NOT FOR PUBLICATION

FILED

MAR 10 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES R. HEFFLIN; PATTI A. HEFFLIN, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 18-72551 Tax Ct. No. 7164-17L MEMORANDUM*

Appeal from a Decision of the
United States Tax Court

Submitted March 3, 2020**

Before: MURGUIA, CHRISTEN, and BADE, Circuit Judges.

James R. Hefflin and Patti A. Hefflin appeal pro se from the Tax Court's summary judgment for the Commissioner of Internal Revenue in the Hefflins' petition seeking review of the Internal Revenue Service Appeals Office's determination upholding the filing of a notice of federal tax lien. We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

APPENDIX "A"

jurisdiction under 26 U.S.C. § 7482(a)(1). We review de novo. *Miller v. Comm'r*, 310 F.3d 640, 642 (9th Cir. 2002). We affirm.

The Tax Court properly granted summary judgment for the Commissioner because petitioners failed to raise a genuine dispute of material fact as to whether the IRS Appeals Office abused its discretion in determining that the notice of federal tax lien was not erroneously filed. *See* 26 C.F.R. § 301.6159–1(f)(3)(i)(B) (actions the IRS may take with regard to liability identified in an installment agreement includes filing a notice of federal tax lien); *Fargo v. Comm'r*, 447 F.3d 706, 709 (9th Cir. 2006) (discussing standard of review).

We reject as unsupported by the record the Hefflins' contentions regarding retaliation and violation of their due process rights.

We do not consider the Hefflins' contentions regarding the existence or amount of the underlying tax liability. *See Comm'r v. McCoy*, 484 U.S. 3, 6 (1987) (court of appeals lacks jurisdiction to decide an issue not before the Tax Court or to grant relief beyond the powers of the Tax Court); *see also* 26 U.S.C. § 6330(c)(2)(B) (taxpayer may challenge existence or amount of underlying tax

liability only if taxpayer did not otherwise have an opportunity to dispute such liability), § 6330(c)(4) (taxpayer may not raise issues at a collection due process hearing already considered at a prior hearing).

AFFIRMED.

SD

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JAMES R. HEFFLIN & PATTI A. HEFFLIN,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 7164-17 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	

ORDER AND DECISION

A hearing was held in this case at the Court's February 26, 2018, San Diego, California, trial session on respondent's First Amended Motion for Summary Judgment and petitioners' Motion for Judgment on the Pleadings, as supplemented. During the hearing, petitioners filed a Statement Under Rule 50(c).[1] On May 11, 2018, respondent filed a response to petitioners' Rule 50(c) statement, and petitioners filed an objection to respondent's response.

On December 20, 2017, respondent filed a Motion for Summary Judgment pursuant to Rule 121, which was later sealed. On January 10, 2018, respondent filed a First Amended Motion for Summary Judgment. The Court ordered petitioners to file, on or before January 26, 2018, a response to respondent's First Amended Motion for Summary Judgment. On January 26, 2018, petitioners filed a Reply to First Amended Motion for Summary Judgment. On February 19, 2018, petitioners filed a Motion for Judgment on the Pleadings, and on February 22, 2018, petitioners filed a First and Second Supplement to Motion for Judgment on the Pleadings.

The Court is satisfied that the material facts are not in dispute, and for the reasons summarized below, respondent's first amended motion for summary

[1]Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986 (Code) as amended and in effect at the relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

APPENDIX B

SERVED Jun 15 2018

judgment should be granted. Petitioners resided in California when they petitioned this Court on March 30, 2017.

This case arises under section 6320 because the Internal Revenue Service (IRS) Appeals Office has sustained a Notice of Federal Tax Lien (NFTL) with respect to petitioners' outstanding income tax liabilities for tax years 2010-2014 (years at issue). In their petition, petitioners claimed that they were not delinquent in their tax liabilities for the years at issue because they previously had entered into an installment agreement with respondent, and the filing of the NFTL was thus erroneous. They also stated that the amount owed was incorrect because the agreement with respondent included an abatement of interest and penalties.

Background

On March 30, 2017, petitioners filed a timely petition in this case after the IRS Appeals Office issued a Letter 3193, Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code, on February 28, 2017, sustaining a NFTL for tax years 2010-2014. Petitioners' tax liabilities arise from their failure to pay self-assessed taxes due to insufficient withholdings and/or estimated tax payments and from penalties imposed by respondent for: (1) failure to timely file for tax years 2010-2012; (2) failure to pay tax for tax years 2010-2014; (3) failure to pay estimated tax for tax years 2011-2013; and interest assessed for tax years 2010-2014.

On October 25, 2016, respondent filed a NFTL for the years at issue in Riverside County, California. On November 3, 2016, respondent sent petitioners a Letter 9172, Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320, informing petitioners of the filing of the NFTL and their right to a collection due process (CDP) hearing under section 6320. On November 9, 2016, petitioners sent respondent a Form 12153, Request for a Collection Due Process Hearing. On the Form 12153, petitioners indicated that they believed the NFTL should be removed because petitioners and respondent had entered into an installment agreement as a result of a prior CDP hearing.

On November 22, 2016, petitioners sent respondent additional correspondence, including a copy of a fax petitioners claimed to have sent to respondent's collection office in Cincinnati and a second Form 12153 in which they indicated that they would like to be considered for an installment agreement in lieu of the collection action. The second Form 12153 again disputed the NFTL and claimed that respondent had breached an existing installment agreement with

petitioners. Petitioners also stated on this form that the penalties and interest amounts should have been abated under the same agreement. Petitioners also submitted a number of other documents including: (1) solicitation letters sent from attorneys to petitioners regarding the NFTL; (2) a letter sent by Palm Desert Tax to United States Treasury on behalf of petitioners regarding overpayments from tax year 2015 being applied to petitioners' liabilities from earlier years; (3) several notices of intent to terminate an installment agreement for nonpayment, each dated August 8, 2016, sent to petitioners by respondent; (4) an October 28, 2016, letter sent by respondent to petitioners stating that overpayments from tax year 2015 had been applied to their balance due and an installment agreement had been implemented for $1,295.00 per month; and (5) copies of the NFTL and the first Form 12153. These documents were provided to respondent's Office of Appeals for consideration during the CDP hearing.

On January 24, 2017, respondent's Settlement Officer (SO) M. Banks sent petitioners a letter acknowledging timely receipt of petitioners' Form 12153 and scheduling a teleconference for the CDP hearing for February 16, 2017. SO Banks also requested that petitioners provide her with any additional documents that they wanted her to consider by February 15, 2017. On February 15, 2017, SO Banks received a letter from petitioners detailing petitioners' disagreement with respondent's collection efforts. Included with the letter were a copy of Form 668(Y)(c), Notice of Federal Tax Lien; a copy of Form 12257, Summary Notice of Determination, Waiver of Right to Judicial Review of a Collection Due Process Determination, Waiver of Suspension of Levy Action, and Waiver of Periods of Limitations in Section 6330(e)(1), from a prior levy hearing for the same tax periods signed by petitioner husband on February 8, 2016; and a copy of Form 433-D, Installment Agreement. Although petitioners did not sign the Form 433-D, both petitioners and respondent signed the Form 12257, which stated that the parties were entering into the installment agreement as an alternative to a levy for the years at issue with payments of $1,295.00 due monthly beginning on April 15, 2016. The Form 12257 did not contain an agreement to abate interest or additions to tax or any representation by respondent that they would refrain from filing or remove any notice of tax lien.

On February 16, 2017, SO Banks and petitioner husband conducted the scheduled CDP hearing by phone. SO Banks explained that petitioners could not challenge the penalties because they had the opportunity to do so during their prior CDP hearing. When SO Banks told petitioner husband that the IRS followed the applicable law and proper procedures when filing the NFTL, petitioner husband stated that his agreement with the IRS was that a NFTL would not be filed unless

petitioners defaulted on the installment agreement. SO Banks told petitioner husband that the Form 12257 did not contain those terms and that the installment agreement did not meet the criteria under which the IRS would agree not to file a NFTL. SO Banks stated that petitioners were likely also in default of the installment agreement as no payments had ever been made. Petitioner husband stated that petitioners did not make any payments because they were appealing the NFTL and did not agree with the amount owed. In their petition and other mailings to respondent, petitioners claimed that the NFTL had ruined their credit and prevented them from paying for their son's college education, but they did not provide SO Banks with any documentation of economic hardship.

On February 28, 2017, respondent issued a notice of determination to petitioners sustaining the NFTL. On March 30, 2017, petitioners filed a timely petition with this Court challenging the notice of determination. In their petition, petitioners stated that the amount owed was incorrect, that they believed penalties and interest should have been abated, and that the NFTL filing was "abusive" because they had an installment agreement in place prior to the filing.

Discussion

Respondent's motion requests summary judgment in his favor under Rule 121. Summary adjudication is designed to expedite litigation and avoid unnecessary and expensive trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Under Rule 121(b), summary judgment may be granted with respect to all or any part of the legal issues presented "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." See Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994).

The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences will be drawn in a manner most favorable to the party opposing summary adjudication. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985). Although facts are viewed in the light most favorable to the nonmoving party, Naftel v. Commissioner, 85 T.C. 527, 529 (1985), the nonmoving party may not rest upon allegations and denials in that party's pleadings. The nonmoving party must set forth specific facts showing that there is a genuine dispute as to any material fact. Rule 121(d); Dahlstrom v. Commissioner, 85 T.C. at 820-821.

Section 6320 entitles a taxpayer, upon timely request, to an administrative hearing before the filing of a tax lien by respondent. Sec. 6320(b). The taxpayer may raise any relevant issues relating to the proposed collection action, including the appropriateness of the collection action and proposed collection alternatives, such as an installment agreement or offer-in-compromise. See Sec. 6320(c); Sec. 6330(c)(2)(A)(ii) and (iii). Petitioners cannot dispute the existence or amount of any underlying tax liability during the CDP hearing if petitioners received a statutory notice of deficiency or otherwise had an opportunity to dispute the tax liability. Sec. 6330(c)(2)(B). During the hearing, the Appeals Office must verify "that the requirements of any applicable law or administrative procedure have been met." Sec. 6330(c)(1). The Appeals Office must then consider the issues raised and balance the need for efficient collection activities "with the legitimate concern of the person that any collection action be no more intrusive than necessary" in making its determination. Sec. 6330(c)(3).

This Court has jurisdiction to review the determination of the Appeals Office upon the issuance of a valid notice of determination and the timely filing of a petition. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). The Court reviews all determinations, other than a properly disputed underlying tax liability, for an abuse of discretion. Id. at 182; see also Sego v. Commissioner, 114 T.C. 604, 609-610 (2000). An abuse of discretion occurs when the determination of the Appeals Office 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). In deciding whether a decision is arbitrary, capricious, or without sound basis in fact or law, the Court does not substitute its judgment for that of the Appeals Office; rather it decides whether the requirements of section 6320 have been met, including whether relevant issues were considered. See, e.g., id.; Woodral v. Commissioner, 112 T.C. 19, 23 (1999).

Respondent may withdraw a NFTL under certain circumstances, such as where the NFTL was improperly filed or where an installment agreement is in place under section 6159. Sec. 6323(j). However, it may be proper for respondent to file an NFTL even when an installment agreement is in place. See Karakaedos v. Commissioner, T.C. Memo. 2012-53; Crisan v. Commissioner, T.C. Memo. 2007-67. Unless the installment agreement provides otherwise, respondent may take action to protect the interests of the Government with respect to the tax liability, including the filing of a NFTL. Sec. 301.6159-1(f)(3)(i)(B), Income Tax Regs. It is not an abuse of discretion for a settlement officer to refuse to withdraw a NFTL where petitioners have made an "unsupported contention" that they will

face economic hardship but failed to provide any documentation to support this claim. Kyereme v. Commissioner, T.C. Memo. 2012-174 slip. op. at 16-17.

Section 6330(c)(2)(A)(iii) authorizes taxpayers to raise collection alternatives during a CDP hearing. Taxpayers must provide financial information in order to be considered for collection alternatives, and the Appeals Office "does not abuse its discretion when it rejects a collection alternative because a taxpayer does not provide all the necessary financial information during the CDP hearing process." Cunningham v. Commissioner, T.C. Memo. 2014-200 at *18 (citing Olsen v. United States, 414 F.3d 144, 151-154 (1st Cir. 2005); McLaine v. Commissioner, 138 T.C. 228, 243 (2012).

Because petitioners had the opportunity to dispute the underlying tax liabilities during the prior CDP hearing regarding the NFTL with respect to the same tax years, they are precluded from doing so in the present case and we review for abuse of discretion. Reading all factual inferences in favor of petitioners, the record establishes that SO Banks did not abuse her discretion.

Petitioners allege that the NFTL was filed erroneously because an installment agreement was already in place with respect to the years at issue. They also claim that the installment agreement included an agreement to abate interest and penalties and an agreement by respondent not to file a NFTL. However, the installment agreement contains no terms restricting respondent's ability to file a NFTL in order to protect the Government's interest and no terms regarding the abatement of interest and penalties.

Further, as of the date of the CDP hearing, petitioners had not made any payments under the installment agreement and thus were not in compliance with its terms. The terms of the installment agreement were clearly outlined in the Form 12257 issued after the prior hearing. The Form 12257 was signed by petitioners. Although petitioners claimed that the NFTL caused them economic hardship, they provided no documentation of such hardship during the hearing and are thus not entitled to consideration of additional collection alternatives. We find that SO Banks did not abuse her discretion in upholding the NFTL filing in the notice of determination.

Because the material facts are not in dispute and respondent is entitled to a decision as a matter of law, it is hereby,

ORDERED that respondent's First Amended Motion for Summary Judgment, filed January 10, 2018, is granted. It is further

ORDERED that petitioner's Motion for Judgment on the Pleadings, filed February 19, 2018, and as supplemented, February 22, 2018, is denied as moot. It is further

ORDERED AND DECIDED that respondent's determination set forth in the Notice of Determination Concerning Collection Actions Under Section 6320 and/or 6330 issued to petitioners on February 28, 2017, for petitioners' income tax liabilities for the tax years 2010-2014 is sustained in full.

(Signed) L. Paige Marvel
Judge

ENTERED: **JUN 15 2018**