United States Tax Court

T.C. Memo. 2022-56

INNOCENT O. CHINWEZE,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 29940-15L. Filed June 7, 2022.

Innocent O. Chinweze, pro se.

Derek P. Richman and *Daniel C. Munce*, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

URDA, *Judge*: Petitioner, Innocent O. Chinweze, invokes our jurisdiction under sections 6320(c) and 6330(d)(1)[1] to review a determination by the Internal Revenue Service (IRS) Office of Appeals[2] upholding a notice of federal tax lien (NFTL) filing with respect to his tax liabilities for 2008–10 and 2012. Mr. Chinweze seeks to dispute his liabilities for three of these years (2008–10) and asserts, moreover, that the settlement officer assigned to his case abused her discretion in sustaining the collection action with respect to all of the years. We find

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

[2] 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 time relevant to this case, i.e., the Office of Appeals.

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[*2] that Mr. Chinweze is precluded from challenging his underlying liabilities for tax years 2008, 2009, and 2010 (except for the section 6662 penalties which respondent has conceded), and we otherwise detect no abuse of discretion by the settlement officer.

FINDINGS OF FACT

This case was tried at the Court's remote trial session for cases associated with Denver, Colorado. We draw the following facts from the evidence admitted at trial, as well as the parties' pleadings.[3] Mr. Chinweze lived in Florida when he timely filed his petition.

I. *Mr. Chinweze's Legal Practice and Tax Reporting*

A. *Tax Years 2008 Through 2010*

During 2008–10, Mr. Chinweze was a tax attorney (admitted to practice before this Court) who worked at his own firm. Mr. Chinweze's firm was organized as a subchapter S corporation under the Code, with Mr. Chinweze as its sole shareholder.[4]

Mr. Chinweze did not timely file his federal income tax returns for 2008–10. IRS transcripts reflect that Mr. Chinweze filed his individual tax returns for these years in November 2012, reporting no tax liability for 2008 and tax liabilities of $3,764 and $119 for 2009 and 2010, respectively. Mr. Chinweze did not pay the liabilities reported on his belated returns.

Mr. Chinweze's firm likewise filed delinquent tax returns for 2008–10 in November 2012. IRS transcripts derived from those returns reflect net ordinary income of $97,311 for 2008, $82,537 for 2009, and $78,262 for 2010.

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[3] At trial, the Commissioner moved into evidence Exhibits 1009-R and 1010-R, and we reserved ruling on their admissibility. Having reviewed the parties' arguments on this point, we will not admit Exhibits 1009-R and 1010-R into evidence.

[4] A subchapter S corporation is a "small business corporation for which an election under section 1362(a)" has been made. § 1361(a)(1). S corporations are afforded special treatment under the Code. "One of the benefits of S corporation tax status is that income earned by the entity escapes corporate-level taxation." *Mourad v. Commissioner*, 121 T.C. 1, 3 (2003), *aff'd*, 387 F.3d 27 (1st Cir. 2004). "Thus, an S corporation's income passes through the entity and is, generally, taxed only at the shareholder level on a pro rata basis." *Id.*; *see* §§ 1363, 1366.

[*3] The IRS thereafter conducted an examination into Mr. Chinweze's tax liabilities for these years, which led to the issuance of a notice of deficiency on March 4, 2014. Among other things, the notice "adjusted [Mr. Chinweze's] share of the S Corporation's taxable income or loss as shown on the S Corp return," increasing his taxable income by $97,311, $82,537, and $78,262 for 2008–10, respectively. The notice determined deficiencies of $25,235 for 2008, $32,305 for 2009, and $33,046 for 2010, as well as certain penalties.

The IRS sent the notice on March 4, 2014, via certified mail to Mr. Chinweze at an address in Miramar, Florida, which he subsequently used in his correspondence with the Office of Appeals and with this Court. Mr. Chinweze did not file a petition in this Court contesting the deficiency determination, and the IRS subsequently assessed the amounts that it had determined.

B. *Tax Year 2012*

Mr. Chinweze filed a belated tax return for his 2012 tax year in February 2014. Although he reported a liability of $3,684, he did not pay that liability when he filed his tax return.

II. *Collection Activities*

A. *Initial CDP Hearing*

The IRS subsequently issued to Mr. Chinweze a notice of intent to levy on March 6, 2015, noting that his outstanding liability would amount to $166,134 by April 5, 2015. The IRS followed the levy notice with a notice of NFTL filing on March 17, 2015.

On April 15, 2015, Mr. Chinweze timely requested a collection due process (CDP) hearing with respect to the NFTL filing. In his written request he indicated his interest in collection alternatives and lien withdrawal, explaining that the liability amount was incorrect and that mitigating factors, including poor health, justified such relief. In an accompanying Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, Mr. Chinweze reported monthly net income of $5,500 and assets with negative equity. Mr. Chinweze did not appeal the notice of intent to levy.

A settlement officer subsequently sent Mr. Chinweze a letter scheduling a telephone CDP hearing, asking him to submit information supporting his claims and provide proof of current compliance with his

[*4] tax obligations. Mr. Chinweze neither submitted the requested information nor called the settlement officer on the scheduled hearing date. Although the settlement officer gave Mr. Chinweze another opportunity to submit material for her consideration, he did not provide any such material. The Office of Appeals accordingly issued a notice of determination sustaining the NFTL filing.

B. *Tax Court Proceedings and Supplemental CDP Hearing*

Mr. Chinweze timely filed a petition in this Court challenging the notice of determination. We later granted the Commissioner's motion to remand the case to the Office of Appeals to ensure proper verification of the requirements governing the assessment of the tax liabilities and penalties.

On remand, the settlement officer scheduled a supplemental CDP hearing with Mr. Chinweze, again asking him to provide certain documents: (1) a completed Form 433-A and supporting documentation; (2) signed tax returns for 2016 and 2017; and (3) proof of current compliance with estimated tax payments. Mr. Chinweze did not provide this material.

The supplemental hearing was held on May 30, 2018. Mr. Chinweze focused on his 2008–10 tax liabilities, stating that he never received the notice of deficiency. The settlement officer informed him that the notice was mailed to his last known address and asked Mr. Chinweze to provide relevant information to challenge these liabilities.

During the hearing Mr. Chinweze also made certain claims about his financial status. Specifically, he stated that he was suffering financial hardship and that he did not earn sufficient income in 2016 and 2017 to necessitate the filing of a tax return. The settlement officer requested substantiation for Mr. Chinweze's claim that he was not required to file a tax return and noted that he would need to submit a new Form 433-A for her to consider any collection alternative.

The settlement officer gave Mr. Chinweze until June 20, 2018, to file his tax returns and provide the requested documents. While awaiting these filings, the settlement officer examined the notice of deficiency and a certified mailing list, U.S. Postal Service (USPS) Form 3877, Firm Mailing Book For Accountable Mail (Form 3877), which indicated that the notice was mailed to Mr. Chinweze's last known address.

[*5] Mr. Chinweze subsequently requested and received three extensions of time (to July 2, August 15, and August 28, 2018) to submit the financial and tax return information. After receiving no additional information from Mr. Chinweze, the settlement officer closed his case on September 12, 2018.

On September 18, 2018, the Office of Appeals issued a supplemental notice of determination sustaining the NFTL filing. The notice did not entertain Mr. Chinweze's challenges to his 2008–10 liabilities, based on the conclusion that the IRS sent Mr. Chinweze the notice of deficiency and he thus had a prior opportunity to challenge these liabilities. It further stated that Mr. Chinweze failed to provide any of the requested documents required for the settlement officer to consider a collection alternative or a lien withdrawal.

OPINION

I. *Standard of Review*

We have jurisdiction to review the Office of Appeals' determination pursuant to sections 6320(c) and 6330(d)(1). Where the validity of the underlying tax liability is properly at issue, we review the determination regarding the underlying tax liability de novo. *Sego v. Commissioner*, 114 T.C. 604, 610 (2000); *Goza v. Commissioner*, 114 T.C. 176, 181–82 (2000). We review all other determinations for abuse of discretion. *Sego*, 114 T.C. at 610; *Goza*, 114 T.C. at 182. 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. *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.[5]

II. *Underlying Liabilities*

Mr. Chinweze contends, as he did during his CDP proceeding, that he should be able to challenge his 2008–10 tax liabilities on the ground that he never received the notice of deficiency. Although the

[5] Mr. Chinweze asserts that the burden of proof should shift to the Commissioner pursuant to section 7491. "This Court has held that section 7491(a) applies only when the underlying tax liability is at issue in a CDP case." *Davison v. Commissioner*, T.C. Memo. 2019-26, at *10, *aff'd*, 805 F. App'x 259 (5th Cir. 2020). As we will explain *infra* pp. 6–8, the underlying tax liabilities are not at issue in this case, and thus section 7491 is inapplicable.

[*6] assessment of an income tax liability is generally valid if the Commissioner properly mails the taxpayer a notice of deficiency, the taxpayer may still challenge his underlying liability if he did not actually receive the notice of deficiency or did not otherwise have an opportunity to dispute the tax liability. § 6330(c)(2)(B); *see also* § 6320(c); *Rivas v. Commissioner*, T.C. Memo. 2017-56, at *19–20; Treas. Reg. § 301.6320-1(e)(3), Q&A-E2. A taxpayer has had a prior opportunity to dispute the liability where he "previously received a CDP Notice under section 6330 with respect to the same tax and tax period and did not request a CDP hearing with respect to that earlier CDP Notice." Treas. Reg. § 301.6320-1(e)(3), Q&A-E7; *see also Bell v. Commissioner*, 126 T.C. 356, 358 (2006); *Lang v. Commissioner*, T.C. Memo. 2014-183, at *12–14.

Contrary to his contentions, we find that Mr. Chinweze actually received both a notice of deficiency with respect to his 2008–10 liabilities and a levy notice with respect to all the years at issue. He thus is prohibited from challenging the underlying liabilities in these proceedings.

A. *Notice of Deficiency*

First, the IRS sent Mr. Chinweze a notice of deficiency in 2014, giving him an initial opportunity to petition this Court at that time for redetermination of his 2008–10 liabilities. *See* §§ 6320(c), 6330(c)(2)(B); *Beam v. Commissioner*, T.C. Memo. 2017-200, at *10. Where, as here, "the existence of the notice of deficiency is not disputed, a properly completed Form 3877 by itself is sufficient, absent evidence to the contrary, to establish that the notice was properly mailed to a taxpayer." *Coleman v. Commissioner*, 94 T.C. 82, 91 (1990) (discussing principle in deficiency context); *accord Portwine v. Commissioner*, T.C. Memo. 2015-29, at *10–11 (recognizing principle in CDP context), *aff'd*, 668 F. App'x 838 (10th Cir. 2016). More specifically, "[e]xact compliance with [the] Form 3877 mailing procedures raises a presumption of official regularity in favor of the Commissioner," which the taxpayer must rebut. *Portwine*, T.C. Memo. 2015-29, at *10; *see also Ruddy v. Commissioner*, T.C. Memo. 2017-39, at *9, *aff'd per curiam*, 727 F. App'x 777 (4th Cir. 2018).

"Although an incomplete certified mailing list that does not contain all of the information required by Form 3877 is insufficient to create a presumption of proper mailing, it nevertheless has some probative value." *Portwine*, T.C. Memo. 2015-29, at *11. "Even without

[*7] the presumption of official regularity, the IRS can still prevail so long as it provides 'otherwise sufficient' evidence of mailing." *Ruddy*, T.C. Memo. 2017-39, at *10 (quoting *Welch v. United States*, 678 F.3d 1371, 1377 (Fed. Cir. 2012)); *Schlegel v. Commissioner*, T.C. Memo. 2016-90, at *10–11 (citing *Coleman*, 94 T.C. at 91).

Here, the Commissioner supplied a Form 3877 that contains the following information: (1) a USPS date stamp of March 4, 2014; (2) the signed initials of the USPS employee who received the notice; (3) the number of notices submitted on that date; (4) Mr. Chinweze's name and his last known address; and (5) the certified mail article number of the corresponding notice of deficiency. The Form 3877 contains one foot-fault in that it lacks the signature (or initials) of the IRS employee who issued the notice. We have previously held that this omission, together with other mistakes and omissions, "render[s] the presumption of official regularity inapplicable." *Schlegel*, T.C. Memo. 2016-90, at *10; *see also Meyer v. Commissioner*, T.C. Memo. 2013-268, at *24.

Regardless of whether that presumption applies here, on the preponderance of the evidence we find that the Commissioner has provided otherwise sufficient evidence to establish that the IRS mailed the notice of deficiency to Mr. Chinweze. *See, e.g.*, *Ruddy*, T.C. Memo. 2017-39, at *10; *Portwine*, T.C. Memo. 2015-29, at *11; *Campbell v. Commissioner*, T.C. Memo. 2013-57, at *8. Specifically, the Commissioner has introduced the notice of deficiency, which bears the same mailing date, mailing address, and certified mail article number as the corresponding certified mailing list. Accordingly, even if the Commissioner does not benefit from the presumption of mailing, "we conclude that, in this case, the dated cop[y] of the notice[] of deficiency, combined with the incomplete certified mailing lists, are sufficient to show that the notice[] of deficiency for the years at issue [was] mailed to [Mr. Chinweze] at his last known address." *Portwine*, T.C. Memo. 2015-29, at *12; *see also Cropper v. Commissioner*, 826 F.3d 1280, 1286 (10th Cir. 2016) (holding that proof of mailing was "otherwise sufficient" where IRS produced copies of the deficiency notices, the defects in the USPS Forms 3877 were minor, and the Forms 3877 were date-stamped with the date on which the notices were submitted to USPS), *aff'g* T.C. Memo. 2014-139; *Schlegel*, T.C. Memo. 2016-90, at *12.

"The mailing of a properly addressed letter creates a 'presumption that it reached its destination and was actually received by the person to whom it was addressed . . . .'" *BM Constr. v. Commissioner*, T.C. Memo. 2021-13, at *12 (quoting *Rivas*, T.C. Memo. 2017-56, at *20). A

[*8] taxpayer can rebut that presumption with credible evidence, *see id.*, although "[a] taxpayer's self-serving testimony that he did not receive the notice of deficiency, standing alone, is generally insufficient to rebut the presumption," *Campbell*, T.C. Memo. 2013-57, at *9.

We conclude that Mr. Chinweze has failed to rebut the presumption. As an initial matter, Mr. Chinweze does not argue that the mailing address on the notice of deficiency was incorrect, nor does he assert that the IRS failed to follow its established mailing practices. *See Schlegel*, T.C. Memo. 2016-90, at *11; *Portwine*, T.C. Memo. 2015-29, at *11–12. Mr. Chinweze instead relies solely upon his unsupported allegation that he did not receive the notice. We are unconvinced. Mr. Chinweze was an experienced tax lawyer and filed a CDP request setting forth specific challenges to the NFTL filing (i.e., the liability amount and mitigating factors). His failure to contest receipt of the notice of deficiency in his CDP request undermines the credibility of his subsequent claim, particularly in light of the compelling evidence of mailing and the accompanying presumption of delivery. *See Campbell*, T.C. Memo. 2013-57, at *9 ("The Commissioner generally has prevailed in foreclosing challenges to the underlying liability under section 6330(c)(2)(B) where he establishes that a notice of deficiency was mailed to the taxpayer's last known address and no factors are present that rebut the presumption . . . of delivery."); *see also Sego*, 114 T.C. at 611; *Mathews v. Commissioner*, T.C. Memo. 2021-85, at *6.

B. *Levy Notice*

The record before us further establishes, and Mr. Chinweze does not contest, that the IRS issued a notice of intent to levy to him on March 6, 2015. This notice provided him with an opportunity to request a CDP hearing with respect to tax years 2008–10 and 2012, the years at issue in this case. Consequently, even if he had not received the notice of deficiency, he nonetheless had "a prior opportunity to dispute the existence or amount of the underlying tax liabilit[ies]" by means of the notice of intent to levy, which likewise bars us from considering his challenge to his underlying liabilities. *See Benson v. Commissioner*, T.C. Memo. 2021-78, at *8; Treas. Reg. § 301.6320-1(e)(3), Q&A-E7.

[*9] C. *Conclusion*

As Mr. Chinweze had at least one prior opportunity to contest the underlying liability for each year at issue, he is precluded from doing so in this case. *See* §§ 6320(c), 6330(c)(2)(B).[6]

III. *Abuse of Discretion*

Because we find that Mr. Chinweze is not entitled to challenge his underlying liabilities, we review the settlement officer's determination for abuse of discretion. We accordingly consider whether the settlement officer: (1) properly verified that the requirements of applicable law or administrative procedure have been met, (2) considered any relevant issues Mr. Chinweze raised, and (3) considered "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of [Mr. Chinweze] that any collection action be no more intrusive than necessary." § 6330(c)(3). Our review of the record establishes that the settlement officer satisfied all these requirements.

A. *Verification*

Mr. Chinweze alleges that the verification requirement was not met, contending that the remand for a supplemental CDP hearing necessarily established that the settlement officer had previously abused her discretion. Mr. Chinweze's focus is misplaced, however. "When this Court remands a case to the Appeals Office and it comes back to us after a supplemental determination is issued, we review the

[6] We further note that, even if we were to conclude that Mr. Chinweze did not have a prior opportunity to challenge his underlying liabilities, we would nonetheless find that he failed to properly challenge his underlying liabilities in this case. A taxpayer may dispute his underlying tax liability in a CDP case only if he properly raised that issue at the CDP hearing. *See Giamelli v. Commissioner*, 129 T.C. 107, 113 (2007); *see also* Treas. Reg. § 301.6320-1(f)(2), Q&A-F3. An issue is not properly raised if the taxpayer does not request consideration of the issue by the Office of Appeals, or if consideration is requested but the taxpayer did not present to the Office of Appeals any evidence regarding the issue after being given a reasonable opportunity to do so. *See Giamelli*, 129 T.C. at 113–15; *see also* Treas. Reg. § 301.6320-1(f)(2),Q&A-F3. Mr. Chinweze did not challenge the 2012 liability before the Office of Appeals and did not submit any information to the settlement officer to dispute the IRS's calculation of the liabilities for any of the years at issue (during either the initial or supplemental CDP hearings). We thus cannot now consider challenges to those underlying liabilities.

[*10] supplemental determination." *Hoyle v. Commissioner*, 136 T.C. 463, 468 (2011), *supplementing* 131 T.C. 197 (2008).[7]

With one exception (no longer at issue[8]), we conclude that the settlement officer conducted a thorough review of Mr. Chinweze's account transcripts and properly verified that all applicable requirements were met. In particular, the record before us refutes Mr. Chinweze's argument that the settlement officer failed to verify the issuance of the notice and demand for payment required by section 6303. We likewise find that the settlement officer properly verified that the IRS mailed him the notice of deficiency at his last known address, as we have explained in detail *supra* pp. 6–8.

B. *Issues Raised*

During the proceedings before the Office of Appeals, Mr. Chinweze requested consideration of lien withdrawal and collection alternatives, ostensibly because of economic hardship. Mr. Chinweze has not raised either issue in this Court and has therefore conceded each. *See* Rule 331(b)(4) ("Any issue not raised in the assignments of error shall be deemed to be conceded."); *CreditGuard of Am., Inc. v. Commissioner*, 149 T.C. 370, 379 (2017).

In any event, the settlement officer did not abuse her discretion in determining that Mr. Chinweze was ineligible for a collection alternative or lien withdrawal because he failed to provide the financial information she requested. Although Mr. Chinweze repeatedly referred to his straitened circumstances, he nonetheless failed to provide the financial documentation that would support this claim or allow consideration of either lien withdrawal or a collection alternative. Mr. Chinweze had ample opportunity to supply such information, as the

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[7] Mr. Chinweze also suggests that email correspondence between the settlement officer and various other IRS employees (including her supervisor and an attorney from the Office of Chief Counsel) casts doubt on the supplemental notice of determination. We review the supplemental notice of determination as issued, and correspondence urging edits to earlier drafts (or ensuring that the terms of our remand order were respected) is of no moment.

[8] This case was remanded, in part, because of the concern that the settlement officer had not obtained adequate verification of managerial approval for the penalties at issue, pursuant to section 6751(b). The supplemental notice of determination did not explicitly address this point and rejected abatement of the penalties. The Commissioner has since conceded that Mr. Chinweze "bears no liability for the assessed I.R.C. § 6662 penalties for tax years 2008, 2009, [and] 2010 . . . , nor any liability for interest accruing on these assessed penalties."

[*11] settlement officer extended the deadline three times after the supplemental hearing in May 2018, giving him an additional three months. Under these circumstances, the settlement officer did not abuse her discretion in declining to consider Mr. Chinweze's purported economic hardship, request for lien withdrawal, or a collection alternative. *See, e.g.*, *Roberts v. Commissioner*, T.C. Memo. 2021-131, at *8; *Richards v. Commissioner*, T.C. Memo. 2019-89, at *10 ("Because NFTL withdrawal is a collection alternative, *see* [Treas. Reg. § 301.6320-1(e)(3), Q&A-E6], [the taxpayers] were required to provide [the settlement officer] with relevant information for her to consider in determining whether the NFTL should be withdrawn . . . ."); *Rehn v. Commissioner*, T.C. Memo. 2016-54, at *13 ("For the settlement officer to consider economic hardship taxpayers cannot just claim they would suffer economic hardship; taxpayers must submit complete and current financial information.").

C. *Balancing Analysis*

Mr. Chinweze did not allege in his petition or argue at any later point that the settlement officer failed to consider "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." *See* § 6330(c)(3)(C). He thus has conceded this issue. *See* Rule 331(b)(4). In any event the settlement officer expressly concluded in the supplemental notice of determination that the NFTL filing appropriately balanced the competing concerns. As noted above, Mr. Chinweze neither substantiated his vague claims of hardship nor provided information that might support an alternative to the NFTL filing, and we find no basis in the record for disturbing the settlement officer's conclusion in this regard.[9]

IV. *Conclusion*

Finding no abuse of discretion, we will uphold the IRS's determination to sustain the collection action.

To reflect the foregoing,

An appropriate decision will be entered.

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[9] As Mr. Chinweze is not the prevailing party under section 7430, we will deny his request for litigation costs.