

United States Tax Court

T.C. Memo. 2022-28

LUKE J. MIDDLETON,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 8158-19L.

Filed April 4, 2022.

Luke J. Middleton, pro se.

Nhi T. Luu, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

KERRIGAN, *Judge*: The Petition in this case was filed in response to a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 (notice of determination) dated April 15, 2019, upholding a proposed levy collection action for tax periods ending June 30, September 30, and December 31, 2012; March 31, June 30, September 30, and December 31, 2013; and March 31, 2014.¹

We must consider whether respondent's determination to proceed with the collection action regarding petitioner's section 6672 Trust Fund Recovery Penalty (TFRP) liabilities for tax periods ending September 30 and December 31, 2012; March 31, June 30, September 30, and

¹ The notice of determination is dated April 12, 2019, but it was not actually mailed until April 15, 2019. We treat the notice of determination as being dated April 15, 2019. *See, e.g., Bongam v. Commissioner*, 146 T.C. 52, 58 (2016).

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[*2] December 31, 2013; and March 31, 2014 (periods at issue), was an abuse of discretion.²

Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, and all regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times. We round all monetary amounts to the nearest dollar.

FINDINGS OF FACT

Petitioner resided in California when he timely filed the Petition. No stipulation of facts was filed in this case.³ Exhibits from the administrative record were admitted during the trial and are incorporated herein.

In March 2007 Lineation Marketing Co. (Lineation) was organized and registered with the California secretary of state. Lineation provided roadway striping and signage. Petitioner was the responsible managing officer for Lineation during the relevant tax periods. Bank records show that petitioner opened a checking account for Lineation on December 13, 2012, and a savings account on September 16, 2013. He was the only signer on the bank accounts. On July 15, 2016, petitioner signed a Domestic Stock Corporation Certificate of Dissolution, which was filed with the California secretary of state on August 8, 2016.

In July 2014 a revenue officer was assigned to the collection of outstanding employment tax liabilities of Lineation. On November 10, 2015, the revenue officer interviewed petitioner regarding his responsibilities with Lineation and recorded his responses on Form 4180, Report of Interview with Individual Relative to Trust Fund

² Respondent's Motion to Dismiss on Ground of Mootness as to the tax period ending June 30, 2012, was granted on November 29, 2021.

³ The Court of Appeals for the Ninth Circuit has concluded that the record rule applies to collection due process (CDP) cases before this Court. *See Keller v. Commissioner*, 568 F.3d 710, 718 (9th Cir. 2009), *aff'g in part* T.C. Memo. 2006-166, *and aff'g in part, vacating in part* decisions in related cases. Under section 7482(b)(1)(G), appeal of this case would lie in the Court of Appeals for the Ninth Circuit, absent a stipulation to the contrary. *See Golsen v. Commissioner*, 54 T.C. 742, 756-57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). Accordingly, the facts in this opinion are derived from the administrative record developed before the IRS Office of Appeals.

[*3] Recovery Penalty or Personal Liability for Excise Taxes. Petitioner signed the Form 4180.

On March 8, 2016, the revenue officer prepared and forwarded to her manager Form 4183, Recommendation re: Trust Fund Recovery Penalty Assessment. The same day, her manager approved the assessment of the TFRPs for the periods at issue.

Letter 1153 and Form 2751, Proposed Assessment of Trust Fund Recovery Penalty, were mailed on March 17, 2016, by certified U.S. postal mail to petitioner's last known address in Concord, California. On May 17, 2016, the revenue officer noticed that the assertion of the TFRP for the period ending March 31, 2013, was inadvertently not included in the original mailing. She prepared a Form 4813 to address the TFRP for the period ending March 31, 2013, and her manager signed it. On June 3, 2016, petitioner was mailed Letter 1153 and Form 2751 proposing a TFRP against petitioner with respect to Lineation for the taxable period ending March 31, 2013.

Petitioner did not dispute receipt of the Letters 1153 and did not request a hearing with the Internal Revenue Service (IRS) Office of Appeals (Appeals).⁴ The TFRPs attributable to Lineation were assessed against petitioner in July and September 2016.

In August and October 2016 petitioner submitted multiple Forms 656-L, Offer in Compromise (Doubt as to Liability), on which he argued that he was an employee and not an owner of Lineation. On June 14, 2017, respondent rejected petitioner's offers-in-compromise and informed petitioner that he had 30 days in which to request a reconsideration by Appeals. Within 30 days petitioner completed a Form 13711, Request for Appeal of Offer in Compromise.

A settlement officer was assigned to petitioner's appeal. On March 30, 2018, Appeals issued Letter 5197, Offer in Compromise Rejection, which sustained respondent's rejection of petitioner's offers-in-compromise.

Respondent sent petitioner a Notice of Intent to Levy and Notice of Your Right to a Hearing on June 19, 2018. Petitioner timely submitted a request for a CDP or equivalent hearing, and on the request he indicated that he could not pay and was not liable for the TFRPs. A

⁴ This office is now referred to as the Independent Office of Appeals. Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983 (2019).

[*4] settlement officer was assigned to the case, and she sent petitioner Letter 4837 scheduling a CDP hearing for January 15, 2019. In the letter she requested the following documents: (1) a completed Form 433–A, Collection Information Statement for Wage Earners and Self-Employed Individuals; (2) signed tax returns for 2017; and (3) supporting documentation for any expenses reported.

The CDP hearing was not held on January 15, 2019, because of the shutdown of the Federal Government. After numerous attempts, the settlement officer was not able to reschedule the CDP hearing. On April 15, 2019, respondent issued a notice of determination with respect to the proposed levy for assessed TFRPs for taxable periods ending June 30, 2012, through March 31, 2014.

Petitioner filed his Petition on May 20, 2019. On April 28, 2020, respondent filed a Motion to Remand in order for Appeals to verify whether the revenue officer's supervisor or manager approved the assertion of TFRPs in writing by signing a Form 4183 before the issuance of Letters 1153 as required by section 6751(b) and to verify whether the Letters 1153 had been issued to and received by petitioner.

After the Court granted respondent's Motion to Remand, a second settlement officer who had no prior involvement with the case was assigned. He reviewed all the documents associated with this case, and on September 17, 2020, called petitioner to schedule a hearing. Unable to reach petitioner, the second settlement officer left a message scheduling a hearing for October 20, 2020. He followed up with a letter sent September 24, 2020, confirming the hearing and requesting the following: (1) tax returns for 2018 and 2019; (2) a completed Form 433–A; (3) bank statements for the last six months; (4) copies of loans/mortgage statements; and (5) proof of recurring expenses.

Petitioner called the second settlement officer asking to reschedule the hearing. The rescheduled hearing was held on November 6, 2020. Petitioner requested that the hearing be continued to the following week, and it was continued on November 10, 2020. The second settlement officer advised petitioner that he had determined petitioner was liable for the TFRPs and that the information he had requested in his letter was needed if a collection alternative, such as an installment agreement, was to be considered. Petitioner requested an installment agreement and agreed to send the requested information by December 4, 2020.

[*5] On January 4, 2021, petitioner left a voicemail with the second settlement officer stating that he had received a notice from respondent's counsel stating that the second settlement officer had not received the requested financial information. Petitioner stated in the voicemail that he had mailed the requested information on December 4, 2020, and that he would call the second settlement officer back the following day. On January 5, 2021, petitioner did not call. On January 6, 2021, the second settlement officer left a voicemail with petitioner providing his office address and fax number and requesting that petitioner send him the requested information. He checked his own mailbox, the employee mailboxes, and the mailroom at his office at various points in January 2021 but did not see any package of documents from petitioner.

On January 28, 2021, the second settlement officer mailed petitioner a letter describing his attempts to contact petitioner for the requested information. On February 5, 2021, he received a voicemail from petitioner stating that petitioner would send the requested information by the following week.

On February 12, 2021, petitioner faxed information to the second settlement officer, including a Form 433-A, bank statements from 2019, and a doctor's bill. The fax did not include all the requested information, such as 2018 and 2019 tax returns. At petitioner's request, a phone conversation was held on February 26, 2021. The second settlement officer advised petitioner that he did not qualify for a collection alternative because his 2018 and 2019 tax returns had not been filed. He gave petitioner until March 18, 2021, to provide updated information.

As of April 5, 2021, the second settlement officer had not received the requested updates. He verified that all requirements of administrative procedures and requirements of applicable laws were met. On April 23, 2021, Appeals issued a supplemental notice of determination sustaining the proposed levy action with respect to the assessed TFRPs for taxable periods ending June 30, 2012, through March 31, 2014. The second settlement officer reviewed the documents included in the case file and concluded that the Forms 4183 had been signed by a manager before the issuance to petitioner of the Letters 1153 and that the TFRPs were appropriately assessed against petitioner. He concluded that petitioner could not be granted an installment agreement because he had failed to provide the required financial documentation and was not current with tax filings.

[*6] On May 4, 2021, the second settlement officer received petitioner’s unsigned 2018 federal income tax return. On May 12, 2021, he received petitioner’s unsigned 2019 federal income tax return. Respondent’s records show that petitioner has not filed his federal income tax return for 2018 or 2019.

OPINION

I. *Trust Fund Recovery Penalty*

Section 6672(a) imposes a penalty—commonly referred to as the TFRP—for willfully failing to collect, account for, and pay over income and employment taxes of employees. These penalties are assessed and collected in the same manner as taxes against a person who is “an officer or employee of a corporation . . . who as such officer, [or] employee . . . is under a duty to perform,” in this case, the duties to which section 6672 refers. § 6671(a) and (b). Such persons are referred to as “responsible persons,” a term which may be broadly applied. *Mason v. Commissioner*, 132 T.C. 301, 321 (2009).

II. *Scope of Review*

Under certain circumstances a taxpayer may raise challenges in a CDP proceeding to the Commissioner’s determination of his or her underlying tax liabilities. *See* § 6330(c)(2)(B). A taxpayer’s challenge to his or her status as a responsible person constitutes a dispute of the taxpayer’s liability. *Anderson v. Commissioner*, T.C. Memo. 2016-219, at *11; *Morgan v. Commissioner*, T.C. Memo. 2011-290, slip op. at 8. A taxpayer may challenge in a CDP proceeding the amount of the tax assessed by the Commissioner if he or she did not receive a statutory notice of deficiency or did not otherwise have a prior opportunity to dispute the tax liability. § 6330(c)(2)(B); *see also Montgomery v. Commissioner*, 122 T.C. 1, 7 (2004).

Where the assessments against the taxpayer are TFRPs, the Commissioner does not issue or mail a notice of deficiency. *See* § 6212(a). Instead, in general the Commissioner must provide the taxpayer with a notice of the TFRPs before assessment. § 6672(b)(1). A Letter 1153 provides a taxpayer the opportunity to dispute his or her liability for a TFRP by filing an appeal with the IRS. *See Mason*, 132 T.C. at 317–18.

If a taxpayer receives a Letter 1153 and takes the resulting opportunity to dispute the underlying TFRP liability at the Appeals

[*7] conference, then the taxpayer is precluded by section 6330(c)(2)(B) from challenging the underlying tax liability in a subsequent CDP hearing. *See, e.g., Mason*, 132 T.C. at 317. The same is true of a taxpayer who receives a Letter 1153 but forgoes the opportunity to dispute liability by failing to timely request an Appeals conference. *See Bletsas v. Commissioner*, T.C. Memo. 2018-128, at *8–9, *aff'd*, 784 F. App'x 835 (2d Cir. 2019).

Documentary evidence of mailing may suffice as proof that a notice of deficiency was properly mailed to a taxpayer. *Coleman v. Commissioner*, 94 T.C. 82, 90 (1990). When a Letter 1153 is mailed, the Commissioner must follow the same mailing procedures that are provided for notices of deficiency in section 6212(b). § 6672(b)(1). Likewise, the same evidence that establishes that the Commissioner mailed a notice of deficiency to a taxpayer's last known address is sufficient to establish that the Commissioner properly sent a Letter 1153. *See Mason*, 132 T.C. at 318.

On March 17 and June 3, 2016, respondent sent petitioner Letters 1153 notifying him of respondent's intent to assess TFRPs for the periods at issue. The Letters 1153 were sent by certified mail to petitioner's last known address. The Letters 1153 informed petitioner of his appeal rights and provided clear instructions about how to appeal. Petitioner did not respond to the Letters 1153 or dispute his receipt of them during his administrative proceedings with Appeals, and the second settlement officer verified that they had been properly issued.

Petitioner was properly sent the Letters 1153 but did not request a conference before Appeals to challenge his TFRP liabilities. He thus had a prior opportunity to challenge the underlying liabilities and therefore was precluded from challenging them during his CDP hearing. *See* § 6330(c)(2)(B).

This Court will consider an underlying tax liability on review only if the taxpayer properly raised the issue during the CDP hearing. *Giamelli v. Commissioner*, 129 T.C. 107, 112–16 (2007). For the first time at trial, petitioner testified that he did not recall receiving the Letters 1153. Petitioner did not raise this issue during his CDP hearing and is precluded from challenging his underlying liabilities here. *See id.*; Treas. Reg. § 301.6330-1(f)(2), Q&A-F3.

Even if petitioner could challenge his underlying liabilities before this Court, his claims would fail. Petitioner does not dispute that he

[*8] worked for Lineation and was responsible for its bank accounts. He testified that he was the responsible managing officer during the relevant tax periods. During trial petitioner raised the issue that he was coerced by the revenue officer into admitting that he was the responsible person for Lineation on the Form 4180. Even if his claim of coercion was true, it would not affect his status as the responsible person. *See* § 6672(a); *Mason*, 132 T.C. at 321.

III. *Abuse of Discretion*

Because petitioner's underlying liabilities are not at issue, our review of the notice of determination is for abuse of discretion. *See Sego v. Commissioner*, 114 T.C. 604, 610 (2000); *Goza v. Commissioner*, 114 T.C. 176, 181–82 (2000). An abuse of discretion occurs if Appeals exercises its discretion “arbitrarily, capriciously, or without sound basis in fact or law.” *Woodral v. Commissioner*, 112 T.C. 19, 23 (1999); *see also Keller v. Commissioner*, 568 F.3d at 716.

Section 6330(c)(3) requires the settlement officer to consider the following during a CDP hearing: (1) whether the requirements of any applicable law or administrative procedure have been met; (2) any issues appropriately raised by the taxpayer; and (3) whether the proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. *See also Lunsford v. Commissioner*, 117 T.C. 183, 184 (2001). We note that the second settlement officer properly based his determination on the factors specified by section 6330(c)(3).

This Court has authority to review satisfaction of the verification requirement of section 6330(c)(1) regardless of whether the taxpayer raised that issue at the CDP hearing. *Hoyle v. Commissioner*, 131 T.C. 197, 202–03 (2008), *supplemented by* 136 T.C. 463 (2011). Section 6330(c)(1) requires the Appeals officer, as part of his or her review of a proposed action to collect TFRPs, to verify that a Letter 1153 was issued to the taxpayer. *See Lee v. Commissioner*, 144 T.C. 40, 49–50 (2015).

On remand, the second settlement officer verified that the written approval requirement under section 6751(b) had been met. *See Chadwick v. Commissioner*, 154 T.C. 84 (2020) (holding that TFRPs are penalties subject to the written supervisory approval requirement for assessment).

[*9] He also verified that petitioner had been mailed the Letters 1153 before the assessment of the TFRPs. Section 6330 does not require that the Appeals officer rely upon any particular document in order to verify that all applicable laws and administrative procedures were followed. *Craig v. Commissioner*, 119 T.C. 252, 262 (2002). Where a taxpayer specifically alleges that he or she never received a Letter 1153, an Appeals officer cannot rely solely on tax transcripts to verify that a Letter 1153 has been sent. *See Hoyle*, 131 T.C. at 205 n.7. Instead, the Appeals officer must examine “underlying documents in addition to the tax transcripts, such as the taxpayer’s return, a copy of the notice of deficiency, and the certified mailing list.” *Id.* (quoting Chief Counsel Notice CC-2006-019 (Aug. 18, 2006)).

Petitioner alleged at trial that he did not recall receiving the Letters 1153. The administrative record reflects that the second settlement officer reviewed the documents in the case file, including the Letters 1153, and determined that the Letters 1153 had been sent to petitioner’s last known address by certified mail. The record contains photocopies of the Letters 1153. The photocopies of the Letters 1153 have U.S. Postal Service Forms 3800, Certified Mail Receipt, attached, indicating that they were sent by certified mail. We conclude that the second settlement officer verified that all requirements of applicable law and administrative procedure were met.

We further conclude that the second settlement officer properly considered all issues appropriately raised by petitioner. Petitioner requested an installment agreement during the CDP hearing with the second settlement officer. The second settlement officer requested that petitioner provide him with financial documentation and file tax returns for 2018 and 2019 in order for him to consider a collection alternative. Petitioner did not provide the requested documents or file the tax returns.

The second settlement officer first requested documents from petitioner in a letter sent September 24, 2020. He extended the initial deadline for petitioner to provide the documents, with a final deadline of March 18, 2021, almost seven months after his initial request. When a settlement officer gives a taxpayer an adequate timeframe to submit requested items, it is not an abuse of discretion to move ahead if the taxpayer fails to submit the items within that timeframe. *Pough v. Commissioner*, 135 T.C. 344, 352 (2010).

[*10] We have considered the other arguments of the parties, and they are either without merit or need not be addressed in view of our resolution of the issue.

To reflect the foregoing,

An appropriate decision will be entered.