

U. S. TAX COURT  
FILED AT  
**TAMPA**  
DEC 7 2009

UNITED STATES TAX COURT

[REDACTED],  
) )  
) )  
Petitioner, ) )  
) )  
v. ) )  
) )  
COMMISSIONER OF INTERNAL REVENUE, ) )  
) )  
Respondent. ) )

Docket No. [REDACTED]-08

**RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

PURSUANT TO this Court's order dated [REDACTED], 2009, respondent responds to petitioner's Motion for Summary Judgment ("Petitioner's Motion") as follows:

**Facts**

1. Petitioner failed to file Form 1040 individual income tax returns for tax years 2000, 2001 and 2002. Although not directly at issue, petitioner has also failed to file Forms 1040 for tax years 2004, 2005, 2006 and 2007.

2. On [REDACTED], 2003, respondent issued a statutory notice of deficiency to petitioner for his 2000 tax year. Attached hereto as Exhibit 1 is a copy of this notice of deficiency. Petitioner filed a petition with the United States Tax Court in dispute of this notice of deficiency. This petition was assigned docket number [REDACTED]-03. This case was tried, an opinion was issued and a decision was entered under T.C. Rule 155. See [REDACTED] v. Commissioner, T.C. Memo. [REDACTED]. Petitioner appealed this decision to the United States Court of

Appeals for the 11<sup>th</sup> Circuit. The Court of Appeals dismissed petitioner's appeal.

3. Attached hereto as Exhibit 2 is a copy of the Declaration of Settlement Officer J█████, including attached Exhibits A through Q. The attached exhibits will be referred to in this motion as "Declaration Exhibit \_\_\_."

\* 4. Respondent's records indicate that substitutes for return were prepared for petitioner's 2001 and 2002 tax years. However, respondent's records do not indicate that statutory \*  
notices of deficiency were issued with regard to tax years 2001  
and 2002. \* A review of petitioner's tax modules reveals that \*  
assessments were made for petitioner's 2001 and 2002 tax years on ██████, 2006. (Declaration Exhibit K)

5. On ██████, 2008 a Final Notice of Intent to Levy was mailed to petitioner regarding his 2000, 2001 and 2002 tax years. (Declaration Exhibit B) On ██████, 2008 a Notice of Federal Tax Lien and Your Right to a Hearing under IRC 6330 was mailed to petitioner. (Declaration Exhibit C)

6. On ██████, 2008, respondent received a Form 12153 Request for a Collection Due Process Hearing from petitioner. (Declaration Exhibit D) Petitioner indicated that he was requesting the hearing in regards to both the lien and the levy action (collectively the "collection actions"). In an

attachment to the Form 12153 petitioner indicated that he requested a face-to-face CDP hearing and his intention to audio record this hearing. Petitioner also indicated that he wished to address the following issues:

- (a) There seems to be a conflict in the date the Tax Lien was filed. The Notice of Federal Tax Lien shows a filing date of ██████, 2008. Form 668(Y)(C) claim it was filed on ██████ 2008. As a result of the IRS not following proper procedure, I am requesting that you remove this tax lien by issuing a Release of Lien as soon as possible. I was under the impression that the IRS is required to notify me within five (5) days of the date the Lien was filed. In this case I was notified 11 days after the Lien was filed.
- (b) Verify whether or not the IRS followed all proper procedure as required by law.
- (c) I don't believe I am liable for the assessed tax seeing that I NEVER had a chance to challenge it before.
- (d) If this liability is indeed a proper assessment and can be proven that it is authentic and owed, I would like to discuss what collection alternatives are available to me, to include, but not limited to: Offer in Compromise, Installment Agreements, and any other payment arrangements that may be available to me.

7. Petitioner also indicated that he wished for both the levy notice and lien notice to be combined into one CDP hearing and that it was not his intent to discuss any frivolous issues.

8. Petitioner's request for a CDP hearing was assigned to Settlement Officer ██████ (the "settlement officer"). The settlement officer reviewed petitioner's request for CDP hearing and other available information related to petitioner's 2000, 2001 and 2002 tax years.

9. On ██████, 2008, the settlement officer mailed petitioner a letter, hereinafter the "██████ Letter." (Declaration Exhibit J) This letter responded to the issues raised by petitioner in the attachment to his Form 12153. The settlement officer also indicated in this letter, that petitioner did not raise any "specific viable issue" in his request for CDP hearing.

10. In the ██████<sup>st</sup> letter, the settlement officer indicated that if petitioner wished to participate in a face-to-face hearing, he "must be prepared to discuss issues relevant to filing correct U.S. Individual Income Tax Returns for the subject tax periods and offering a viable collection alternative." The settlement officer requested that if petitioner wished to have a face-to-face conference that petitioner write the settlement officer by September 9, 2008 describing the relevant issues petitioner wished to discuss at the conference. (Declaration Exhibit J)

11. In the ██████<sup>st</sup> letter, the settlement officer

indicated that if petitioner wished to address the liability issue, he should submit correct, original signed tax returns for 2000, 2001 and 2002. The settlement officer indicated that if petitioner wished to address collection alternatives, that petitioner should provide his outstanding 2004, 2005, 2006 and 2007 Forms 1040 and a completed Form 433-A financial statement by ██████, 2008. (Declaration Exhibit J)

12. With the ██████<sup>st</sup> letter, the settlement officer provided petitioner with copies of plain language transcripts of petitioner's 2000, 2001 and 2002 tax modules, the Internal Revenue Service publication, "The Truth About Frivolous Tax Arguments," Publication 3598 (What You Should Know About the Audit Reconsideration Process), Form 433-A Collection Information Statement for Wage Earners and Self-Employed Individuals, a Collection Information Statement Checklist and a document entitled, "Orientation to the Appeals Process." (Declaration Exhibit J)

13. In the ██████ letter, the settlement officer indicated that if petitioner did not provide the requested information, the hearing will consist of the Collection administrative file and whatever information you have already submitted. (Declaration Exhibit J)

14. On ██████, 2008 petitioner responded to

respondent's [REDACTED] letter (the "[REDACTED] letter"). (Declaration Exhibit I) In this letter, petitioner disputed what he perceived to be "discrepancies" in the [REDACTED] letter and further disputed that he had not previously raised any "viable issues." Petitioner did not provide any of the information requested by the settlement officer in the August 21<sup>st</sup> letter.

15. Petitioner did state the following in the [REDACTED] [REDACTED], "[n]ow my question o you is if I never received any notice informing me of this deficiency for the tax years 2001 and 2002, how was it possible for me to have had a prior opportunity to dispute the liability?" Petitioner does admit in the [REDACTED] Letter that he petitioned the Tax Court from the 2000 notice of deficiency, and that the Tax Court ruled against him. (Declaration Exhibit I)

16. After review of the [REDACTED]<sup>th</sup> Letter, the settlement officer conducted petitioner's CDP hearing through correspondence. On [REDACTED] 2008, a Notice of Determination was issued upholding the collection actions at issue. (Declaration Exhibit A).

17. In the Notice of Determination, the settlement officer indicated that he considered the issue of petitioner's tax liability open for hearing. In the Notice of Determination, the

settlement officer stated that the 2000 tax liability remained open because the settlement officer "could not determine" if petitioner had a chance to appeal the current assessment.<sup>1</sup> In the Notice of Determination, the settlement officer stated that the 2001 and 2002 tax liabilities remained open because the settlement officer "could not determine" if petitioner received Notices of Deficiency prior to the current assessments.

18. In the Notice of Determination the settlement officer stated that petitioner did not qualify for a face-to-face CDP hearing because petitioner was not current with his filing obligations and that petitioner only raised "vague issues without detail" in his hearing request.

19. On ████████, 2009, petitioner's motion for summary judgment was filed by the Court. Petitioner raised two issues in his motion for summary judgment. The first issue was that petitioner was not granted a face-to-face collection due process hearing. The second issue was that respondent cannot provide proof that respondent properly created any notices of deficiency for tax years 2001 and 2002 to petitioner as required by I.R.C. § 6212(a). These issues will be addressed separately

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<sup>1</sup> Petitioner does not dispute that he had a prior opportunity to dispute this assessment. In fact, in the ████████ letter, petitioner indicated that he received the statutory notice of deficiency for 2000 and petitioned the Tax Court.

below.

Petitioner was not Entitled to a Face-to-Face Collection Due Process Hearing

20. Petitioner alleges that respondent did not allow petitioner to "raise relevant issues at the hearing." A review of the record indicates that this allegation is incorrect. Petitioner was given an opportunity to inform the settlement officer of legitimate issues in advance of the scheduled CDP hearing. (Declaration Exhibit J) Should petitioner have availed himself of this opportunity, petitioner would have been entitled to a face-to-face hearing. In his ██████<sup>th</sup> letter petitioner did not address any specific relevant issues he was disputing nor did he provide the documentation requested by the settlement officer in his ██████<sup>th</sup> letter.

21. Respondent does not dispute that petitioner did not receive a face-to-face collection due process hearing. However, based on the paucity of detail in petitioner's request for a CDP hearing, the settlement officer requested that petitioner state with specificity the relevant issues that he wished to discuss at the CDP hearing. Petitioner did not avail himself of this opportunity.

22. Petitioner contends that respondent erred in refusing to grant him a "face-to-face" CDP hearing. However, under



Treas. Reg. § 301.6330-1(d)(2), A-D6, CDP hearings are "informal in nature and do not require the Appeals officer or employee and the taxpayer, or the taxpayer's representative, to hold a face-to-face meeting. A CDP hearing may, but is not required to, consist of a face-to-face meeting." See Granger v. Commissioner, T.C. Memo. 2009-258.

23. Furthermore, Treas. Reg. § 301.6330-1(d)(2), A-D8, "states that a face-to-face CDP conference concerning a collection alternative... will not be granted unless other taxpayers would be eligible for the alternative in similar circumstances. For example, because the IRS does not consider offers to compromise from taxpayers who have not filed required returns... no face-to-face conference will be granted to a taxpayer who wishes to make an offer to compromise but has not fulfilled [this obligation]. Granger v. Commissioner, T.C. Memo. 2009-258.

24. Instantly, petitioner was offered the opportunity to raise legitimate issues to discuss at the collection due process hearing and to file income tax returns to come into compliance with his filing obligation. Petitioner chose not to do so. Accordingly, respondent did not err in conducting petitioner's CDP hearing through correspondence.

Notices of Deficiency for 2001 and 2002

25. In petitioner's motion for summary judgment, petitioner asserts that respondent cannot prove that respondent created notices of deficiency with respect to petitioner's 2001 and 2002 tax years.

\* 26. Respondent is conceding this issue. \*

\* 27. As respondent is conceding that he did not properly issue notices of deficiency for tax years 2001 and 2002, the assessments at issue are invalid. Accordingly, respondent will abate the assessments made on █████, 2006 for petitioner's 2001 and 2002 tax years. \*

28. After abatement, this issue will be moot.

Conclusion

29. Although petitioner was not entitled to a face-to-face CDP hearing, due to the invalidity of the assessments for tax years 2001 and 2002, respondent concedes that the determinations set forth in the Notice of Determination Concerning Collection Action under Section 6320 and/or 6330 issued to petitioner on █████, 2008, as related to petitioner's income tax liability for taxable years 2001 and 2002, are not sustained.

30. Further respondent concedes that respondent will abate the balance of petitioner's outstanding income tax liabilities for taxable years 2001 and 2002 on the basis that a statutory

notice of deficiency was not sent to petitioner's last know address and that petitioner did not receive an opportunity to file a Tax Court petition. Petitioner's 2001 and 2002 income tax assessments will be abated without prejudice to respondent's right to reassess the tax liabilities for 2001 and 2002 pursuant to the deficiency procedures prescribed in the Internal Revenue Code, to the extent permitted by law.

WHEREFORE, aside from the above issues conceded by respondent, and based on the reasons stated herein, the relief sought by petitioner in his motion for summary judgment should be denied.

~~WILLIAM S. WILKINS~~  
Chief Counsel  
Internal Revenue Service

Date: [REDACTED] 4/09

By: [REDACTED]  
~~[REDACTED]~~  
Senior Attorney  
(Small Business/Self-Employed)  
Tax Court Bar No. ~~[REDACTED]~~  
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