This case is before the Court on petitioners' motion for reasonable litigation and administrative costs pursuant to section 7430 and Rule 231.[1] No party requested a hearing on this matter, and no material fact is in

[1]Unless otherwise indicated, all section references are to the Internal
(continued...)

[*2] dispute. We will therefore decide petitioners' motion on the basis of the parties' submissions and the existing record. See Rule 232(a)(1).

For the reasons set forth below, we conclude that petitioners did not incur "reasonable administrative costs" under section 7430. We further conclude that petitioners are not entitled to an award of reasonable litigation costs because the position of the United States before this Court was "substantially justified." We will deny petitioners' motion for fees and costs.

Background

The following facts are derived from the parties' pleadings, petitioners' motion for judgment on the pleadings, petitioners' motion for costs, and the parties' responses, including the declarations and the exhibits attached thereto. Petitioners resided in California when they filed their petition.

In 2007 Mr. Dang started Copia Networks, Inc. (Copia), which purchased computers and other electronic equipment for resale to wholesalers in Vietnam. Mr. Dang engaged MF & Associates, LLC, to keep his books and prepare his tax returns.

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[1](...continued)
Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. We round some monetary amounts to the nearest dollar.

[*3] In 2011 the Internal Revenue Service (IRS) began an audit of petitioners' and Copia's tax returns for tax years 2008 and 2009. By the time of the audit Copia had failed and petitioners were suffering financial difficulties. Upon completion of the audit the IRS mailed to petitioners a notice of deficiency in which it determined deficiencies of $83,292 and $24,165 for tax years 2008 and 2009, respectively, and accuracy-related penalties under section 6662. Petitioners timely petitioned this Court with respect to the notice of deficiency. On February 5, 2015, this Court entered a stipulated decision in docket No. 18971-13. The stipulated decision reflected income tax deficiencies of $76,453 and $14,412 for tax years 2008 and 2009, respectively, but respondent conceded the accuracy-related penalties. Respondent assessed the deficiencies and interest.

Petitioners then began discussing payment options with the IRS. Specifically, petitioners requested that the IRS levy against funds held in Mr. Dang's individual retirement account (IRA). Petitioners offered this alternative because a levy by the IRS is one of the exceptions to the additional tax on early distributions from retirement plans under section 72(t). IRS Collections declined petitioners' invitation because it determined that petitioners had alternative sources of funds that were sufficient to satisfy the liabilities in full.

[*4] In an attempt to collect the outstanding liabilities, the IRS issued a notice of Federal tax lien filing and a notice of intent to levy. Petitioners timely filed a Form 12153, Request for a Collection Due Process or Equivalent Hearing, requesting a hearing under sections 6330 and 6320. During the section 6330/6320 hearing, petitioners raised only one issue for consideration--whether the IRS should levy on the IRA. On September 8, 2017, the Appeals Office sustained the collection actions because it determined that the selection of the levy source was a discretionary matter for IRS Collections and thus the levy source request was properly addressed to IRS Collections and not the Appeals Office. On October 10, 2017, petitioners filed a timely petition with this Court seeking review of the Appeals Office's determination to sustain the collection actions.

On December 1, 2017, respondent filed his answer conceding that the Appeals Office abused its discretion in rejecting petitioners' offer to pay in full via a levy on the IRA. Respondent indicated that he would move to remand the case so the Appeals Office could correct its error. On January 3, 2018, respondent filed a motion to remand, explaining that substitution of assets is a valid collection alternative and conceding that the Appeals Office should have considered petitioners' request for the IRS to levy on the IRA. See sec. 301.6330-1(e)(3),

[*5] Q&A-E6, Proced. & Admin. Regs. On March 20, 2018, we granted respondent's motion to remand.

A supplemental hearing took place on April 11, 2018. On May 17, 2018, the Appeals Office issued a Supplemental Notice of Determination, concluding that a levy on the IRA was appropriate. On June 12, 2018, the IRS served a notice of levy on the financial institution that held Mr. Dang's IRA. Shortly thereafter, however, petitioners obtained a loan on their personal residence and requested that the IRS suspend the levy process so that they could pay the balance from the loan proceeds instead. On July 6, 2018, petitioners fully paid their liabilities for tax years 2008 and 2009 from the loan proceeds.

On August 10, 2018, the parties filed a joint stipulation of settled issues in which respondent agreed to take no further collection action with respect to petitioners' 2008 and 2009 tax years. On the same day petitioners filed a motion for reasonable litigation or administrative costs. The only remaining issue is whether petitioners are entitled to reasonable litigation and administrative costs.

Discussion

Section 7430 provides for an award of reasonable litigation and administrative costs to a taxpayer in a proceeding involving the collection of any

[*6] tax, interest, or penalty.[2] An award may be made where the taxpayer can demonstrate that he: (1) is the "prevailing party", (2) has exhausted administrative remedies within the IRS,[3] (3) has not unreasonably protracted the proceedings, and (4) has claimed "reasonable" costs. Sec. 7430(a), (b)(1), (3), (c)(1) and (2); Morrison v. Commissioner, 565 F.3d 658, 661 (9th Cir. 2009), rev'g on other grounds T.C. Memo. 2006-103; Alterman v. Commissioner, 146 T.C. 226, 227 (2016). These requirements are conjunctive; failure to satisfy any one precludes an award of costs to the taxpayer. See Minahan v. Commissioner, 88 T.C. 492, 497 (1987); Marten v. Commissioner, T.C. Memo. 2000-186.

As relevant here, a "prevailing party" is a party that "has substantially prevailed with respect to the amount in controversy" or "with respect to the most significant issue or set of issues presented".[4] Sec. 7430(c)(4)(A)(i). A party is not treated as a "prevailing party", however, if "the United States establishes that the position of the United States in the proceeding was substantially justified." Id.

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[2]If a taxpayer is represented by an individual on a pro bono basis, as is the case here, an award of reasonable attorney's fees may exceed the amount paid or incurred by the taxpayer. Sec. 7430(c)(3)(B).

[3]This requirement applies only as to litigation costs. See sec. 7430(b)(1).

[4]Under sec. 7430(c)(4)(A)(ii), a "prevailing party" cannot have a net worth exceeding $2 million. Respondent concedes that neither petitioner's net worth exceeds the net worth threshold.

[*7] subpara. (B)(i). A rebuttable presumption arises that the Government's position was not substantially justified when it fails to adhere to applicable published guidance during the administrative proceeding. Id. cl. (ii). Applicable published guidance means regulations, revenue rulings, revenue procedures, information releases, notices, and announcements, as well as private letter rulings, technical advice memoranda, and determination letters issued to the taxpayer. Id. cl. (iv).

When a taxpayer seeks both administrative and litigation costs, we apply a bifurcated analysis to separately determine whether "the 'position of the United States'" was substantially justified in the administrative proceeding and the litigation proceeding. Huffman v. Commissioner, 978 F.2d 1139, 1144 (9th Cir. 1992), aff'g in part, rev'g in part T.C. Memo. 1991-144. We start with an analysis of petitioners' claim for an award of administrative costs.

A. Reasonable Administrative Costs

Reasonable administrative costs are limited to those costs incurred by the taxpayer on or after the earliest of: (1) the date of the receipt by the taxpayer of the notice of determination, (2) the date of the notice of deficiency, or (3) the date of the first letter of proposed deficiency that allows the taxpayer to appeal a decision to the IRS Appeals Office. Sec. 7430(c)(2); see also sec. 301.7430-4(a),

[*8] Proced. & Admin. Regs. (providing that reasonable administrative costs include only those costs incurred on or after the "administrative proceeding date"); sec. 301.7430-3(c)(1)(i), Proced. & Admin. Regs. (providing that the "administrative proceeding date" is the date of the receipt of a notice of decision by the Appeals Office). Because a section 6330/6320 proceeding ordinarily occurs only after an assessment is recorded, the date of the notice of determination is the only applicable date under the statute for a claim of administrative costs in section 6330/6320 cases to begin accruing. Sec. 7430(c)(2); see also Worthan v. Commissioner, T.C. Memo. 2012-263, at *18. And, because the notice of determination in section 6330/6320 cases also concludes the administrative proceeding, a taxpayer cannot recover an award for administrative costs arising in a section 6330/6320 proceeding.[5] Sec. 7430(c)(2); see Worthan v. Commissioner, at *18; see also sec. 301.7430-3(a) and (b), Proced. & Admin. Regs. (clarifying that hearings under sections 6320 and 6330 are collection actions and accordingly not administrative proceedings within the meaning of section 7430).

[5]In 1988, when Congress amended sec. 7430 to include recovery for administrative costs in addition to litigation costs, the legislative history of the amendment acknowledged that the dates triggering costs precluded an award for administrative costs arising from a collection action. See H.R. Conf. Rept. No. 100-1104, at 226 (1988), 1988-3 C.B. 473, 716 ("Thus, with respect to a collection action, only reasonable litigation costs are recoverable under * * * [sec. 7430].").

[*9] Because petitioners' administrative costs were incurred before the Appeals Office issued the notice of determination, they do not constitute "reasonable administrative costs." In the light of this conclusion, we need not decide whether petitioners were prevailing parties in the administrative proceeding.

B. Reasonable Litigation Costs

In order for a taxpayer to qualify for an award of reasonable litigation costs under section 7430, the taxpayer must qualify as a "prevailing party". Sec. 7430(a). As relevant here, a "prevailing party" is a party that has substantially prevailed with respect to the most significant issue presented, unless the IRS can show that its position was substantially justified. Sec. 7430(c)(4)(A)(i), (B). For purposes of disposing of this motion, we assume without deciding that petitioners met this first hurdle[6]--they substantially prevailed with respect to the most significant issue presented. Our analysis focuses on whether respondent has shown that the "position of the United States" in this Court proceeding was substantially justified.

The "position of the United States" in litigation is generally established in its answer. Huffman v. Commissioner, 978 F.2d at 1148. The "substantially

[6]Respondent appears to concede this issue, but the extent of his concession is unclear.

[*10] justified" standard means "'justified in substance or in the main'--that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). A substantially justified position means a position with a "reasonable basis both in law and fact". Id. To be substantially justified, however, means "more than merely undeserving of sanctions for frivolousness". Id. at 566. Of particular relevance here, the Court of Appeals for the Ninth Circuit, the venue for appeal in this case absent a stipulation to the contrary, has previously held that when the Government concedes a case in its answer, its conduct is reasonable. See Huffman v. Commissioner, 978 F.2d at 1148 (citing Bertolino v. Commissioner, 930 F.2d 759, 761 (9th Cir. 1991)).

Because respondent conceded his error in his answer--the earliest possible opportunity--we conclude that "the position of the United States" was substantially justified. See id. Respondent conceded the merits in full and moved for remand to give petitioners what they sought all along--a levy against Mr. Dang's IRA.

Petitioners' contentions to the contrary are unavailing. Petitioners primarily contend that because respondent failed to adhere to a regulation, his position is presumed to be unreasonable. See sec. 7430(c)(4)(B)(ii). Specifically, petitioners allege that, under the regulations governing section 6330/6320 administrative

[*11] proceedings, the IRS must consider the substitution of assets as a collection alternative. See sec. 301.6330-1(e)(3), Q&A-E6, Proced. & Admin. Regs.[7] Because the IRS failed to adhere to this regulatory requirement, petitioners contend that the section 7430(c)(4)(B)(ii) presumption arises and the position of the United States is presumed unreasonable. Furthermore, relying on United States v. Appelbaum, Nos. 5:12-CV-186, 3-14-CV-504, 2016 WL 4059680, at *1 (W.D.N.C. July 27, 2016), aff'd, 691 F. App'x 714 (4th Cir. 2017), and Currell v. United States, No. C-1-00-429, 2001 WL 1480294 (S.D. Ohio Oct. 12, 2001), petitioners contend that the only way to rebut this presumption is by establishing a reasonable basis for deviating from the applicable regulation.

Although respondent has now conceded that the Appeals Office should have considered petitioners' request to satisfy their unpaid tax liabilities by levying on Mr. Dang's IRA, we need not decide whether the presumption arose in this case, because even if it did, we find it is rebutted by respondent's prompt and reasonable concession in his answer.[8] See Huffman v. Commissioner, 978 F.2d

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[7]We assume without deciding, as the parties concede, that petitioners' request to levy on the IRA constitutes substitution of assets.

[8]Generally, sec. 301.7430-3(a) and (b), Proced. & Admin. Regs., would act to bar petitioners' contentions regarding the presumption, but petitioners have challenged the ongoing validity of that regulation. We need not rule on

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[*12] at 1148 (citing Bertolino v. Commissioner, 930 F.2d at 761 (holding that a concession in the answer is reasonable)).

The cases petitioners cite may support an argument that having a reasonable basis for deviating from published guidance is one way to rebut the presumption, but they do not support an argument that it is the only way. In Currell, the District Court for the Southern District of Ohio denied a substantially justified position defense because the Government could not establish a reasonable basis for deviating from published guidance. Currell, 2001 WL 1480294, at *3-*4. In that case, however, the Government's position deviated from published guidance and remained the same throughout both the court and administrative proceedings. Id. That is not the case here where respondent promptly conceded the case in his answer. In Appelbaum, 2016 WL 4059680, at *4-*6, the District Court for the Western District of North Carolina found that the presumption did not arise because no administrative proceeding took place but stated that, even if the presumption had arisen, the Government rebutted the presumption by showing that there was little to no precedent on the issue. Neither case requires us to accept

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[8](...continued)
petitioners' regulatory challenge, however, because we conclude that--in any event--respondent's prompt and complete concession in his answer established that his litigation position was substantially justified whatever the implications of the challenged regulation may be.

[*13] petitioners' contention that only a showing of reasonable basis may rebut the presumption.[9]

Because we conclude that "the position of the United States" was substantially justified, petitioners are not treated as prevailing parties with respect to the Court proceeding and consequently are not entitled to "reasonable litigation costs." We have considered the parties' remaining arguments, and to the extent not discussed above, conclude those arguments are irrelevant, moot, or without merit.

To implement the foregoing,

An appropriate order and decision will be entered.

[9]Moreover, any presumption that may have arisen in this case would only apply during the timeframe in which respondent acted contrary to applicable published guidance. See sec. 301.7430-5(d)(7), Proced. & Admin. Regs. By conceding this case in his answer, respondent took a position that was not contrary to applicable published guidance and therefore not subject to any burden-shifting presumption.