



United States Tax Court

Washington, DC 20217

Steven L. Barkan & Janice Barkan,)
Petitioners)
v.) Docket No. 18595-19L
Commissioner of Internal Revenue,)
Respondent)

ORDER

On September 9, 2019, petitioners timely filed a petition in docket number 16625-19L.¹ On October 15, 2019, petitioners timely filed a petition in docket number 18595-19L. By order dated May 18, 2020, the Court granted respondent's amended motion to consolidate the cases.

Petitioners seek review of a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated August 6, 2019 (first notice of determination), and a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated September 11, 2019 (second notice of determination).² The first notice of determination sustained a proposed levy with respect to petitioners' unpaid tax liability for tax year 2016. The second notice of determination sustained a proposed levy with respect to petitioners' unpaid tax liabilities for tax years 2011, 2012, and 2013.

¹The petition in docket no. 16625-19L challenged IRS determinations for tax years 2012, 2013, 2014, 2015, and 2016. On November 5, 2019, respondent filed a Motion to Dismiss for Lack of Jurisdiction as to the tax years 2012, 2013, 2014, and 2015 (motion to dismiss). The Court granted respondent's motion to dismiss on February 24, 2020, because the IRS did not issue a notice of determination to petitioners for tax years 2014 and 2015, and the notices of determination related to tax years 2012 and 2013 were issued to petitioners on September 11, 2019, after the petition in docket No. 16625-19L was filed.

²Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended, in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

On July 1, 2020, in each of the consolidated cases, respondent filed a Motion for Summary Judgment (motions) pursuant to Rule 121. Respondent filed in support of the motions a declaration by Mehrin Bakht, an attorney in the Internal Revenue Service (IRS)³ Associate Area Counsel's Office in Westbury, New York.⁴ Respondent was unable to obtain petitioners' views on the motion. By order dated July 7, 2020, the Court directed petitioners to file a response to the motions by August 4, 2020. To date, petitioners have not filed a response. By order served September 29, 2021, the motions were assigned for disposition to the undersigned.

Upon review of the record on the motions, the Court concludes that there are genuine issues of material fact and that respondent is not entitled to judgment as a matter of law and that the cases should be remanded to respondent's Appeals Office for a supplemental hearing.

Background

The record on the motions establishes the following. Petitioners resided in New York at the time the petition in this case was filed with the Court.

For tax year 2016 petitioners late-filed their joint Federal income tax return on November 13, 2017. On that return petitioners' reported income tax due of \$99,038, withholding of \$1,398, and estimated tax payments of \$17,500. Accordingly, petitioners reported a 2016 tax liability of \$80,140 that resulted from insufficient withholding and insufficient payment of estimated taxes. On November 13, 2017, the IRS issued a notice and demand to petitioners' last known address for the unpaid income tax liability, a late payment addition to tax of \$2,804.90, an addition to tax for underpayment of estimated tax of \$283.00, and interest of \$1,883.58. Petitioners established an installment agreement on November 25, 2017, but were removed from installment agreement status on December 18, 2017. On April 3, 2018, petitioners had a pending installment agreement that was removed on the same day.

³The Court uses the term "IRS" to refer to administrative actions taken outside of these proceedings. The Court uses the term "respondent" to refer to the Commissioner of Internal Revenue, who is the head of the IRS and is respondent in this case, and to refer to actions taken in connection with this case.

⁴The record does not indicate why respondent provided a declaration from a respondent's counsel rather than from the settlement officers who conducted the CDP hearings.

For tax years 2011 and 2012 petitioners late filed joint Federal income tax returns on July 21, 2014. For tax year 2013 petitioners late filed a joint Federal income tax return on March 30, 2015. Each return showed zero tax due. Petitioners' tax liabilities for 2011, 2012 and 2013 stem from the IRS examination of the filed tax returns for those years. On October 29, 2018, the IRS assessed additional tax (\$33,823, \$20,406, and \$23,583 for 2011, 2012, and 2013, respectively) as well as interest (\$12,174.73, \$6,203.41, and \$5,683.30 for 2011, 2012, and 2013, respectively), late filing additions to tax (\$8,107, \$4,601.25, and \$5,425 for 2011, 2012, and 2013, respectively), and miscellaneous penalties (\$6,764.60, \$4,081.20, and \$4,440 for 2011, 2012, and 2013, respectively).

On December 10, 2018, the IRS issued, both jointly and separately to petitioners, a Notice of intent to levy and notice of your right to a hearing (notice of intent to levy) related to their unpaid 2016 Federal income tax liabilities. On April 18, 2019, the IRS issued, separately to each petitioner, a notice of intent to levy related to their unpaid 2011, 2012, and 2013 Federal income tax liabilities. The notices of intent to levy advised petitioners of their right to request a Collection Due Process (CDP) hearing.

Petitioners timely submitted a Form 12153, Request for a Collection Due Process or Equivalent Hearing, to challenge the proposed levy with respect to their unpaid tax liability for 2016. Petitioners checked the box for an installment agreement as the only requested collection alternative. Petitioners also timely submitted a Form 12153, Request for a Collection Due Process or Equivalent Hearing, to challenge the proposed levy with respect to their unpaid tax liabilities for 2011, 2012, and 2013. Petitioners checked the box for an offer-in-compromise as a collection alternative.⁵

Petitioners' CDP hearing request for tax year 2016 was assigned to settlement officer Kenneth Johnson (SO). The SO verified that he did not have prior involvement with petitioners for the tax year at issue in this case. He sent petitioners a letter dated May 17, 2019, scheduling a telephone CDP hearing for June 20, 2019, which was later rescheduled for July 25, 2019. The SO, by letter dated May 17, 2019, requested petitioners provide a completed Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and three current months of bank statements so that the SO could consider the requested installment agreement. The letter requested that petitioners

⁵In both Forms 12153 petitioners checked the box to request an equivalent hearing, but the record on the motion indicates that petitioners timely requested the CDP hearings.

provide such documents within 14 days. Petitioners did not provide the requested documents.

Petitioners' CDP hearing request for tax years 2011, 2012, and 2013, was assigned to settlement officer Rebecca Roggeveen (SO). The SO verified that she did not have prior involvement with petitioners for the tax years at issue in this case. She sent petitioners a letter dated July 22, 2019, scheduling a telephone CDP hearing for August 20, 2019. The SO, by letter dated July 22, 2019, requested petitioners provide a completed Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and a Form 656, Officer in Compromise, along with any documentation required for its completion so that the SO could consider the requested offer-in-compromise. The letter requested that petitioners provide such documents within 14 days. Petitioners did not provide the requested documents.

The telephone CDP hearing for tax year 2016 was held as scheduled on July 25, 2019, between petitioners' counsel and SO Johnson. According to the SO's case activity notes petitioner's counsel informed the SO that he thought the CDP hearing was in August and that he had received a CDP notice scheduling a hearing in August. The record indicates that a CDP hearing with respect to the other periods--2011, 2012, and 2013--had been scheduled for August 20, 2019. The SO learned for the first time during the CDP hearing that a different SO was working a CDP levy for petitioners' 2011, 2012, and 2013 tax years. SO Johnson determined that petitioners had not provided the requested financial information for him to consider their request for an installment agreement and he closed the case.

The telephone CDP hearing for tax years 2011, 2012, and 2013 was held as scheduled on August 20, 2019, between petitioners' counsel and SO Roggeveen. According to the SO's case activity notes petitioner's counsel informed the SO that he had just received a notice of determination from another SO for another tax period (tax year 2016). The SO informed petitioners' counsel that she had not received the requested financial information necessary for her to consider their request for an offer-in-compromise. However, the case activity notes also indicate that SO Roggeveen and petitioners' counsel discussed the total liability. Petitioner's counsel informed SO Roggeveen that petitioners had received another notice of determination form another SO for another tax period, presumably 2016. Petitioner's counsel requested a Notice of Determination be issued for this CDP to allow petitioners to file a petition with this Court.

After the CDP hearing for tax year 2016, SO Johnson's case activity notes indicated that he reviewed the files and transcripts and verified that requirements

of applicable law and administrative procedure had been met and that he balanced the need for efficient collection of taxes with the legitimate concern of petitioners that any collection be no more intrusive than necessary. However, his case activity notes do not indicate if he contacted SO Roggeveen or made any effort to determine if the CDP hearings as to all the years should be considered together. Instead SO Johnson concluded that petitioners did not challenge the underlying tax liabilities in the case he was reviewing, did not submit the requested Form 433-A and three recent months of bank statements, nor propose an installment agreement that could establish the basis for an alternative to the proposed collection action.

After the CDP hearing for tax years 2011, 2012, and 2013, SO Roggeveen case activity notes indicate that she reviewed the files and transcripts and verified that the requirements of applicable law and administrative procedure had been met. However, her case activity notes do not indicate if she contacted SO Johnson or made any effort to determine if a CDP hearing was requested or held with respect to the other notice of determination that petitioner's counsel mentioned. SO Roggeveen noted that she had discussed the total tax liability with petitioner's counsel but did not indicate what if any conclusion she reached. Rather SO Roggeveen concluded that she balanced the need for efficient collection of taxes with the legitimate concern of petitioners that any collection be no more intrusive than necessary. She concluded that no alternative collection action would be available or proper at that time because petitioners did not challenge the underlying tax liabilities and did not submit the requested Form 433-A and Form 656.

On August 6, 2019, the IRS Office of Appeals (Appeals Office) sent each petitioner the first notice of determination sustaining the proposed levy for petitioners' unpaid income tax liability from tax year 2016.

On September 11, 2019, the Appeals Office sent each petitioner the second notice of determination sustaining the proposed levy for petitioners' unpaid income tax liabilities from tax years 2011, 2012, and 2013 (second notice of determination).

On September 9, 2019, in response to the first notice of determination related to tax year 2016, petitioners timely filed a petition with this Court. In their petition, petitioners asserted that they "were not allowed deductions for reasonable business expenses" and that they "submitted proof of expenses and amended tax returns to substantiate their deductions."

On October 15, 2019, in response to the second notice of determination related to tax years 2011, 2012, and 2013, petitioners timely filed a petition with

this Court. In their petition, petitioners asserted that they “were not allowed deductions for reasonable business expenses” and that “[s]ome of the amounts included in [the] audit were not income, and should not be charged to the taxpayer[s].”

Discussion

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Either party may move for summary judgment upon all or any part of the legal issues in controversy. Rule 121(a). The Court may grant summary judgment only “if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, if any, show 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 Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

Respondent, as the moving party, bears the burden of proving that not any genuine dispute exists as to any material fact and that respondent is entitled to judgment as a matter of law. See FPL Grp., Inc. v. Commissioner, 115 T.C. 554, 559 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, 85 T.C. at 529. In deciding whether to grant summary judgment, the factual materials and inferences drawn from them must be considered in the light most favorable to the nonmoving party. FPL Grp., Inc. v. Commissioner, 115 T.C. at 559; Bond v. Commissioner, 100 T.C. at 36; Naftel v. Commissioner, 85 T.C. at 529. The party opposing summary judgment must set forth specific facts which show that a question of genuine material fact exists and may not rely merely on allegations or denials in the pleadings. Rule 121(d); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Grant Creek Water Works, Ltd. v. Commissioner, 91 T.C. 322, 325 (1988); King v. Commissioner, 87 T.C. 1213, 1217 (1986).

There is a genuine dispute as to whether petitioners disputed their underlying liabilities for tax years 2011, 2012, 2013, and 2016 during their two CDP hearings, given that both petitioners’ counsel and the SOs assigned to each CDP hearing were seemingly unaware that the Appeals Office was working multiple CDP levy cases for petitioners with different SOs and tax periods. Due to this confusion, the record is unclear as to whether petitioners disputed their underlying liabilities during their CDP hearings for the tax years in issue, which is a material fact. Therefore, summary adjudication is not appropriate at this time.

Accordingly, the Court concludes that there remain genuine disputes as to the material facts and respondent is not entitled to summary judgment as a matter of law. Upon due consideration, it is

ORDERED that respondent's motion for summary judgment, filed July 1, 2020, is denied without prejudice. It is further

ORDERED that on the Court's own motion, this case is remanded to respondent's Independent Office of Appeals for a supplemental hearing with petitioners and/or their duly authorized representative to consider petitioners challenge to their underlying liability for the tax years in question and (if their underlying liability challenge is rejected) to allow petitioners to submit additional information necessary for the Appeals Office to consider their request for a collection alternative. It is further

ORDERED that, due to the confusion caused by having multiple settlement officers for different years in issue, respondent shall offer petitioners a supplemental administrative hearing with respect both notices of determination to be conducted by the same Settlement Officer who will consider all the tax years in issue at a reasonable and mutually agreeable date and time, but no later than January 7, 2022. It is further

ORDERED that the undersigned will retain jurisdiction of this case. It is further

ORDERED that on or before February 7, 2022, the parties shall jointly or separately report to the Court as to the then-present status of this case and whether a supplemental Notice of Determination will be issued.

**(Signed) Diana L. Leyden
Special Trial Judge**