

APPENDIX

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 17-70050
Tax Ct. No. 10100-15L

KAREN FUJITA,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from a Decision of the
U.S. Tax Court

(Filed October 26, 2017)

MEMORANDUM*

Submitted October 23, 2017**

* 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).

Before: McKEOWN, WATFORD, and FRIEDLAND,
Circuit Judges.

Karen Fujita appeals pro se from the Tax Court's summary judgment sustaining the Commissioner of Internal Revenue's collection action for the 2003 and 2009 tax years. We have jurisdiction under 26 U.S.C. § 7482(a)(1). We review de novo. *Sollberger v. Comm'r*, 691 F.3d 1119, 1123 (9th Cir. 2012). We affirm.

The Tax Court properly granted summary judgment because the settlement officer did not abuse his discretion in sustaining the proposed collection action for tax years 2003 and 2009. *See* 26 U.S.C. § 6330(c)(3) (setting forth matters an appeals officer must consider in making a determination to sustain a proposed collection action); 26 U.S.C. § 6330(c)(2)(B) (a taxpayer may challenge the underlying tax liability only "if the person did not receive any statutory notice of deficiency . . . or did not otherwise have an opportunity to dispute such tax liability").

In light of our disposition, we do not consider Fujita's contentions challenging the validity of the underlying tax assessments.

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

We reject as meritless Fujita's contentions concerning sanctions and violations of due process.

Fujita's request for judicial notice (Docket Entry No. 12) is denied.

AFFIRMED.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

KAREN K. FUJITA,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 10100-15 L.

ORDER AND DECISION

On July 21, 2016, respondent filed a Motion for Summary Judgment pursuant to Rule 121.¹

Rule 121 provides for summary judgment on legal issues in controversy where there is no genuine issue of material fact, and a decision may be rendered as a matter of law. Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). The burden is on the moving party to show that it is entitled to summary judgment as a matter of law. Respondent, as the moving party, bears the burden of proving that no genuine issue exists as to any material fact and that he is entitled to judgment as a matter of law. Any inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion for

¹ All section references are to the Internal Revenue Code, and all Rule references are to the Tax Court Rules of Practice and Procedure.

summary judgment. FPL Group, Inc. & Subs. v. Commissioner, 115 T.C. 554, 559 (2000); Rule 121(b). Once a motion for summary judgment is made, the nonmoving party must do more than merely allege or deny facts, it must "set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, then a decision, if appropriate, may be entered against such party." Rule 121(d); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); FPL Group, Inc. & Subs. v. Commissioner, 115 T.C. at 559-560.

This case is before the Court based upon respondent's collection action via lien filing to collect an income tax liability for 2003 and a civil penalty under section 6702 for 2009. Petitioner timely sought review of a lien filing in King County, Washington, and now seeks us to reverse the actions of the IRS settlement officer who sustained the lien filing in a Notice of Determination.

We have jurisdiction based upon section 6330(d)(1). We find there was a timely marked petition in this case.

On or about September 19, 2011, respondent assessed the frivolous submission penalty, section 6702(a), against petitioner for taxable year 2009.

On or about January 6, 2012, respondent issued petitioner a Notice of Intent to Levy with respect to the frivolous-submission penalty assessed against her for the taxable year 2009.

On or about February 27, 2012, respondent received a Form 12153, Request for Collection Due Process Hearing from petitioner for the frivolous-submission penalty assessed against her for the taxable year 2009.

The 2012 Form 12153 was postmarked January 30, 2012.

In response to the 2012 Form 12153, respondent's Office of Appeals afforded petitioner a CDP hearing (the 2012 CDP hearing), which hearing included an opportunity to dispute her liability for the frivolous-submission penalty assessed against her for the taxable year 2009.

On August 28, 2012, respondent's Office of Appeals issued a Notice of Determination to petitioner with respect to the 2012 CDP hearing.

During the 2012 CDP hearing, petitioner did not submit information demonstrating that she was not liable for the frivolous-submission penalty.

Petitioner did not file a Tax Court petition with respect to the Notice of Determination issued at the conclusion of the 2012 CDP hearing.

In light of the foregoing, petitioner has had a prior opportunity to dispute her liability for the frivolous-submission penalty assessed against her for the taxable year 2009 within the meaning of section 6330(c)(2)(B).

Petitioner has also had a prior opportunity to dispute her 2003 income tax liability. As the certified account transcript for petitioner's 2003 income tax liability reflects, the IRS prepared a substitute for return for petitioner on May 14, 2007, and issued a Notice of Deficiency to petitioner with respect to her 2003 income tax liability. The IRS assessed petitioner's 2003 income tax liability on December 3, 2007, after petitioner did not file a petition with respect to the Notice of Deficiency.

On November 3, 2008, the IRS also issued a Notice of Intent to Levy and Notice of Your Right to a

Collection Due Process Hearing to petitioner with respect to petitioner's 2003 income tax liability.

On November 6, 2008, petitioner signed the return receipt indicating her receipt of the Notice of Intent to Levy and Notice of Your Right to a Collection Due Process Hearing.

Because petitioner has already had a prior opportunity to dispute her 2003 income tax liability, she is not entitled to dispute it in the present case.

On September 12, 2014, respondent filed a Notice of Federal Tax Lien with the County Auditor of King County, Washington, listing the unpaid income tax liability for taxable year 2003 and unpaid civil penalty liability for 2009 (the lien).

On October 14, 2014, respondent received a Form 12153, Request for CDP or Equivalent Hearing, from petitioner relating to the lien filed in relation to petitioner's 2003 income tax liability and 2009 civil penalty liability. The Form 12152 was dated October 10, 2014 and was timely filed.

On December 3, 2014, a Letter 4141 was sent by respondent to petitioner to provide information on the Office of Appeals within the IRS, their role, and contact information for respondent's settlement officer that would be handling the appeal with petitioner.

On December 16, 2014, petitioner faxed respondent's settlement officer a letter confirming receipt of the Letter 4141 dated December 3, 2014 and requested that instead of a telephone meeting that she would prefer a face-to-face review of her case.

On January 14, 2015, a Letter 4836 was mailed to petitioner informing her that her request for a CDP hearing was received, advising her of her appeal

rights, and scheduling a telephone conference for February 19, 2015 at 1:00 pm PST. The Letter 4836 also indicated that at this time the petitioner did not qualify for a face-to-face conference as petitioner was required to provide additional financial or return information.

A second letter was faxed by petitioner to respondent's settlement officer on February 5, 2015, again requesting a face-to-face hearing and denying the need to provide additional financial or return information before a face-to-face can be granted. In the February 5, 2015 letter, petitioner alleged her debt with the IRS had been satisfied in its entirety on April 9, 2014 because she claimed she provided "genuine payment" to respondent in the form of a personal note in the amount of \$150,267.73.

On February 19, 2015, petitioner did not call in for the telephonic CDP conference as scheduled by respondent's settlement officer.

On February 19, 2015, respondent's settlement officer prepared and sent petitioner a letter indicating that she missed the meeting scheduled for that day and giving her an additional 14 days to provide any information she would like him to consider in making a determination. In response, petitioner faxed a third letter on February 28, 2015 making her third request for a face-to-face hearing.

Additionally in the February 28, 2015 letter, petitioner continued to make claims respondent considers frivolous including the claim that she "[does] not understand or recognize '\$' as a valid form of money."

In the February 28, 2015, letter, petitioner again states her opposition to the United States monetary

system when she states, "[b]ecause I do not understand or recognize '\$' I am not sure what kind of 'monetary sanction' this would be. Since my responses to the IRS regarding this instant matter has [sic.] been timely, all the delays hence have been entirely on the part of the IRS." The February 28, 2015 letter failed to address the settlement officer's requests for information including updated Forms 433-A and 433-B as well as any documents to support petitioner's income and expenses.

In all three letters, petitioner failed to raise any legitimate issues or provide any supporting documentation regarding her civil penalty and income tax liability for taxable years 2003 and 2009.

As petitioner continued to be non-responsive to requests for additional information and telephonic meetings, respondent's settlement officer made a review of the information available in the administrative file and came to the determination to uphold the lien as valid and appropriate.

Based on that finding, a Notice of Determination was sent via certified mail to petitioner on March 16, 2015. The Notice of Determination outlined the background of the procedures followed as well as the basis for upholding the lien. It additionally provided petitioner with the information necessary to file a petition within 30 days if so desired.

Petitioner's petition was timely received by the Tax Court on April 20, 2015 in which petitioner claims a violation of her due process rights, unauthorized seizure of her assets, and the violation of various collection and penalty provisions by the IRS.

The basis of respondent's motion is that petitioner had prior opportunities to challenge the under-

lying liabilities for 2003 and 2009 and under section 6330(c)(2)(B) petitioner may not contest these liabilities in this proceeding. Also, because petitioner offered no other legitimate matters for the settlement officer to consider there is no basis for any alternative to the lien and a Motion for Summary Judgment is warranted. Section 6330(c)(2)(B) provides that a taxpayer may challenge the existence or amount of the underlying tax liability in a CDP hearing if the taxpayer does not receive a statutory notice of deficiency for the tax liability or did not otherwise have an opportunity to dispute the tax liability.

Petitioner offered no defense to respondent's position that the underlying liability is not in dispute and offered no other defense to respondent's motion.

Petitioner does maintain the liability for 2009 was paid but her argument was based on the penalty against her husband. The declaration in support of respondent's motion states that the settlement officer verified that the requirements of applicable law have been met and that the collection action balances the need for collection of tax with the taxpayers legitimate concerns regarding as required by section 6330(c)(3).

This case was recalled for hearing on respondent's motion in Seattle, Washington, on September 23, 2016. Petitioner conceded at the hearing on respondent's motion that she was not contesting the liability for the frivolous return penalty in 2009. In addition the uncontested facts establish that she had a previous opportunity to contest the liability. Likewise, regarding the 2003 income tax liability petitioner had a previous opportunity to raise the liabil-

ity and she offers no argument in dispute of this uncontested finding.

At the hearing on respondent's motion petitioner's comments ranged between tax protestor type arguments and complaints that the IRS ignored the joint income tax return which she alleges was filed by her husband and herself in October 2004. Respondent's records do not reflect this return having been filed. Regardless, whatever effect this alleged return might have on her income tax liability is not a matter we are permitted to consider in reviewing a section 6330 hearing given the prior opportunity discussed previously.

Respondent seeks a penalty in this matter pursuant to section 6673. Because of the nature of petitioner's arguments in this matter we believe no sanction is appropriate.

ORDERED that so much of respondent's Motion for Summary Judgment moving for summary adjudication in respondent's favor is granted. It is further

ORDERED that so much of respondent's Motion for Summary Judgment moving the Court to impose sanctions against petitioner is denied. It is further

ORDERED and DECIDED that respondent may proceed with the collection action as determined in the Notices of Determination Concerning Collection Action dated March 16, 2015, as to the income tax liability for 2003 and the civil penalty under section 6702 for 2009.

(Signed) Joseph Robert Goeke
Judge

ENTERED: OCT 07 2016

**CONSTITUTIONAL AMENDMENT, STATUTES,
AND REGULATIONS INVOLVED
(PERTINENT TEXT)**

The First Amendment of the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C. § 61 provides:

Gross Income Defined. (a) **General Definition.**- Except as otherwise provided in this subtitle, gross

income means all income from whatever source derived, including (but not limited to) the following items;

- (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property; ...

26 U.S.C. § 61(b) provides:

Cross references. For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

26 U.S.C. § 83 provides:

Property Transferred in Connection with the Performance of Services. (a) If, in connection with the performance of services, property is transferred. ..., the excess of -

- (1) the fair market value of such property... over,
 - (2) the amount (if any) paid for such property,
- shall be included in the gross income of the person who performed such services...

26 U.S.C. § 212 provides:

Expenses for Production of Income. In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year-

- (1) for the production or collection of income; ...

26 U.S.C. § 1001(a) provides:

Computation of Gain or Loss. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011...

26 U.S.C. § 1011(a) provides:

General rule. The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under section 1012...) ...

26 U.S.C. § 1012 provides:

Basis of Property-Cost. (a) In general. The basis of property shall be the cost of such property ...

26 U.S.C. § 6001 provides:

Notice or regulations requiring records, statements, and special returns.

Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. Whenever in the judgment of the Secretary it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax under this title. The only records which an employer shall

be required to keep under this section in connection with charged tips shall be charge receipts, records necessary to comply with section 6053(c), and copies of statements furnished by employees under section 6053(a).

26 U.S.C. § 6673 provides:

Sanctions and costs awarded by courts.

(a) Tax court proceedings.

(1) Procedures instituted primarily for delay, etc.

Whenever it appears to the Tax Court that -

(A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,

(B) the taxpayer's position in such proceeding is frivolous or groundless, or

(C) the taxpayer unreasonably failed to pursue available administrative remedies, the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of \$25,000.

26 U.S.C. § 6702 provides:

Frivolous tax submissions.

(a) Civil penalty for frivolous tax returns.

A person shall pay a penalty of \$5,000 if -

(1) such person files what purports to be a return of a tax imposed by this title but which -

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect, and

(2) the conduct referred to in paragraph (1) -

(A) is based on a position which the Secretary has identified as frivolous under subsection (c), or

(B) reflects a desire to delay or impede the administration of Federal tax laws.

(b) Civil penalty for specified frivolous submissions.

(1) Imposition of penalty. Except as provided in paragraph (3), any person who submits a specified frivolous submission shall pay a penalty of \$5,000.

(2) Specified frivolous submission. For purposes of this section -

(A) Specified frivolous submission. The term "specified frivolous submission" means a specified submission if any portion of such submission -

(i) is based on a position which the Secretary has identified as frivolous under subsection (c), or

(ii) reflects a desire to delay or impede the administration of Federal tax laws.

26 U.S.C. § 7214 provides:

Offenses by officers and employees of the United States.

(a) Unlawful acts of revenue officers or agents. Any officer or employee of the United States acting in connection with any revenue law of the United States

(1) who is guilty of any extortion or willful oppression under color of law; or

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or

(3) who with intent to defeat the application of any provision of this title fails to perform any of the duties of his office or employment; or

(4) who conspires or colludes with any other person to defraud the United States; or

(5) who knowingly makes opportunity for any person to defraud the United States; or

(6) who does or omits to do any act with intent to enable any other person to defraud the United States; or

(7) who makes or signs any fraudulent entry in any book, or makes or signs any fraudulent certificate, return, or statement; or

(8) who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to the Secretary; or

(9) who demands, or accepts, or attempts to collect, directly or indirectly as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do;

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment

against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

26 U.S.C. § 7345 (a)(3) provides:

Revocation or denial of passport in case of certain tax delinquencies.

(a) In general. If the Secretary receives certification by the Commissioner of Internal Revenue that an individual has a seriously delinquent tax debt, the Secretary shall transmit such certification to the Secretary of State for action with respect to denial, revocation, or limitation of a passport pursuant to section 32101 of the FAST Act.

(b) Seriously delinquent tax debt.

(1) In general. For purposes of this section, the term "seriously delinquent tax debt" means an unpaid, legally enforceable Federal tax liability of an individual -

(A) which has been assessed,

(B) which is greater than \$50,000, and

(C) with respect to which -

(i) a notice of lien has been filed pursuant to section 6323 and the administrative rights under section 6320 with respect to such filing have been exhausted or have lapsed, or

(ii) a levy is made pursuant to section 6331.

(2) Exceptions. Such term shall not include -

(A) a debt that is being paid in a timely manner pursuant to an agreement to which the individual is party under section 6159 or 7122, and

(B) a debt with respect to which collection is suspended with respect to the individual -

(i) because a due process hearing under section 6330 is requested or pending, or

(ii) because an election under subsection (b) or (c) of section 6015 is made or relief under subsection (f) of such section is requested.

26 U.S.C. § 7803 provides:

[Commissioner of Internal Revenue; other officials.]

(3) Execution of duties in accord with taxpayer rights. In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including -

(A) the right to be informed,

(B) the right to quality service,

(C) the right to pay no more than the correct amount of tax,

(D) the right to challenge the position of the Internal Revenue Service and be heard,

(E) the right to appeal a decision of the Internal Revenue Service in an independent forum,

(F) the right to finality,

(G) the right to privacy,

(H) the right to confidentiality,

(I) the right to retain representation, and

(J) the right to a fair and just tax system.

26 C.F.R. 1.83-3(g) provides:

Amount paid. For the purposes of section 83 and the regulations thereunder, the term "amount paid" refers to the value of any money or property paid for

the transfer of property to which § 83 applies.

26 C.F.R. 1.83-4(b)(2) provides:

If property to which 1.83-1 applies is transferred at an arm's length, the basis of the property in the hands of the transferee shall be determined under section 1012 and the regulations thereunder.

26 C.F.R. 1.1012-1(a) provides:

... The cost is the amount paid for such property in cash or other property.

26 C.F.R. 1.1011-1 provides:

Adjusted basis.- The adjusted basis ... is the cost or other basis prescribed in section 1012[.]

26 C.F.R. 1.1001-1 provides:

Computation of gain or loss.

(a) *General rule.* Except as otherwise provided in subtitle A of the Code, the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent, is treated as income or as loss sustained. The amount realized from a sale or other disposition of property is the sum of any money received plus the fair market value of any property (other than money) received. The fair market value of property is a question of fact, but only in rare and extraordinary cases will property be considered to have no fair market value. The general method of computing such gain or loss is prescribed

by section 1001(a) through (d) which contemplates that from the amount realized upon the sale or exchange there shall be withdrawn a sum sufficient to restore the adjusted basis prescribed by section 1011 and the regulations thereunder (i.e., the cost or other basis adjusted for receipts, expenditures, losses, allowances, and other items chargeable against and applicable to such cost or other basis). The amount which remains after the adjusted basis has been restored to the taxpayer constitutes the realized gain.