United States Tax Court

T.C. Memo. 2022-20

BRIAN K. BUNTON AND KAREN A. BUNTON,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 5770-19L. Filed March 10, 2022.

Brian K. Bunton and Karen A. Bunton, for themselves.

Laura J. Mullin and *Michael K. Park*, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

MORRISON, *Judge*: This case is before the Court for review of a notice of determination sustaining a notice of intent to levy to collect the unpaid federal income tax liabilities for 2013, 2014, and 2015 (years at issue) for petitioners Brian K. Bunton and Karen A. Bunton. We review respondent's (the IRS's) determination pursuant to section 6330(d).[1]

The parties submitted this case fully stipulated for decision without trial under Rule 122. In its notice of determination, the IRS Office of Appeals sustained a proposed levy to collect income tax and accuracy-related penalties for the years at issue.[2] The IRS now concedes

[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.

[2] On July 1, 2019, the IRS Office of Appeals was renamed the IRS Independent Office of Appeals. *See* Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981,

Served 03/10/22

[*2] that the Buntons do not owe the accuracy-related penalties because the initial determination to impose these penalties was not approved by a supervisor as required by section 6751(b). We therefore do not sustain the levy action as to the penalties. We sustain the levy action as to the other liabilities because (1) the Buntons were not entitled to challenge the existence and amounts of their underlying tax liabilities for the tax years at issue during their collection due process (CDP) proceeding, (2) the Office of Appeals properly verified the requirements of applicable law and procedure were met, (3) the Office of Appeals did not abuse its discretion in denying the Buntons a face-to-face hearing, and (4) the Office of Appeals did not abuse its discretion in considering issues raised under section 6330(c)(2).

FINDINGS OF FACT

The Buntons resided in California when they filed their petition.[3]

On April 15, 2014, the Buntons timely filed a joint federal income tax return for 2013 on Form 1040, U.S. Individual Income Tax Return. A copy of the return is not in the record.

On November 18, 2014, the IRS received a letter from the Buntons making arguments about why they should not pay tax on the 2013 income reported to have been paid to them on Forms W–2, Wage and Tax Statement. For example, the Buntons claimed that "the payments made to [them] . . . did not result from any taxable activity

---

983 (2019). We will use the name in effect at the times relevant to this case, i.e., the Office of Appeals.

[3] The facts in this opinion are derived from the administrative record developed before the Office of Appeals. 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." However, the Court of Appeals for the Ninth Circuit has concluded otherwise, holding that the so-called administrative record rule applies to CDP cases involving an abuse of discretion standard 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; *see also Belair v. Commissioner*, 157 T.C. 10 (2021) (explaining the application of the administrative record rule). Under section 7482(b)(1)(G), appeal of this case would lie in the Court of Appeals for the Ninth Circuit, absent a stipulation by the parties to the contrary. Accordingly—and in circumstances when the underlying liabilities are not at issue—our review of the Office of Appeals' determination for abuse of discretion in the instant case is limited by the administrative record rule. *See Golsen v. Commissioner*, 54 T.C. 742, 756–57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

[*3] and do not constitute any taxable income under relevant law." The Buntons attached to their letter two Forms 4852, Substitute for Form W–2, Wage and Tax Statement, or Form 1099–R, Distribution From Pensions, Annuities, Retirement or Profit Sharing Plans, IRAs, Insurance Contracts, etc.: one for Ms. Bunton's employer, Fulcrum BioEnergy, Inc., and one for Mr. Bunton's employer, Virgin America, Inc. Both Forms 4852 reported zero wages. The Buntons also attached to their letter a Form 1040X, Amended U.S. Individual Income Tax Return, for the 2013 tax year, which reported adjusted gross income of zero and tax of zero. It claimed that the Buntons were due a refund of $40,471. The IRS paid the refund.

On April 15, 2015, the Buntons timely filed their joint return for 2014 on Form 1040. Although a copy of the return is not in the record, IRS records state that the Buntons reported they received no wages, that they reported zero tax liability, and that they claimed a refund of $42,168.49. The IRS paid the refund.

On April 15, 2016, the Buntons timely filed their joint return for 2015 on Form 1040. The return reported zero wages and claimed a refund of $26,252.79. No Forms W–2 were attached to the return. Instead, the Buntons attached two Forms 4852, one for Ms. Bunton's employer, Fulcrum BioEnergy, Inc., and one for Mr. Bunton's employer, Virgin America, Inc. Both Forms 4852 reported zero wages. Letters accompanying the forms made arguments regarding why the Buntons should not pay tax on the income reported to have been paid to them on Forms W–2, arguments such as "[t]he payments made to [them] by these private sector companies did not result from any taxable income and do not constitute any taxable income under relevant law" and that they are "private sector workers." The IRS paid the refund.

On February 17, 2016, the IRS issued a notice of deficiency to the Buntons for 2013 and 2014. The IRS sent the notice by certified mail to the Buntons' address on Pepperwood Way in San Jose, California. For 2013, the determinations in the notice were made by reference to the amounts shown on the Buntons' amended return, not their original return. The notice determined a $49,916 deficiency for 2013 and a $62,731 deficiency for 2014. It determined section 6662 accuracy-related penalties of $3,686 for tax year 2013 and $12,546 for tax year 2014. The notice advised the Buntons that their last day to file a petition with the Tax Court was May 18, 2016.

[*4] The Buntons did not file a petition with the Tax Court disputing the notice of deficiency for 2013 and 2014.

On February 8, 2017, the IRS issued a notice of deficiency to the Buntons for 2015. The IRS sent the notice by certified mail to the Buntons' Pepperwood Way address. The notice determined a deficiency of $61,653 and a section 6662 accuracy-related penalty of $12,330. The notice advised the Buntons that their last day to file a petition with the Tax Court was May 9, 2017.

The Buntons did not file a petition with the Tax Court disputing the notice of deficiency for 2015.

On May 2, 2017, the Buntons sent a letter to the IRS regarding the notice of deficiency for tax year 2015, which they attached to the letter. The letter included many frivolous arguments, such as stating that their Forms W–2 were incorrect and that it "was necessary that [they] make the corrections . . . because [they] fully understand that the payers misapplied or did not consider the reporting requirements found in IRC § 6051(a)."

On March 15, 2018, the IRS sent to the Buntons LT11, Notice of Intent to Levy and Notice of Your Right to a Hearing, for the years at issue. The letter informed them of their right to request a CDP hearing under section 6330 within 30 days of the date of the letter.

On April 13, 2018, the Buntons timely submitted Form 12153, Request for a Collection Due Process or Equivalent Hearing. They left blank the section requesting a "[t]elephone number and best time to call during business hours." They also did not select one of the three preprinted reasons they "disagree with the filing of the lien or levy," which were "Installment Agreement," "Offer-in-Compromise," or "I Cannot Pay Balance." Instead, in the box "Other," they wrote:

> We are disputing the alleged taxes and penalties associated with these taxes. We would like verification that the IRS performed all the procedures that are required by law. We would like to request a face-to-face hearing close to where we live, which we intend to record. If at the end of the hearing it is found that we owe the tax, then we would like to discuss all the available collection alternatives available to us.

[*5] On April 19, 2018, the IRS Automated Collection System Support Unit (ACS Support Unit) in Fresno, California, sent a letter to the Buntons confirming it received their Form 12153.

On May 16, 2018, the ACS Support Unit sent a letter to the Buntons advising them that their request for a CDP hearing was being forwarded to the Office of Appeals and that the Office of Appeals would contact them within 60 days.

Settlement Officer (SO) Lora Davis of the Office of Appeals was assigned to the Buntons' CDP hearing. She researched their account transcripts on the IRS Integrated Data Retrieval System. SO Davis's review of the Buntons' account transcripts revealed that the Buntons had not yet filed their 2017 return.

SO Davis obtained a certified mail list showing that the IRS mailed the notice of deficiency for 2013 and 2014 to the Buntons' Pepperwood Way address. SO Davis also obtained certified mail receipts showing that the IRS mailed the notice of deficiency for tax year 2015 to the Buntons' Pepperwood Way address. In addition to the certified mail list and certified mail receipts, SO Davis obtained other information relevant to the mailing of the notices of deficiency, including the Buntons' tax returns, IRS account transcripts, and copies of the notices of deficiency themselves. That SO Davis in fact gathered the documents (i.e., certified mail list, certified mail receipts, IRS account transcripts, tax returns, and notices of deficiency) is shown by SO Davis's case activity notes. Furthermore, the parties have stipulated that these documents are part of the administrative record, which is the set of documents relied on by the Office of Appeals. *See* Treas. Reg. § 301.6330-1(f), Q&A-F4.

On August 3, 2018, SO Davis sent a letter to the Buntons scheduling a telephone conference for September 5, 2018, as part of their CDP hearing. The letter explained that although the Buntons requested a face-to-face hearing, SO Davis scheduled a telephone conference and that "[w]e can offer you a virtual conference or a correspondence hearing in lieu of a telephonic hearing." The letter noted that the Buntons' Form 12153 had stated that the Buntons disagreed with the liabilities. The letter explained that the Buntons had had a prior opportunity to raise the liabilities, and that because they had had a prior opportunity, they could not raise these liabilities before the Office of Appeals. The letter advised that if they had "further information to provide for consideration in regard to being able to raise the liabilit[ies]," they should provide that

[*6] information by August 17, 2018. The letter stated that for SO Davis to consider collection alternatives, the Buntons had to send her a completed Form 433–A, Collection Information Statement for Wage Earners and Self-Employed Individuals, with supporting documentation, by August 17, 2018, and their completed 2017 tax return by August 24, 2018.

On August 28, 2018, the Buntons sent a letter to SO Davis acknowledging they had received the August 3, 2018 letter scheduling a telephone hearing for September 5, 2018. The letter contended that the Buntons were entitled to a face-to-face hearing. The Buntons' letter stated that not all requirements of law and administrative procedure had been met because (the letter alleged) they "did *not* receive any statutory notices of deficiency for the tax years 2013-2015, either because they were never created, printed or mailed to us." The letter requested SO Davis "address the issues [they] brought up in [their] original Collection Due Process Hearing request." The letter did not, however, attach any of the information SO Davis requested in her August 3, 2018 letter.

As of September 5, 2018, the date of the scheduled telephone hearing, the Buntons had not provided SO Davis with a completed Form 433–A with supporting documentation or submitted their 2017 tax return. They also had not provided any further information for consideration that would allow them to raise their underlying tax liabilities.

On September 5, 2018, SO Davis called the Buntons' representative, Tim Brewer, for the telephone hearing, and was told he was in a meeting. She left a message. Mr. Brewer did not return her call.[4]

On September 7, 2018, SO Davis mailed a followup letter to the Buntons. The letter stated that the information requested in her August

[4] The correspondence arranging for the telephone hearing was sent to Mr. Brewer, who was authorized by the Buntons to represent them before the IRS. The Buntons do not contend that SO Davis erred by calling Mr. Brewer rather than the Buntons other than to refer to Mr. Brewer as their "alleged" representative in their briefs. They do not explain in the briefs why there was a question about Mr. Brewer's authority to represent them. Nor does the administrative record show there was any question that Mr. Brewer was so authorized. Indeed, SO Davis's case activity notes show that the Buntons had submitted a power of attorney form to the IRS authorizing the representation.

[*7] 3, 2018 letter had not been received but that she would give the Buntons an additional 14 days, until September 21, 2018, to provide the requested information before a notice of determination would be issued.

On September 17, 2018, the Buntons sent a letter to SO Davis in response to her September 7, 2018 letter. The letter again requested a face-to-face hearing be scheduled and that SO Davis "address the issues [they] brought up in [their] original Collection Due Process Hearing request." The letter did not, however, attach any of the information SO Davis requested in her September 7, 2018 letter.

On November 18, 2018, SO Davis received undated correspondence from the Buntons. It was filled with frivolous arguments, including that the Buntons were not "citizens of the United States Corporation." The letter referred to Mr. Bunton as a "Trust and a Vessel in Commerce," and threatened a "lawsuit and a penalty of $2 million against each government officer or agent."

On February 25, 2019, SO Davis issued the Buntons a notice of determination for the years at issue. The notice determined that the proposed levy was appropriate. It stated that SO Davis had verified that all requirements of any applicable law and administrative procedure had been met. It also stated that even though the Form 12153 had stated that the Buntons were disputing taxes and penalties, the Buntons had not (as of February 14, 2019) "provided any new information as required to proceed with reconsideration of the balance(s) due and/or non-frivolous challenges to the existence or amount of underlying tax liability." It also stated that the Buntons' request for a face-to-face hearing "is denied" because "the information [the Buntons] . . . provided subsequent to [their] request for a hearing fails to reflect the position of non-frivolous challenges to the existence or amount of underlying tax liability" and that they "have not provided all returns to date which is required to proceed with a collection alternative." It also stated that "the proposed levy balances the need for efficient collection with your concern that any collection action be no more intrusive than necessary."

On March 27, 2019, the Buntons timely filed a petition with the Tax Court. In the petition, they argued that they were wrongly denied a face-to-face hearing with the Office of Appeals. They also argued that the IRS did not attempt to verify that notices of deficiency were created and mailed to the Buntons for the years at issue. They stated that they

[*8] did not receive the notices of deficiency. The petition did not raise a challenge to the amounts of the tax liabilities for the years at issue.

The IRS concedes that the determination of the accuracy-related penalties for the years at issue failed to comply with the approval requirements of section 6751(b) because of the lack of timely managerial approval.

OPINION

Section 6331(a) authorizes the Treasury Secretary (who acts through the IRS) to levy upon property and property rights of a taxpayer liable for tax if the taxpayer fails to pay the tax within 10 days after notice and demand for payment is made. The IRS is first required, however, to notify the taxpayer in writing of his or her right to a pre-levy hearing with the Office of Appeals on the issue of whether the levy is appropriate. § 6330(a)(1), (b)(1). If a taxpayer requests a hearing, such hearing shall be held before an "officer or employee [of the Office of Appeals] who has had no prior involvement with respect to the unpaid tax." § 6330(b)(3).

Section 6330(c)(2) prescribes the matters that a taxpayer may raise at a CDP hearing, including spousal defenses, challenges to the appropriateness of the collection action, and collection alternatives. In making the determination the Office of Appeals must consider issues raised by the taxpayer under section 6330(c)(2) and must verify that the requirements of any applicable law or administrative procedure have been met. § 6330(c)(1), (3). The existence or amount of the underlying tax liability may be contested at the CDP hearing only if the taxpayer did not receive a notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute the tax liability. § 6330(c)(2)(B); *see Sego v. Commissioner*, 114 T.C. 604, 609 (2000); *Goza v. Commissioner*, 114 T.C. 176, 180–81 (2000).

Section 6330(d)(1) allows a taxpayer dissatisfied with a section 6330 determination of the Office of Appeals to file a petition with the Tax Court. Section 6330(d)(1) grants this Court jurisdiction to review the determination. If the existence or amount of the underlying tax liability is properly at issue, the Court will review the determination as to the existence or amount of the taxpayer's liability de novo. *See Sego*, 114 T.C. at 609–10. If the existence or amount of the underlying tax liability is not properly at issue, the Court will review the determination for abuse of discretion. *Goza*, 114 T.C. at 182. An abuse of discretion

[*9] occurs if the determination was made "arbitrarily, capriciously, or without sound basis in fact or law." *Woodral v. Commissioner*, 112 T.C. 19, 23 (1999).

I. *The Buntons were not entitled to challenge the underlying tax liabilities for the years at issue.*

In their petition, the Buntons contend that they did not receive the February 17, 2016 notice of deficiency or the February 8, 2017 notice of deficiency.

A deficiency is essentially the amount of unreported tax. § 6211(a). Before the IRS can assess and collect a tax deficiency, it must first mail the taxpayer a notice of deficiency to the taxpayer's last known address. § 6212(a) and (b)(1). As explained *supra*, if the taxpayer does not receive the notice of deficiency, the taxpayer eventually can contest the existence and amount of the tax liability at a CDP hearing.

The record contains documents, obtained by SO Davis, showing that the notices of deficiency were mailed by the IRS to the Buntons. The address to which the IRS directed both notices was the address at Pepperwood Way in San Jose, California, the same address used by the Buntons on their most recently filed returns. It was their last known address. *See* Treas. Reg. § 301.6212-2(a) (stating that the last known address is the "address that appears on the taxpayer's most recently filed and properly processed Federal tax return, unless the [IRS] is given clear and concise notification of a different address").

The mere fact that a notice is mailed does not mean it is received. However, the Buntons did not provide any evidence to support their assertion that they did not receive the notices of deficiency. Additionally, the Buntons' May 2, 2017 letter to the IRS, which made reference to and attached a copy of the notice of deficiency for tax year 2015, confirmed that the Buntons did in fact receive the notice of deficiency for the 2015 tax year.

On the preponderance of the evidence, *see Sego*, 114 T.C. at 611, we conclude that the IRS mailed to the Buntons notices of deficiency for the tax years at issue to their last known address, and that the Buntons received them. Because the Buntons received the notices of deficiency, they are not entitled to contest their underlying tax liabilities. *See* § 6330(c)(2)(B). But even if they had not received the notices of deficiency, they still would not be entitled to contest their underlying liabilities. This is because at the CDP hearing the Buntons did not

[*10] provide any genuine information relevant to their underlying tax liabilities. *See* Treas. Reg. § 301.6330-1(f)(2), Q&A-F3. Furthermore, the Buntons did not contest their underlying tax liabilities in their petition or present any evidence relevant to their underlying tax liabilities in our Court.

II. *The Office of Appeals properly verified that the requirements of applicable law and administrative procedure were met.*

Section 6330(c)(1) requires the Office of Appeals to obtain verification that the requirements of any applicable law or administrative procedure have been met. As part of this review, the Office of Appeals must verify that a valid notice of deficiency was mailed to the taxpayer. *Jordan v. Commissioner*, 134 T.C. 1, 12 (2010), *supplemented by* T.C. Memo. 2011-243. This is the only specific type of verification the Buntons argue was not made.

SO Davis obtained a certified mail list and certified mail receipts showing the notices of deficiency were mailed. In addition, she reviewed other corroborating documents, including the notices of deficiency themselves and IRS account transcripts.

SO Davis properly verified that the notices of deficiency were mailed to the Buntons' last known address.

The Buntons observe that section 6330(c)(1) requires the Office of Appeals to obtain the necessary verifications "at the hearing." The Buntons contend that the Office of Appeals did not have a hearing because it did not have a conference with them. A "hearing" for these purposes does not necessarily mean a face-to-face meeting, or even a telephone conversation. Treas. Reg. § 301.6330-1(d)(2), Q&A-D6. It can consist of an exchange of written communications, *id.*, and that is what the Buntons' hearing comprised.

Where the supervisory approval requirement of section 6751(b)(1) applies, the Office of Appeals should obtain verification that such approval was obtained. *ATL & Sons Holdings, Inc. v. Commissioner*, 152 T.C. 138, 144 (2019) (*citing Rosendale v. Commissioner*, T.C. Memo. 2018-99, at *14). As discussed *supra* pages 7–8, the IRS conceded that the Buntons are not liable for the accuracy-related penalties for the years at issue. Therefore, we will not sustain the notice of determination as to the section 6662 penalties.

[*11] III. *The Office of Appeals did not abuse its discretion in not offering the Buntons a face-to-face hearing.*

The Buntons requested a face-to-face hearing with the Office of Appeals to discuss (1) their underlying tax liabilities for the years at issue and (2) collection alternatives if it were determined they were liable for the underlying tax liabilities for the years at issue.

A face-to-face conference will not be granted concerning a taxpayer's underlying liability if the taxpayer presents only frivolous issues concerning the liability. Treas. Reg. §§ 301.6320-1(d)(2), Q&A-D8, 301.6330-1(d)(2), Q&A-D8; *see Williams v. Commissioner*, 718 F.3d 89, 93 (2d Cir. 2013). The Buntons presented only frivolous issues. Therefore, the Office of Appeals did not abuse its discretion by deciding not to offer the Buntons a face-to-face conference to discuss their underlying tax liabilities.

Furthermore, a face-to-face conference is not required to discuss collection alternatives unless the taxpayer qualifies for collection alternatives. Treas. Reg. § 301.6330-1(d)(2), Q&A-D8. The Buntons did not qualify for collection alternatives. They did not submit a 2017 tax return or a Form 433–A. Therefore, the Office of Appeals did not abuse its discretion by deciding not to offer the Buntons a face-to-face conference to discuss collection alternatives. *See*, *e.g.*, *Steinhardt v. Commissioner*, T.C. Memo. 2018-206, *aff'd per curiam*, 792 F. App'x 721 (4th Cir. 2020); *Talbot v. Commissioner*, T.C. Memo. 2016-191, *aff'd*, 708 F. App'x 421 (9th Cir. 2017); *Hull v. Commissioner*, T.C. Memo. 2015-86; *Rivas v. Commissioner*, T.C. Memo. 2012-20; *Toth v. Commissioner*, T.C. Memo. 2010-227; *Huntress v. Commissioner*, T.C. Memo. 2009-161.

SO Davis did not abuse her discretion in not granting the Buntons a face-to-face hearing.

IV. *The Office of Appeals did not abuse its discretion in considering issues raised under section 6330(c)(2).*

Section 6330(c)(2) allows the taxpayer to raise any relevant issue relating to the unpaid tax or the proposed levy, including challenges to the appropriateness of collection actions and offers of collection alternatives (which may include offers-in-compromise).

Although the Buntons' request for a CDP hearing indicated that they wanted to discuss collection alternatives, the Buntons did not

[*12] qualify themselves for collection alternatives by filing their 2017 return and submitting Form 433–A.

We hold that the Office of Appeals did not abuse its discretion in considering the issues it was required to consider under section 6330(c)(2).

V. *The Office of Appeals did not abuse its discretion in determining that the proposed levy balanced the need for collection of tax with the intrusiveness of the proposed levy.*

The Office of Appeals must consider "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern . . . that any collection action be no more intrusive than necessary." *See* § 6330(c)(3)(C). The Buntons do not argue that the Office of Appeals erred in making this balancing determination. Since the Buntons did not raise this argument before this Court, they have waived it. *See 3K Inv. Partners v. Commissioner*, 133 T.C. 112, 121 n.9 (2009).

VI. *Conclusion*

Finding no abuse of discretion, we will sustain the IRS's determination to uphold the collection action as to the unpaid liabilities for the years at issue except that we will not sustain its determination to uphold the collection action as to the penalties.

To reflect the foregoing,

An appropriate decision will be entered.