United States Tax Court

T.C. Memo. 2022-30

ROBERT J. NORBERG AND DEBRA L. NORBERG,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 12638-20L. Filed April 5, 2022.

Robert J. Norberg and Debra L. Norberg, pro sese.

David D. Duncan, for respondent.

MEMORANDUM OPINION

LAUBER, *Judge*: In this collection due process (CDP) case, petitioners seek review pursuant to section 6330(d)(1) of a determination by the Internal Revenue Service (IRS or respondent) to uphold a notice of intent to levy (levy notice) as to their 2016 tax year.[1] The question for decision is whether the IRS abused its discretion in denying petitioners' request for currently not collectible (CNC) status. Respondent has filed a Motion for Summary Judgment under Rule 121, contending that there are no disputed issues of material fact and that his determination to sustain the proposed collection action was proper as a matter of law. We agree and accordingly will grant the Motion.

[1] 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 Rule references are to the Tax Court Rules of Practice and Procedure.

Served 04/05/22

[*2] *Background*

The following facts are derived from the parties' pleadings and motion papers, including the attached declaration and exhibits. Petitioners resided in Florida when their Petition was timely filed.

On February 11, 2019, petitioners filed a delinquent Federal income tax return for 2016. That return reported a tax liability of $41,678. Petitioners did not enclose full payment with the return; as of September 1, 2019, their outstanding liability for 2016 was about $9,200.

On September 2, 2019, in an effort to collect this liability, the IRS issued petitioners a levy notice, and they timely requested a CDP hearing. They expressed interest in a collection alternative, checking the box "I Cannot Pay Balance." Petitioners did not challenge, in their hearing request or at any subsequent point during the CDP proceeding, their underlying tax liability for 2016.

Petitioners' case was assigned to a settlement officer (SO1) in the IRS Independent Office of Appeals (Appeals) in Jacksonville, Florida. SO1 verified that petitioners' tax for 2016 had been properly assessed and that all other legal and administrative requirements had been met. SO1 scheduled a telephone conference for June 9, 2020. Both petitioners participated.

During the conference SO1 explained that the only tax year properly before her was 2016, the sole year covered by the levy notice. Petitioners requested that their 2016 account be placed in CNC status, meaning the debt is not forgiven or extinguished, but collection is deferred. They indicated that they had submitted financial information to support their request, but SO1 was unable to retrieve the documents because of pandemic-related office closures.

The case was reassigned to a new settlement officer (SO2), who secured petitioners' Form 433–A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and supporting bank statements. Employing an "allowable expense calculator," SO2 made a slight downward adjustment to petitioners' claimed monthly expenses, conforming those costs to the expenses allowable for the Florida county in which they lived. *See* Internal Revenue Manual (IRM) 5.15.1.8 (Aug. 29, 2018). Subtracting their allowable monthly expenses from their reported monthly income, SO2 determined that petitioners could pay $62 a month toward their 2016 income tax liability.

[*3] On September 11, 2020, SO2 called petitioner husband and explained that petitioners were not eligible for CNC status. Instead, he offered them a "partial pay installment agreement" (PPIA) calling for monthly payments of $62.[2] He requested a response by September 14, allowing petitioners a weekend to consider his offer. Having received no response, SO2 telephoned petitioners on September 15, leaving a voice message that asked them to call him back the following day.

When petitioners failed to respond by that deadline or subsequently, SO2 decided to close the case. On September 30, 2020, the IRS issued petitioners a notice of determination sustaining the levy, and petitioners timely petitioned this Court. They alleged that the levy "would constitute a financial hardship" and that their "cost of living exceed[ed their] income."

On November 30, 2020, a month after filing their Tax Court Petition, petitioners filed for bankruptcy. This case was accordingly stayed while the bankruptcy case remained pending. *See* 11 U.S.C. § 362(a)(8). We lifted the stay on November 9, 2021, having ascertained that the bankruptcy court had granted petitioners a discharge under 11 U.S.C. § 727. *See* 11 U.S.C. § 362(c)(2)(C).

Respondent filed the Motion for Summary Judgment, and petitioners responded. In petitioners' Response they acknowledge that SO2 offered them a PPIA calling for monthly payments of $62. But they contend that they "cannot afford to pay this amount as it would create an undue hardship."

Discussion

A. *Summary Judgment Standard*

The purpose of summary judgment is to expedite litigation and avoid costly, time-consuming, and unnecessary trials. *Fla. Peach Corp. v. Commissioner*, 90 T.C. 678, 681 (1988). Under Rule 121(b) we may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. *Sundstrand Corp. v. Commissioner,* 98 T.C. 518, 520 (1992), *aff'd*, 17

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[2] A PPIA is an installment agreement whereby the taxpayer agrees to pay only part of the total liability. §§ 6159(a), 7122. Under a PPIA, "[t]he taxpayer must agree to pay the maximum monthly payment based upon the taxpayer's ability to pay." IRM 5.14.2.2.1(9) (Apr. 26, 2019). The taxpayer's ability to pay is reassessed every two years. § 6159(d).

[*4] F.3d 965 (7th Cir. 1994). In deciding whether to grant summary judgment, we construe factual materials and inferences drawn from them in the light most favorable to the nonmoving party. *Ibid.* However, the nonmoving party may not rest upon the mere allegations or denials in his pleadings but instead must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d); *see Sundstrand Corp.,* 98 T.C. at 520. Petitioners have not identified any material fact in dispute, and we find that this case is appropriate for summary adjudication.

B. *Standard of Review*

Section 6330(d)(1) does not prescribe the standard of review that we should apply in reviewing an IRS administrative determination in a CDP case. The general parameters for such review are marked out by our precedents. Where the validity or amount of the taxpayer's underlying liability is at issue, we review the Commissioner's determination de novo. *Goza v. Commissioner*, 114 T.C. 176, 181–82 (2000). Where the taxpayer's underlying liability is not properly before us, we review the IRS action for abuse of discretion. *Id.* at 182. Abuse of discretion exists when a determination is arbitrary, capricious, or without sound basis in fact or law. *See Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006).

C. *Underlying Tax Liability*

As a result of petitioners' bankruptcy case, the IRS has abated the additions to tax, totaling $4,429, that were determined under section 6651(a)(1) and (2) for 2016. However, the IRS has not abated the balance of their outstanding tax liability. Although 11 U.S.C. § 727(a) contains broad discharge provisions to give debtors a fresh start, 11 U.S.C. § 727(b) provides that certain debts are nondischargeable. If a debtor files an untimely Federal income tax return within the two years preceding the debtor's bankruptcy petition, the debt associated with the untimely return is nondischargeable. *See* 11 U.S.C. § 523(a)(1)(B)(ii); *Washington v. Commissioner*, 120 T.C. 114, 121–22 (2003).

Petitioners filed a delinquent Federal income tax return for 2016 on February 11, 2019. Because that date was within two years of November 30, 2020, the date on which they filed their bankruptcy petition, their 2016 income tax liability was nondischargeable. Petitioners do not dispute that proposition, and they did not otherwise challenge their underlying tax liability during the CDP hearing or in their Petition to

[*5] this Court. We therefore review Appeals' actions for abuse of discretion only.

D. *Abuse of Discretion*

In deciding whether the SOs abused their discretion, we consider whether they: (1) properly verified that the requirements of any applicable law or administrative procedure have been met; (2) considered any relevant issues petitioners raised; and (3) determined whether "any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of [petitioners] that any collection action be no more intrusive than necessary." *See* § 6330(c)(3). Our review of the record establishes that SO1 and SO2 properly discharged all of their responsibilities under section 6330(c).

The only issue petitioners raised was their entitlement to have their 2016 account placed in CNC status. To be entitled to this collection alternative taxpayers must demonstrate that, on the basis of their assets, equity, income, and expenses, they have no apparent ability to make payments on the outstanding tax liability. *See Foley v. Commissioner*, T.C. Memo. 2007-242, 94 T.C.M. (CCH) 210, 212.

A taxpayer's ability to make payments is determined by calculating the excess of income over necessary living expenses. *Rosendale v. Commissioner*, T.C. Memo. 2018-99, 116 T.C.M. (CCH) 4, 6; IRM 5.16.1.2.9 (Sept. 18, 2018). An SO does not abuse his discretion when he employs local and national standards to calculate the taxpayer's expenses and ability to pay. *See Friedman v. Commissioner*, T.C. Memo. 2013-44, 105 T.C.M. (CCH) 1288, 1290 (noting that burden is on taxpayer to justify departure from local standards). In reviewing for abuse of discretion, the Court does not substitute its judgment for that of the SO or recalculate a taxpayer's ability to pay. *See O'Donnell v. Commissioner*, T.C. Memo. 2013-247, 106 T.C.M. (CCH) 477, 481.

In determining petitioners' ability to pay, SO2 calculated their allowable monthly expenses by reference to local standards prevailing in the Florida county where they resided. This caused a slight downward adjustment to one of the expenses reported on their Form 433–A. Having made that adjustment, SO2 determined that petitioners could pay the IRS $62 per month and so were not entitled to CNC status. He offered them a PPIA calling for monthly payments of $62, but they did not accept his offer.

[*6] We find no abuse of discretion. Although petitioners allege that their cost of living exceeds their income, this allegation appears based on the expenses reported on their Form 433–A, without reference to prevailing local standards. SO2 was authorized to rely on those standards in assessing their ability to pay, and it was their burden to justify a departure from the local standards. *See Friedman*, 105 T.C.M. (CCH) at 1290. Petitioners have not attempted to meet that burden.

Finding no abuse of discretion in any respect, we sustain the proposed collection action. We note that petitioners are free to submit to the IRS at any time, for its consideration and possible acceptance, a collection alternative in the form of an installment agreement or an offer-in-compromise, supported by the requisite financial information.

To implement the foregoing,

An appropriate order and decision will be entered for respondent.