

# United States Tax Court

T.C. Memo. 2022-21

THOMAS RHEA HAMILTON AND EDITH MARIE PALMER  
HAMILTON,  
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent

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Docket No. 139-19L.

Filed March 15, 2022.

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Thomas Rhea Hamilton and Edith Marie Palmer Hamilton, pro se.

*Nathan M. Swingley and Timothy A. Lohrstorfer*, for respondent.

## MEMORANDUM FINDINGS OF FACT AND OPINION

URDA, *Judge*: In this collection due process (CDP) case petitioners, Thomas Rhea Hamilton and Edith Marie Palmer Hamilton, seek review under sections 6320(c) and 6330(d)(1)<sup>1</sup> of the determination of the Internal Revenue Service (IRS) Office of Appeals<sup>2</sup> to uphold the filing of a notice of federal tax lien (NFTL) with respect to an unpaid federal income tax liability for 2016, as well as associated interest and additions to tax.

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times. We round all monetary amounts to the nearest dollar.

<sup>2</sup> On July 1, 2019, the Office of Appeals was renamed the Independent Office of Appeals. See Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983 (2019). As the events in this case predated that change, we will use the name in effect at the times relevant to this case, i.e., the Office of Appeals.

**Served 03/15/22**

**[\*2]** The parties dispute whether the settlement officer acted within her discretion in sustaining the NFTL. Based on the record before us, we find that the settlement officer abused her discretion in the conduct of the Hamiltons' CDP hearing.

## FINDINGS OF FACT

This case was tried in Indianapolis, Indiana. At trial the parties stipulated some facts, which are so found. The Hamiltons lived in Indiana when they timely filed their petition.<sup>3</sup>

### I. *The Hamiltons' Tax Liability*

During 2016 and 2017, Mr. Hamilton worked as an attorney (first as a solo practitioner and then in a partnership), while Mrs. Hamilton worked as a chaplain. The Hamiltons reported on their 2016 Form 1040, U.S. Individual Income Tax Return, taxable income of \$222,932 and a total tax of \$71,995. They did not pay in full the tax that they reported.

The IRS subsequently assessed the reported tax as well as an addition to tax for failure to timely pay tax under section 6651(a)(2), an addition to tax for failure to pay estimated tax under section 6654, and statutory interest. As of December 17, 2019, the Hamiltons' unpaid tax liability for 2016 totaled \$70,504.

### II. *Notice and CDP Hearing Request*

The IRS filed an NFTL as part of its efforts to collect the outstanding liability and informed the Hamiltons of their right to a CDP hearing. The Hamiltons timely requested a hearing, indicating their interest in an installment agreement and asserting that the "income and expenses for 2014–16 were not properly calculated."

A settlement officer in the Office of Appeals later sent to the Hamiltons two letters dated October 3, 2018, scheduling their CDP hearing for November 15, 2018. In each letter the settlement officer explained that, during the hearing, she would consider "[a]ny relevant issues you wish to discuss." The settlement officer emphasized,

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<sup>3</sup> Before, during, and after trial, the Commissioner urged this Court to revisit our holding in *Robinette v. Commissioner*, 123 T.C. 85 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006), and limit our review of this CDP determination to the administrative record. The U.S. Court of Appeals for the Seventh Circuit, to which this case would normally be appealable, has not ruled on this point, and we will accordingly follow our holding in *Robinette*.

[\*3] however, that the Hamiltons needed to be current with their 2018 estimated tax payments and filing obligations and to provide certain documents for her to consider any collection alternative.

The settlement officer asked for a significant amount of documentation. Both letters requested that within 14 days (October 17) the Hamiltons submit proof that they had made their estimated tax payments for the year to date. The letters further instructed the Hamiltons to provide within 21 days (October 24) the following documents: (1) their 2017 tax return, (2) copies of the preceding six months of bank statements and three months of pay stubs, (3) proof of various expenses for the preceding three months, including utilities, credit card statements, car payment statements, auto insurance, life insurance, loan statements, and phone bills, and (4) “[a]ssets (the last three months of statements)[,] mortgage[s], and any other expenses.” One of the two letters also asked the Hamiltons to submit several years of tax returns (by October 24), ostensibly related to Mr. Hamilton’s law practice: (1) Form 941, Employer’s Quarterly Federal Tax Return, for the fourth quarter of 2015, all four quarters of 2016, the second through fourth quarters of 2017, and the first and second quarters of 2018, and (2) Form 940, Employer’s Annual Federal Unemployment (FUTA) Tax Return, for 2017.

### III. *Prehearing Communications*

The Hamiltons did not supply any documents by October 24, 2018. In a letter to the settlement officer dated October 31, 2018, Mrs. Hamilton addressed the status of the requested documents. She explained that the Hamiltons previously had retained a bookkeeper to prepare their tax returns, maintain personal and professional accounts, advise them as to necessary filings, and submit such filings. Mrs. Hamilton reported that the Hamiltons had discovered (after receiving the settlement officer’s October 3 letters) that the bookkeeper had failed in those various duties.

Specifically, Mrs. Hamilton wrote that “[p]ersonal account records seem never to have been kept, and professional account records are spotty at best.” She further explained that the bookkeeper had destroyed the underlying financial documents that the Hamiltons had supplied her. Mrs. Hamilton stated that she and her husband had retained Patricia Tokar Canton, a certified public accountant, who would represent them in the CDP hearing, to “reconstruct and verify necessary information.” Mrs. Hamilton finally noted that she had

[\*4] reordered online records such as bank account statements, emphasizing that she would “forward your requested documentation as quickly as I can reconstruct it, anticipated to be within days.”

Mrs. Hamilton stressed that the Hamiltons sought to arrange for installment payments on the delinquency. She sounded a note of uncertainty, however, as to whether the CDP hearing was the correct forum to do so.

Between November 2 and November 15, 2018, the Hamiltons sent the settlement officer five faxes containing hundreds of pages of documentation. In particular, the Hamiltons sent various financial documents, including monthly utility bills (such as telephone, electricity, and gas) and bank statements. The Hamiltons also faxed to the settlement officer’s attention Forms 941 for the fourth quarter of 2016 and the second through fourth quarters of 2017, as well as Mr. Hamilton’s 2017 Form 940.

The day before the CDP hearing, the Hamiltons submitted additional documents. Specifically, they sent the settlement officer Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and Form 433-B, Collection Information Statement for Businesses. They also sent a fax message to the settlement officer stating “2017 returns filed,” which was followed by a fax of a copy of the filed returns (and a fax from Ms. Tokar Canton stating that the returns had been e-filed and accepted) on the day of the hearing itself.

In her correspondence, Mrs. Hamilton asked the settlement officer to contact her if she had “any questions or concerns.” The settlement officer did not do so. Nor did she do any work on the case between October 1, 2018, when she spent an hour and a half reviewing the file and drafting the initial letters, and November 15, 2018, when she spent an hour preparing for the hearing scheduled for that day.

#### IV. *CDP Hearing and Notices of Determination*

The telephone CDP hearing was held on November 15, 2018, with the Hamiltons and Ms. Tokar Canton in attendance. The settlement officer pointed out various problems with the Hamiltons’ tax reporting, documentation, and payments. Specifically, she asserted that the Hamiltons had failed to file Form 941 for the third and fourth quarters

[\*5] of 2016<sup>4</sup> as well as their 2017 tax return. The settlement officer also stated that the Hamiltons had failed to supply financial documentation, including proof of monthly expenses. Finally, she observed that the Hamiltons were not in compliance with their estimated tax payments.

Ms. Tokar Canton responded to several of these points. With respect to the supporting financial information, she noted that the Hamiltons had faxed bank statements and documentation establishing monthly expenses, other than for health and auto insurance and out-of-pocket healthcare costs. Ms. Tokar Canton further noted that the Hamiltons had filed their 2017 return before the CDP hearing and had faxed a copy to the settlement officer. In response to questions regarding the Hamiltons' plan for becoming compliant with their estimated tax payments, Ms. Tokar Canton stated that they could be current as soon as December.

The settlement officer then stated that she would recommend sustaining the NFTL filing. She informed the Hamiltons that they were not eligible for a collection alternative because of the issues previously outlined. Mr. Hamilton asked about the possibility of rescheduling the hearing to supply the missing information, but the settlement officer demurred, explaining that the Hamiltons could petition for review or work with the IRS's compliance office.

On December 4, 2018, the Office of Appeals issued identical notices of determination to Mr. and Mrs. Hamilton sustaining the filing of the NFTL for 2016 and rejecting the Hamiltons' request for an installment agreement. The notices stated that the Hamiltons were ineligible for a collection alternative on largely the same grounds as discussed at the hearing: (1) they had failed to file their 2017 income tax return; (2) they had failed to file Mr. Hamilton's Form 941 for the third and fourth quarters of 2016; (3) they had not provided certain financial documentation; and (4) they were not in compliance with their 2018 estimated tax payments.

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<sup>4</sup> The Form 941 for the third quarter of 2016 was filed on December 12, 2018, and Form 941 for the fourth quarter was filed on November 19, 2018. Although Mr. Hamilton had not previously filed Forms 941 for either quarter, IRS transcripts reflect that his tax deposits were sufficient to cover the amounts reflected on the return for each quarter.

[\*6]

## OPINION

I. *Standard of Review*

We have jurisdiction to review the Office of Appeals' determination pursuant to section 6330(d)(1). Where, as here, the underlying tax liabilities are not at issue, we review the determination of the Office of Appeals for abuse of discretion. *Sego v. Commissioner*, 114 T.C. 604, 610 (2000); *Goza v. Commissioner*, 114 T.C. 176, 182 (2000).

In reviewing for abuse of discretion, we must uphold the Office of Appeals' determination unless it is arbitrary, capricious, or without sound basis in fact or law. *See, e.g., Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006); *Taylor v. Commissioner*, T.C. Memo. 2009-27, 2009 WL 275721, at \*9. We do not substitute our judgment for that of the Office of Appeals but consider “whether, in the course of making its determination, the Appeals Office complied with the legal requirements of an administrative hearing.” *Charnas v. Commissioner*, T.C. Memo. 2015-153, at \*7.<sup>5</sup>

II. *Analysis*A. *CDP Hearing Requirements*

When making the determination whether to sustain a collection action, a settlement officer must (1) verify that the requirements of any applicable law or administrative procedure have been met, (2) consider any relevant issues the taxpayers raised, including offers of collection alternatives, and (3) consider whether “any proposed collection action

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<sup>5</sup> In his Motion in Limine, in addition to asserting that we should not consider any matters outside the administrative record, *see supra* note 3, the Commissioner maintains that we should not consider the Hamiltons' testimony and documentary evidence on the grounds that it is self-serving and irrelevant to the extent that the settlement officer was not aware of the information. The self-serving nature of a sworn statement pertains to its credibility; “[w]e may discount testimony which we find to be unworthy of belief, but we may not arbitrarily disregard testimony that is competent, relevant, and uncontradicted” on the ground that it favors the speaker. *Keels v. Commissioner*, T.C. Memo. 2020-25, at \*16 (citation omitted); *see also Camara v. Mastro's Rests. LLC*, 952 F.3d 372, 374 (D.C. Cir. 2020); *Hill v. Tangherlini*, 724 F.3d 965, 967 (7th Cir. 2013). We will consider (and explicitly discuss) those aspects of the Hamiltons' testimony and documentary evidence we deem relevant to the question before us, *viz.*, whether the settlement officer abused her discretion in sustaining the collection action. Accordingly, we will deny the Commissioner's Motion in Limine and admit into evidence Exhibits 3-P, 4-P, and 5-P.

[\*7] balances the need for the efficient collection of taxes with the legitimate concern of the [taxpayers] that any collection action be no more intrusive than necessary.” § 6330(c)(3); *see Chiarelli v. Commissioner*, T.C. Memo. 2017-91, at \*6; *Shanley v. Commissioner*, T.C. Memo. 2009-17, 2009 WL 195929, at \*3.

This case focuses on the second requirement, *viz.*, whether the settlement officer gave proper and fair consideration to issues that the Hamiltons raised. “CDP hearings are designed to be a forum for considering taxpayers’ legitimate disagreement with collection actions.” *Charnas*, T.C. Memo. 2015-153, at \*12; *see also* § 6330(c)(2) (providing that taxpayer may raise “any relevant issue”). “It is therefore important to question whether a taxpayer’s concerns have been properly addressed in the CDP hearing.” *Charnas*, T.C. Memo. 2015-153, at \*12; *see also Blosser v. Commissioner*, T.C. Memo. 2007-323, 2007 WL 3145516, at \*4 (“If section 6330(b) [providing a taxpayer’s right to a fair hearing before a levy is made] is to be given any force, the Appeals Office must make its determination . . . after giving adequate consideration to all meritorious issues the taxpayer has raised during the hearing.”); § 6320(b).

The settlement officer premised her determination to sustain the NFTL filing on four grounds: (1) the Hamiltons’ failure to file their 2017 federal income tax return; (2) the Hamiltons’ failure to file Forms 941 for the third and fourth quarters of 2016; (3) the Hamiltons’ failure to supply requested financial documentation; and (4) the Hamiltons’ noncompliance with their estimated tax obligations. Although any of these grounds might justify sustaining a collection action, the settlement officer here failed to give proper consideration to points the Hamiltons raised during the hearing, which undermined each of the grounds she relied upon.

## B. *Problems Undercutting the Determination*

### 1. *Plain Errors*

As an initial matter, the notices featured plain errors directly related to the reasons the settlement officer gave for her determination. Specifically, the notices relied upon the Hamiltons’ purported failure to file their 2017 federal income tax return in sustaining the collection action. The Hamiltons, however, had filed this tax return the day before the CDP hearing and faxed the settlement officer a copy of the return that had been filed. They also explicitly informed her of this filing at

[\*8] the hearing. The settlement officer nonetheless maintained in the notices that this return had not been filed, which was plainly wrong.

Another significant error related to Mr. Hamilton's Form 941 for the fourth quarter of 2016. Although the notices gave the failure to file this Form 941 as another reason for sustaining the collection action, IRS records reflect that the Form 941 had been filed on November 19, 2018, the day before the settlement officer submitted her case-closing documents and two weeks before the notices were issued. We have previously observed that "[i]t is the policy of the Office of Appeals to consider financial information . . . up to the time of the issuance of the notice of determination." *Dinino v. Commissioner*, T.C. Memo. 2009-284, 2009 WL 4723652, at \*10; *accord Ludlam v. Commissioner*, T.C. Memo. 2019-21, at \*15–16, *aff'd per curiam*, 810 F. App'x 845 (11th Cir. 2020). The Office of Appeals did not do so in this case and instead issued notices contradicted by the IRS's own information.<sup>6</sup>

## 2. *Omission in the Administrative Record*

We also have significant concerns about the administrative record. The record compiled by the settlement officer includes a fax cover sheet dated November 9, 2018, from the Hamiltons to the settlement officer reflecting that they had faxed her 11 pages. The record further contains an internal IRS email to the settlement officer reflecting that 11 pages had been received from the Hamiltons' fax number on that date. The administrative record, however, does not include any of the documents besides the cover sheet.

At trial the Hamiltons introduced a fax transmission log from November 9, 2018, reflecting that they faxed 11 pages to the IRS (at a time consistent with the IRS reception email). They also included the pages purportedly missing from the administrative record, which included the Form 941 for the fourth quarter of 2016.

Based on the documents before us, it appears that the Hamiltons faxed and the Office of Appeals received material bearing directly on the grounds for sustaining the NFTL filing, which the settlement officer did not consider. The failure of the administrative record to capture some documents makes us question the completeness of the administrative

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<sup>6</sup> The notices of determination (one sent to Mr. Hamilton, the other to Mrs. Hamilton) also state that the Hamiltons had not filed their 2018 Form 1040. But the 2018 Form 1040 was not due until April 15, 2019, about four months after the issuance of the notices.



[\*9] record that the settlement officer considered and that we are reviewing. We are further concerned about our ability to assess whether the settlement officer's determination would have been the same had she been aware of this Form 941, and, critically, whether such a determination would have been an abuse of discretion. *See McNair Eye Ctr., Inc. v. Commissioner*, T.C. Memo. 2010-81, 2010 WL 1558164, at \*3; *Meeh v. Commissioner*, T.C. Memo. 2009-180, 2009 WL 2391303, at \*4.

### 3. *Denial of Additional Time*

“An Appeals officer's unreasonable denial of a request for more time to submit financial information or other evidence may be an abuse of discretion.” *Rosenthal v. Commissioner*, T.C. Memo. 2014-252, at \*12. “The reasonableness of a request for more time, and the reasonableness of a denial of such a request, will depend on the particular facts of the case.” *Dinino v. Commissioner*, 2009 WL 4723652, at \*9; *see also Szekely v. Commissioner*, T.C. Memo. 2013-227, at \*10 (“[A] settlement officer should take into consideration the entire context of the case.”). In making this decision, the settlement officer often considers the taxpayers' “prior conduct.” *Dinino v. Commissioner*, 2009 WL 4723652, at \*9; *see also Judge v. Commissioner*, T.C. Memo. 2009-135, 2009 WL 1636284, at \*3. The context of this case shows that the settlement officer's denial of a brief extension was arbitrary and capricious.

As an initial matter, the Hamiltons made efforts to keep the settlement officer informed as to issues affecting their information-gathering process. *Cf. Shanley v. Commissioner*, 2009 WL 195929, at \*6 (noting that “reasons related to the information-gathering process” might bear on a settlement officer's exercise of discretion). They alerted the settlement officer to difficulties in producing the many documents that had been requested, giving a plausible explanation (their bookkeeper's failures and destruction of their documents) as to the source of their problems. The Hamiltons later asked the settlement officer to apprise them of any questions or concerns that they could answer before the hearing. She did not take them up on that offer; her doing so would have allowed the Hamiltons to address any issues before the November 15, 2018, hearing. Finally, Mr. Hamilton requested rescheduling the hearing so that they could rectify the gaps identified by the settlement officer.

The Hamiltons demonstrated a similar willingness to fix the problems identified with their estimated tax payments. After being

[\*10] informed that they owed estimated tax for 2018, the settlement officer asked the Hamiltons about their plan for meeting their obligations. The Hamiltons responded that they could make the requisite payments within a few weeks.

The Hamiltons' prehearing conduct also showed a commitment to cooperating with the settlement officer so that they could qualify for an installment agreement. Between November 2, 2018, and the hearing on November 15, they sent the settlement officer at least five fax messages, four of which included financial records and copies of completed tax forms. They sent hundreds of pages of financial and tax documentation, including monthly bills and bank statements, Forms 433-A and 433-B, and numerous personal and business tax returns.

In summary, the Hamiltons had demonstrated through word and deed a sincere commitment to meeting their obligations in order to be eligible for a collection alternative. The Hamiltons' case is far from "the run-of-the-rejection-mill case where a taxpayer submits no information." *Leslie v. Commissioner*, T.C. Memo. 2016-171, at \*29, *aff'd*, 725 F. App'x 597 (9th Cir. 2018). Nor had the Hamiltons previously requested an extension, choosing instead to keep the settlement officer abreast of developments while attempting to satisfy her requests. *See Judge v. Commissioner*, 2009 WL 1636284, at \*3.

The settlement officer thus had every reason to expect that, if she granted the Hamiltons an extension or rescheduled the hearing, they would work quickly to do whatever was needed to qualify them for an installment agreement. *See id.* ("[The taxpayer's] past cooperation with the Appeals Office persuades us that he would have timely submitted the revised financial information if granted an extension."). It further seems apparent that if the settlement officer had taken the time to discuss with the Hamiltons their outstanding obligations, that conversation would not have fallen on deaf ears. *See Szekely*, T.C. Memo. 2013-227, at \*10 ("We would hope that the IRS would reach out to a taxpayer in these circumstances and assist him in his tax compliance efforts, rather than proceed to close his case."). We accordingly conclude the Hamiltons had presented the settlement officer

[\*11] with a “substantial reason to grant an extension.” *Shanley v. Commissioner*, 2009 WL 195929, at \*6.<sup>7</sup>

#### 4. Conclusion

A settlement officer generally does not abuse her discretion by sustaining a determination where taxpayers fail to submit requested financial information or comply with their tax obligations during the CDP proceeding. *See, e.g., Giamelli v. Commissioner*, 129 T.C. 107, 111–12 (2007) (“Reliance on a failure to pay current taxes in rejecting a collection alternative does not constitute an abuse of discretion.”); *Rockafellor v. Commissioner*, T.C. Memo. 2019-160, at \*13. In this case, however, the settlement officer’s plain errors, the uncertain state of the administrative record, and the arbitrary denial of an extension convince us that the notices of determination lacked a sound basis in fact and law.

Fundamentally, the record before us suggests that the settlement officer made up her mind after a cursory one-hour review of the Hamiltons’ materials and failed to give proper consideration to the issues they raised, as required by section 6330(c)(3)(B). *Blosser v. Commissioner*, 2007 WL 3145516, at \*4 (“If section 6330(b) is to be given any force, the Appeals Office must make its determination *after* the taxpayer has had the opportunity to be heard at a fair hearing and after giving adequate consideration to all meritorious issues the taxpayer has raised during the hearing.”); *see also Charnas*, T.C. Memo. 2015-153, at \*12 (“It is therefore important to question whether a taxpayer’s concerns have been properly addressed in the CDP hearing.”); *cf. Glossop v. Commissioner*, T.C. Memo. 2013-208, at \*16 (“The statute requires . . . that a taxpayer be given a reasonable chance to be heard before the issuance of a notice of determination.”).

The cumulative effect of the settlement officer’s conduct in this case was to deprive the Hamiltons of fair consideration of their issues and concerns. The Hamiltons’ conduct was by no means perfect, but it reflected consistent cooperation and good-faith effort throughout the CDP process. “Although we cannot substitute our judgment for that of the [settlement officer], our review of the overall record leaves us with a

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<sup>7</sup> We note that a brief extension might have allowed the settlement officer the opportunity to catch and correct the errors in the notices of determination regarding the Hamiltons’ 2017 tax return and the Form 941 for the fourth quarter of 2016. We further observe that IRS records show that Form 941 for the third quarter of 2016 was filed on December 12, 2018, thus suggesting that an extension of a few weeks might have seen the resolution of this point as well.

[\*12] firm sense that [the Hamiltons have] not been treated in a fair and rational manner.” *Szekely*, T.C. Memo. 2013-227, at \*11–12 (citation omitted).

### III. *Remand*

We find that, on the particular circumstances of this case, the settlement officer’s decision to uphold the NFTL filing was arbitrary and lacked a sound basis in fact or law. We therefore will remand the case to the Office of Appeals for a supplemental hearing.

To reflect the foregoing,

*An appropriate order will be issued.*