

United States Tax Court

T.C. Memo. 2022-18

CARL WILLIAM COSIO,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 23623-17L.

Filed March 9, 2022.

Carl William Cosio, pro se.

Randall B. Childs and *A. Gary Begun*, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WEILER, *Judge*: In this collection due process (CDP) case, Carl William Cosio seeks review, pursuant to section 6330(d)(1),¹ of the determination by the Internal Revenue Service (IRS) Office of Appeals² (Appeals) to proceed with collection by levy of his unpaid federal income tax liability for tax year 2015. This matter is before the Court after a trial on the merits. For the reasons set forth below, we will affirm

¹ Unless otherwise indicated, all statutory references are to the Internal Revenue 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. All monetary amounts are rounded to the nearest dollar.

² On July 1, 2019, the IRS Office of Appeals was renamed the Internal Revenue Service Independent Office of Appeals. *See* Taxpayer First Act, Pub. L. No. 116-25, § 1001(a), 133 Stat. 981, 983 (2019). As the events in this case largely predate that change, we use the name in effect at the times relevant to this case, i.e., the Office of Appeals.

Served 03/09/22

[*2] Appeals' determination concluding that the proposed IRS collection action against Mr. Cosio is appropriate.

FINDINGS OF FACT³

Respondent filed a proposed Stipulation of Facts and attached exhibits, including the administrative record⁴ of Mr. Cosio's matter before Appeals. Mr. Cosio failed to respond, so respondent filed a Motion pursuant to Rule 91(f) (Rule 91(f) Motion) requesting the Court issue an order to show cause requiring Mr. Cosio to show cause why the facts and evidence set forth in respondent's proposed stipulation of facts should not be accepted. On March 5, 2021, the Court granted respondent's Rule 91(f) Motion and issued an Order to Show Cause requiring that Mr. Cosio file his response on or before March 26, 2021. The Court granted respondent's Rule 91(f) Motion before trial. Accordingly, the facts and evidence found in the stipulation are incorporated herein by this reference. Mr. Cosio resided in Florida when he filed his Petition.

I. *IRS Collection Efforts*

Mr. Cosio filed his Form 1040, U.S. Individual Income Tax Return, for the 2012 tax year on August 1, 2016. Mr. Cosio's 2012 Form 1040 reflected a total tax liability of \$1,512, tax withholding of \$433, and a tax balance due of \$1,097. With his 2012 Form 1040, Mr. Cosio included a check for \$1,097. On September 12, 2016, the IRS assessed the reported tax liability of \$1,512 reported on Mr. Cosio's 2012

³ Although the findings of fact section discusses tax years 2012 and 2015 since the two years are intertwined, only tax year 2015 is before the Court.

⁴ The facts in this opinion are principally derived from the administrative record developed before Appeals; however, our review of Appeals' determination is not limited to the administrative record. In *Robinette v. Commissioner*, 123 T.C. 85, 95 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006), we held that "when reviewing for abuse of discretion under section 6330(d), we are not limited by the Administrative Procedure Act . . . and our review is not limited to the administrative record." The Courts of Appeals for the First, Eighth, and Ninth Circuits have concluded otherwise, holding that the so-called record rule applies to 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; *Murphy v. Commissioner*, 469 F.3d 27 (1st Cir. 2006), *aff'g* 125 T.C. 301 (2005); *Robinette v. Commissioner*, 439 F.3d 455. Under section 7482(b)(1)(G), appeal in this case would lie in the Court of Appeals for the Eleventh Circuit, absent a stipulation by the parties to the contrary. Since the Eleventh Circuit has not addressed this issue, our review of Appeals' determination in this case is not limited by the "record rule." *See Golsen v. Commissioner*, 54 T.C. 742, 756-57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

[*3] Form 1040; the IRS also assessed a section 6651(a)(1) late filing addition to tax of \$243, a section 6651(a)(2) failure to pay addition to tax of \$216, and interest of \$144.

On November 15, 2016, Mr. Cosio filed his Form 1040 for tax year 2015 reflecting a total tax liability of \$34,179 and reporting an unpaid tax liability of \$33,394. On December 26, 2016, the IRS assessed the tax liability of \$34,179 reported on Mr. Cosio's 2015 Form 1040 and credited him for tax withholding payments of \$785. The IRS also assessed a section 6651(a)(1) late filing addition to tax of \$7,514, a section 6651(a)(2) failure to pay addition to tax of \$1,503, and interest of \$1,156.

On April 17, 2017, the IRS issued a Notice of Intent to Levy and Notice of Your Right to a Hearing (notice of levy) with respect to Mr. Cosio's unpaid balance for tax year 2015. On May 3, 2017, Mr. Cosio submitted to the IRS Form 12153, Request for a Collection Due Process or Equivalent Hearing, requesting a CDP hearing for tax years 2006 through 2015. On the Form 12153, he checked the "Installment Agreement," "Offer in Compromise," and "I Cannot Pay Balance" boxes as collection alternatives. Mr. Cosio did not check the box on Form 12153 indicating he was interested in an equivalent hearing.

Under the "Other" section of the Form 12153, Mr. Cosio stated:

I am not liable for all of these taxes. There were trades completed on my behalf by Rafael Calleja that were not authorized and the money was stolen from me. I did not see the profit and as such, should not be responsible for that income. I am willing to pay the taxes for income I received, but not on the profits of trades that I did not realize the income on based on the theft by Calleja.

After Mr. Cosio submitted his CDP request, the IRS sent him several letters in response. One informed him that he was not entitled to a CDP hearing or equivalent hearing for tax years 2006 through 2009 because his request was untimely as to those years. Another informed him that his request for a CDP hearing was untimely with respect to tax years 2010, 2011, and 2012. However, the IRS letter invited Mr. Cosio to request an equivalent hearing for tax year 2012 by submitting a new Form 12153 within 15 days; Mr. Cosio sent in a handwritten letter, but he did not complete a new Form 12153. Nonetheless, the IRS subsequently sent Mr. Cosio a letter granting him an equivalent hearing for tax year 2012 and forwarded his request to Appeals. The IRS also

[*4] issued Mr. Cosio a letter with respect to his unpaid tax liability for tax year 2015. For tax year 2015 the IRS acknowledged timely receipt of Mr. Cosio's CDP request and stated that it was forwarding his CDP request to Appeals.

II. *CDP and Equivalent Hearings*

Appeals assigned Settlement Officer Josephine Stockli to conduct Mr. Cosio's CDP hearing for tax year 2015 and his equivalent hearing for tax year 2012. On July 11, 2017, Ms. Stockli mailed Mr. Cosio a letter scheduling a telephone conference for August 16, 2017. Ms. Stockli's letter also requested that Mr. Cosio provide a completed Form 656, Offer in Compromise, and Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, at least 14 days before the scheduled August 16, 2017, conference. Mr. Cosio called Ms. Stockli on July 24, 2017, to discuss his case, and during the call Ms. Stockli again requested that he furnish a completed Form 433-A. She also requested any amended returns for the tax years in issue. At the conclusion of the phone call, Mr. Cosio asked Ms. Stockli to contact his representative, Ron Porat.

Ms. Stockli called Mr. Porat on August 16, 2017, to conduct the scheduled telephone hearing; however, Mr. Porat did not answer, and Ms. Stockli subsequently left a voicemail message.

On August 22, 2017, Ms. Stockli sent letters to both Mr. Cosio and Mr. Porat advising them that no one attended the August 16, 2017, telephone hearing and asking that they provide within 14 days any documents they wanted her to consider. Again, on September 13, 2017, Ms. Stockli sent letters to both Mr. Cosio and Mr. Porat advising them to contact her within 14 days. Neither Mr. Cosio nor Mr. Porat responded to Ms. Stockli's letters. Mr. Cosio did not submit a completed Form 656 or Form 433-A or amended returns to Ms. Stockli.

Neither Mr. Cosio nor Mr. Porat made any further contact with Ms. Stockli. Subsequently, Ms. Stockli closed Mr. Cosio's case and by letter dated October 12, 2017, issued to him a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code (notice of determination), sustaining the proposed levy action with respect to tax year 2015.⁵ In the notice of

⁵ By letter dated October 12, 2017, Ms. Stockli also issued Mr. Cosio a separate Decision Letter on Equivalent Hearing Under Internal Revenue Code Sections 6320 and/or 6330, with respect to tax year 2012.

[*5] determination Ms. Stockli concludes that although Mr. Cosio requested the collection alternatives of an installment agreement or an offer-in-compromise, he failed to provide the requested appropriate paperwork for either collection alternative to be considered. Ms. Stockli further concludes Mr. Cosio does not challenge his underlying liability for tax year 2015.

In the notice of determination Ms. Stockli verified that the requirements of any applicable law or administrative procedure were met. Additionally, Ms. Stockli verified that assessment was proper for each tax period listed on the CDP notice, notice and demand for payment was mailed to Mr. Cosio's last known address, and there was a balance due when the notice of levy was issued. The notice of determination also included Ms. Stockli's balancing test analysis. Ms. Stockli sustained the notice of levy, indicating that because neither Mr. Cosio nor Mr. Porat responded to requests for information, the proposed levy balances the efficient collection of taxes with Mr. Cosio's legitimate concern that the collection action be no more intrusive than necessary.

Mr. Cosio timely filed his petition in this case within 30 days of the date of the notice of determination. In his petition Mr. Cosio argues that he was not given proper notice with respect to his CDP hearing for tax year 2015 and that his July 24, 2017, telephone conversation with Ms. Stockli "led [him] to believe that [he] would receive further communication regarding the [CDP] hearing."

On May 11, 2018, respondent filed a Motion to Dismiss for lack of jurisdiction with respect to tax year 2012, to which Mr. Cosio objected. Therein respondent argued that the Court had no jurisdiction to review the decision letter issued on October 12, 2017, on Mr. Cosio's equivalent hearing. On May 15, 2018, the Court ordered Mr. Cosio to file any objection to respondent's Motion, but he failed to file an objection. On July 10, 2018, the Court granted respondent's motion and dismissed Mr. Cosio's case as to tax year 2012 for lack of jurisdiction.

OPINION

I. *Judicial Review*

Under section 6330(d)(1), we have jurisdiction to review a notice of determination by Appeals in a CDP case. Taxpayers are entitled to notice of the IRS's intent to levy and of the opportunity for a CDP hearing, not less than 30 days before the levy. *See* I.R.C. §§ 6330(a) and (b), 6331(d). Treasury regulations provide that a taxpayer who fails

[*6] to timely request a CDP hearing may instead request a similar administrative hearing, called an “equivalent hearing,” within the one-year period following the mailing date of the written levy notice. Treas. Reg. § 301.6330-1(i)(2), Q&A-I7, Q&A-I9. On the basis of the record before us, we find Mr. Cosio requested a CDP hearing as to tax year 2015 and, consequently, that is the only tax year before the Court.

Where the taxpayer’s underlying tax liability is properly at issue in an administrative hearing, we review the liability determination de novo. *Goza v. Commissioner*, 114 T.C. 176, 181–82 (2000). The taxpayer may challenge the validity of his or her tax liability in a CDP hearing only if he or she did not receive a notice of deficiency or otherwise have a prior opportunity to contest the liability. See I.R.C. § 6330(c)(2)(B); see also *Sego v. Commissioner*, 114 T.C. 604, 609 (2000). If the validity of the underlying tax liability is not properly at issue, the Court will review the Commissioner’s administrative determination for abuse of discretion. See *Goza*, 114 T.C. at 182. Abuse of discretion exists when the determination was arbitrary, capricious, or without sound basis in fact or law. See *Murphy*, 125 T.C. at 308, 320; *Sego*, 114 T.C. at 610.

II. *The Adequacy of a CDP Hearing*

Relevant regulations state that “[a] CDP hearing may, but is not required to, consist of a face-to-face meeting, one or more written or oral communications between an Appeals officer or employee and the taxpayer or the taxpayer’s representative, or some combination thereof.” Treas. Reg. § 301.6330-1(d)(2), Q&A-D6. Additionally, we have previously determined that it is not an abuse of discretion for Appeals to move ahead with its final determination after an Appeals officer gives a taxpayer an adequate timeframe to submit requested items and the taxpayer fails to submit these items. See *Pough v. Commissioner*, 135 T.C. 344, 351 (2010).

III. *Review of Appeals’ Determination*

In reviewing a determination under section 6330(c)(2), including challenges to the underlying tax liability, we consider only issues that the taxpayer properly raised during the CDP hearing. See *Giamelli v. Commissioner*, 129 T.C. 107, 115 (2007); Treas. Reg. § 301.6330-1(f)(2), Q&A-F3. The taxpayer does not properly raise an issue, including the underlying tax liability, during the CDP hearing if he “fails to present to Appeals any evidence with respect to that issue after being given a

[*7] reasonable opportunity to present such evidence.” Treas. Reg. § 301.6330-1(f)(2), Q&A-F3.

Mr. Cosio did not receive a notice of deficiency, and therefore he was entitled to challenge his underlying tax liability in his CDP hearing. Initially Mr. Cosio requested consideration of his underlying tax liability in his CDP hearing request. However, requesting consideration of an issue during a CDP proceeding is not enough to preserve the issue for judicial review. The taxpayer must also present Appeals with “evidence with respect to that issue after being given a reasonable opportunity” to do so. *Id.* We find that Mr. Cosio failed to clear this threshold hurdle. Respondent made multiple attempts to contact Mr. Cosio and Mr. Porat, all of which were unsuccessful. Since Mr. Cosio never properly raised a challenge to his underlying tax liability at the CDP hearing, it was not part of the Appeals officer’s determination and therefore it should not be part of our review. *See Giamelli*, 129 T.C. at 113; *see also Pough*, 135 T.C. at 349.

Because the validity of Mr. Cosio’s underlying tax liability is not properly at issue, we will review Appeals’ administrative determination for abuse of discretion. *See Goza*, 114 T.C. at 181–82. In reviewing for abuse of discretion, we will reject Appeals’ determination only if the taxpayer proves that the determination was arbitrary, capricious, or without sound basis in fact or law. *See* Rule 142(a); *Murphy*, 125 T.C. at 320. We do not substitute our judgment for that of Appeals but consider whether Appeals, in the course of making its determination: (1) verified that the requirements of applicable law and administrative procedure have been met; (2) considered all relevant issues raised by the taxpayer, including offers of collection alternatives such as an offer-in-compromise; and (3) determined whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that collection be no more intrusive than necessary. I.R.C. § 6330(c)(3).

IV. *Our Analysis of Appeals’ Determination*

A. *Whether Appeals Met the Requirements of Applicable Law and Administrative Procedure*

Before issuance of a notice of determination, Appeals must verify that all requirements of applicable law and administrative procedure have been met. I.R.C. § 6330(c)(1), (3)(A). Here, Ms. Stockli determined that the IRS followed the requirements of applicable law and

[*8] administrative procedure in its enforcement action, namely the issuance of the notice of levy. The notice of determination indicated that the liabilities were duly assessed and the requisite notices were timely mailed to Mr. Cosio. There is no evidence before the Court that the requirements of applicable law and administrative procedure were not satisfied.

B. *Relevant Issues Petitioner Raised*

Appeals is required to consider any relevant issue raised by a taxpayer during a hearing, including collection alternatives and challenges to the appropriateness of collection actions. I.R.C. § 6330(c)(2)(A), (3)(B). In his Form 12153 Mr. Cosio sought several collection alternatives. Ms. Stockli explained to Mr. Cosio, both by telephone during their initial conversation and in her subsequent letters dated August 22 and September 13, 2017, that he had to provide her with a completed Form 656 and Form 433-A for her to consider collection alternatives. Mr. Cosio, however, failed to submit this information by the imposed deadline or at any time before (or after) the scheduled telephone conference. Regardless of whether Mr. Cosio believed that he would receive further communication regarding a future CDP hearing, Mr. Cosio is not eligible for a collection alternative, because of his failure to provide the appropriate paperwork for a collection alternative to be considered after being given an adequate timeframe to provide it. *See Pough*, 135 T.C. at 351. Consequently, we find Ms. Stockli did not abuse her discretion.

C. *Balancing the Need for Efficient Collection of Taxes with Concerns That Collection Be No More Intrusive than Necessary*

The final item to consider is “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.” I.R.C. § 6330(c)(3)(C). Ms. Stockli performed a balancing test, finding that the notice of levy balanced the needs of collection with the concerns of Mr. Cosio, since neither Mr. Cosio nor Mr. Porat responded to or satisfied her requests for information. Accordingly, we find Ms. Stockli did not abuse her discretion. *See Pough*, 135 T.C. at 352.

In consideration of the foregoing, decision for respondent is appropriate in this case. We have considered all arguments that the

[*9] parties made, and to the extent they are not addressed herein, we consider them to be moot, irrelevant, or without merit.

To reflect the foregoing,

Decision will be entered for respondent.