

## UNITED STATES TAX COURT

WASHINGTON, DC 20217

STEVEN T. WALTNER & SARAH V. )  
 WALTNER, )  
 )  
 Petitioners )  
 v. )  
 )  
 COMMISSIONER OF INTERNAL REVENUE, )  
 )  
 Respondent )  
 )

Docket No. 8726-11L.

**ORDER**

The Court filed respondent's Motion for Summary Judgment, and Petitioners' Motion for Protective Order, on September 27, 2012 and October 4, 2012, respectively. On October 16, 2012, the Court filed Petitioners' Motion for Summary Judgment and Supplement to Petitioners' Motion for Summary Judgment. On October 31, 2012, the Court filed Petitioners' Response in Opposition to Respondent's Motion for Summary Judgment. On the same date, the Court granted Petitioners' Motion for Protective Order and ordered respondent to file a redacted Motion for Summary Judgment. The Court filed respondent's redacted Motion for Summary Judgment on November 21, 2012, and, on November 19, 2013, ordered respondent to file a supplement to his redacted Motion for Summary Judgment. On December 19, 2013, the Court filed respondent's Supplement to Redacted Motion for Summary Judgment. The Court, on December 26, 2013, filed Petitioners' Response to Respondent's Supplement to Redacted Motion for Summary Judgment. Unless otherwise indicated, all section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Petitioners filed Forms 1040, U.S. Individual Income Tax Return, relating to 2003, 2004, 2005, 2006, and 2007 (years in issue). In addition, petitioner Sarah V. Waltner (Ms. Waltner) filed a Form 1041, U.S. Income Tax Return for Estates and Trusts, on behalf of the Sarah V. Waltner Trust (Trust), relating to 2006. Petitioners reported taxable income and tax liabilities on their 2003, 2004, 2005,

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and 2006 Forms 1040. Petitioners failed to pay their tax liability relating to 2006. On their 2007 Form 1040, petitioners reported zero taxable income and zero tax liability. The Trust, on its 2006 Form 1041, reported zero taxable income and zero tax liability.

Between January and February 2008, petitioners sent respondent two Forms 1040X, Amended U.S. Individual Income Tax Return, relating to 2006, and four additional Forms 1040X, one relating to each of 2003, 2004, 2005, and 2007. Each Form 1040X stated that petitioners had zero tax liability and zero adjusted income relating to the relevant year. Between April 2008 and August 2009, petitioners sent respondent four additional Forms 1040X relating to 2007. Each additional 2007 Form 1040X stated that petitioners had zero income tax liability. Petitioners' 2007 Form 1040, and Forms 1040X relating to the years in issue, included Forms 4852, Substitute for Form W-2, stating that petitioner Steven T. Waltner's (Mr. Waltner) wages were zero and that Forms W-2 prepared by New Century Mortgage Corp., "erroneously alleged payments of IRC Section 3401(a) and 3121(a) 'wages'". Petitioners stated, on the Forms 4852, that Mr. Waltner "received no such 'wages'". In addition, petitioners attached to their Forms 1040X "correcting" Forms 1099. On these forms, petitioners purported to correct Forms 1099 submitted by third parties reporting interest income, dividends, and non-employee compensation received by petitioners. Petitioners reported zero income on each "correcting" Form 1099 and stated that the original Forms 1099 "erroneously alleged" payments to petitioners that they did not receive, or that were not "gains, profit or income".

Respondent did not process any of petitioners' Forms 1040X and assessed each petitioner (i.e., Ms. Waltner and Mr. Waltner) separate section 6702 frivolous return penalties, of \$5,000 each, relating to each Form 1040X. In sum, respondent assessed petitioners \$5,000 each, relating to their 2003 Form 1040X; \$5,000 each, relating to their 2004 Form 1040X; \$5,000 each, relating to their 2005 Form 1040X; \$10,000 each, relating to their two 2006 Forms 1040X; and \$25,000 each, relating to their five 2007 Forms 1040X. Respondent also assessed each petitioner a \$5,000 section 6702 penalty relating to petitioners' 2007 Form 1040. In addition, respondent assessed Ms. Waltner a section 6702 penalty, of \$5,000, relating to the Trust's 2006 Form 1041. Petitioners did not pay any of the section 6702 penalties and respondent sent petitioners:

- A December 29, 2009, Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing, relating to the section 6702 penalties assessed against Ms. Waltner, relating to the years in issue (P-W NFTL).
- An April 12, 2010, Letter 1058, Notice of Intent to Levy and Notice of Your Right to a Hearing, relating to Mr. Waltner's 2006 Federal income tax liability and the section 6702 penalties assessed against him, relating to 2003, 2005, 2006, and 2007 (P-H Levy Notice).
- An April 12, 2010, Letter 1058, Notice of Intent to Levy and Notice of Your Right to a Hearing, relating to Ms. Waltner's 2006 Federal income tax liability (P-W Levy Notice).
- A May 6, 2010, Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing, relating to the section 6702 penalties assessed against Mr. Waltner, relating to the years in issue (P-H NFTL).
- A May 6, 2010, Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing, relating to petitioners' 2006 Federal income tax liability (2006 NFTL).

On December 8, 2010, the Appeals officer sent petitioners a letter scheduling, for January 24, 2011, five consecutive collection due process (CDP) hearings (i.e., one CDP hearing relating to each NFTL and levy notice). In the letter, the Appeals officer requested that petitioners furnish a completed Form 433-A, Collection Information Statement, along with documentation substantiating petitioners' finances. On January 24, 2011, prior to the commencement of the CDP hearings, petitioners faxed the Appeals officer a letter in which petitioners stated that they declined to complete Form 433-A because "[a]s we are neither wage-earners nor self-employed, it would be inappropriate for us to use this form."

On January 24, 2011, the Appeals officer conducted five consecutive telephonic CDP hearings with petitioners, relating to the P-W Levy Notice (P-W Levy CDP hearing), P-W NFTL (P-W NFTL CDP hearing), P-H Levy Notice (P-H Levy CDP hearing), P-H NFTL (P-H NFTL CDP hearing), and 2006 NFTL (2006 NFTL CDP hearing). During the CDP hearings, petitioners disputed their section 6702 penalties relating to the years in issue. Petitioners contended that respondent failed to demonstrate that petitioners' 2007 Form 1040, and Forms 1040X relating to the years in issue, were frivolous. Petitioners further contended that they had

zero tax liability relating to 2006. In addition, petitioners contended that the Appeals officer failed to consider petitioners' financial condition and failed to verify that a manager approved respondent's assessment of all section 6702 penalties. In March 2011, respondent sent petitioners notices of determination sustaining the proposed lien relating to the P-W NFTL, the proposed levy action relating to the P-W Levy Notice, the proposed levy action relating to the P-H Levy Notice, the proposed lien relating to the P-H NFTL, and the proposed lien relating to the 2006 NFTL. All five of the notices determined that petitioners' assertions were frivolous.

On April 12, 2011, petitioners, while residing in Arizona, filed a petition with the Court relating to the notices of determination. On October 24, 2012, the Court filed petitioners' Amendment to Petition.

Pursuant to Rule 121, summary judgment is appropriate if there is no genuine dispute of material fact. The moving party bears the burden of establishing that no genuine dispute of material fact exists and that he is entitled to judgment as a matter of law. See Sundstrand v. Commissioner, 98 T.C. 518, 519 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). Respondent was unable to locate, and failed to submit to the Court, original documents from the administrative file relating to the P-H Levy CDP hearing. Mr. Waltner contends that documentation submitted by respondent to the Court as a "reconstructed administrative file" relating to that CDP hearing was falsified. Making all factual inferences in the manner most favorable to petitioners, we find that there is a genuine issue of material fact with respect to the administrative record relating to the P-H Levy CDP hearing. See id. Accordingly, it is not appropriate to grant respondent's redacted Motion for Summary Judgment, as supplemented, insofar as it relates to the P-H Levy CDP hearing and related notice of determination. We proceed by determining whether summary judgment in respondent's favor is appropriate insofar as respondent's motion relates to the P-W NFTL CDP hearing, P-W Levy CDP hearing, P-H NFTL CDP hearing, 2006 NFTL CDP hearing (remaining CDP hearings at issue), and the related notices of determination. Respondent submitted original administrative files relating to the remaining CDP hearings at issue.

Section 6330 provides that during a collection hearing a taxpayer may raise relevant issues such as spousal defenses, the appropriateness of the proposed collection action, and possible collection alternatives. A taxpayer may challenge his underlying tax liability if he did not receive a notice of deficiency or did not otherwise have an opportunity to dispute such liability. See sec. 6330(c)(2)(B).

We have jurisdiction to review a notice of determination issued pursuant to section 6330 where the underlying tax liability consists of frivolous return penalties. See Callahan v. Commissioner, 130 T.C. 44, 47-49 (2008). Petitioners contend that they are not liable for section 6702 penalties relating to their 2007 Form 1040 and their Forms 1040X relating to the years in issue. In addition, Ms. Waltner contends that she is not liable for the section 6702 penalty relating to the Trust's 2006 Form 1041. Petitioners did not receive notices of deficiency relating to such section 6702 penalties and did not otherwise have an opportunity to dispute such penalties. See id. Accordingly, we review petitioners' section 6702 penalties de novo. See id. at 50.

A penalty for filing frivolous returns may be assessed against a taxpayer if (1) the taxpayer files a document purporting to be an income tax return, (2) the purported tax return lacks the information necessary to gauge the substantial correctness of the self-assessment or lacks information indicating the self-assessment is substantially correct, and (3) the taxpayer's position is based on a position which the Commissioner has identified as frivolous, or demonstrates a desire to delay or impede the administration of Federal income tax laws. See sec. 6702(a); Grunsted v. Commissioner, 136 T.C. 455, 459-460 (2011). Multiple section 6702 penalties relating to the same tax year may be assessed if a taxpayer submits multiple frivolous returns relating to such year. See Grunsted v. Commissioner, 136 T.C. at 459. We generally look to the face of the documents to determine whether a taxpayer is liable, as a matter of law, for a frivolous return penalty. See id.

Petitioners' 2007 Form 1040, and Forms 1040X relating to the years in issue, were filed to obtain refunds and, accordingly, purported to be income tax returns. See Callahan v. Commissioner, 130 T.C. at 53. The Trust's Form 1041 relating to 2006 was filed for the same purpose and thus also purported to be a return. See id. The Forms 1040, 1040X and 1041 contained substantially incorrect information. See Grunsted v. Commissioner, 136 T.C. at 460 (holding that a purported return that reports zero wages, despite indicating that wages have been withheld for taxes, is substantially incorrect). The Commissioner identified the submission of such "zero returns" as frivolous prior to the dates on which petitioners submitted the Forms 1040, 1040X, and 1041. See section 6702(a)(2)(A); Notice 2007-30, 2007-14 I.R.B. 883. Petitioners had taxable income relating to each relevant tax year, and their 2007 Form 1040, and Forms 1040X relating to the years in issue, were frivolous returns. The Trust had taxable income relating to 2006 and its Form 1041 relating to such year was likewise a

frivolous return. Accordingly, petitioners are liable for the section 6702 frivolous return penalties. Mr. Waltner is liable for these penalties, notwithstanding our determination that summary judgment in respondent's favor is inappropriate as it relates to the P-H Levy CDP hearing and notice of determination.

During the CDP hearings relating to the P-W Levy Notice and 2006 NFTL, petitioners attempted to dispute their underlying tax liability relating to 2006 (i.e., the tax liability they self reported on their 2006 Form 1040). Petitioners contended that their 2006 tax liability is zero, as stated on their Forms 1040X relating to that year. Petitioners failed to properly raise their 2006 underlying tax liability because they did not furnish the Appeals officer with any evidence supporting their contention or explaining the discrepancy between the position they adopted on their 2006 Form 1040 and the position they subsequently adopted on their 2006 Forms 1040X. See sec. 301.6320-1(f)(2), Q&A-F3, Proced. & Admin. Regs. ("An issue is not properly raised if \* \* \* consideration is requested but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence."). We may only consider issues properly raised during a CDP hearing. See Giamelli v. Commissioner, 129 T.C. 107, 114 (2007). Accordingly, this issue is not properly before the Court and we review respondent's administrative determinations, relating to the remaining CDP hearings at issue, for abuse of discretion. See Thompson v. Commissioner, 140 T.C. 173, 178 (2013); Giamelli v. Commissioner, 129 T.C. at 115-116; Craig v. Commissioner, 119 T.C. 252, 260 (2002). To establish that the Commissioner abused his discretion, a taxpayer must demonstrate that the Commissioner's actions were arbitrary, capricious, or without sound basis in law or fact. See Giamelli v. Commissioner, 129 T.C. at 111.

Pursuant to section 6330(c)(1), the Appeals officer must verify that the requirements of all applicable laws and administrative procedures were met. Petitioners contend that respondent failed to comply with section 6330(c)(1) because respondent did not demonstrate managerial approval of the assessments of the section 6702 frivolous return penalties in accordance with 6751(b). We reject petitioners' contention as it relates to the remaining CDP hearings at issue. With respect to such CDP hearings, the Appeals officer reviewed Forms 4340 relating to each relevant tax year and verified that all applicable laws and administrative procedures were met. See McLaine v. Commissioner, 138 T.C. 228, 241-242 (2012); Craig v. Commissioner, 119 T.C. at 262. Petitioners failed to demonstrate

any irregularity in the assessment procedure that would raise a question about the validity of the assessments or the information contained in the Forms 4340.

Petitioners further contend that, by failing to consider petitioners' financial condition, the Appeals officer abused her discretion relating to the remaining CDP hearings at issue. Petitioners did not request a collection alternative relating to the P-W NFTL, P-W Levy Notice, P-H NFTL, and 2006 NFTL, and failed to submit a Form 433-A with supporting financial information, as requested by the Appeals officer. Rather, petitioners submitted self-prepared financial documents that were not credible. The Appeals officer did not abuse her discretion by determining that petitioners were not eligible for a collection alternative. See McLaine v. Commissioner, 138 T.C. at 243 (holding that it is not an abuse of discretion for the Commissioner to reject a collection alternative because of a taxpayer's failure to provide requested documentation).

Petitioners further contend that the Appeals officer abused her discretion, relating to the P-W NFTL and P-H NFTL, by failing to verify that the IRS assessed 2003 and 2004 section 6702 penalties within the statutory limitations period. The statute of limitations relating to assessments of tax generally expires three years after the date on which a tax return is filed. See sec. 6501(a). Petitioners filed their Forms 1040X, relating to 2003 and 2004, on February 4, 2008, and February 17, 2008, respectively. Respondent assessed section 6702 penalties, relating to the 2003 and 2004 Forms 1040X, in April 2009 and September 2008, respectively. Such assessments were made within the requisite period. Accordingly, the Appeals officer did not abuse her discretion by concluding that respondent timely assessed the relevant penalties. See secs. 6330(c)(1), 6501(a).

Petitioners attempted to raise additional issues during the remaining CDP hearings at issue, however, their contentions relating to these issues were frivolous and petitioners were accordingly precluded from raising them. See sec. 6330(c)(4)(B); Thornberry v. Commissioner, 136 T.C. 356, 362 (2011). In addition, petitioners failed to establish grounds for withdrawal of the P-W NFTL, P-W Levy Notice, P-H NFTL, and 2006 NFTL. The Appeals officer reviewed the information petitioners submitted, evaluated their contentions, and verified that the requirements of applicable law and administrative procedure had been met. See sec. 6330(c); Nestor v. Commissioner, 118 T.C. 162, 166-167 (2002); Lunford v. Commissioner, 117 T.C. 183 (2001). Furthermore, the Appeals officer balanced the need for the efficient collection of taxes with petitioners'

concerns that the proposed collection actions relating to the remaining CDP hearings at issue be no more intrusive than necessary. See sec. 6330(c)(3)(C). There was a sound basis for each of respondent's determinations and such determinations were not arbitrary or capricious. See Murphy v. Commissioner, 125 T.C. 301, 320 (2005); Woodral v. Commissioner, 112 T.C. 19, 23 (1999). Accordingly, respondent did not abuse his discretion relating to the remaining CDP hearings at issue and the related notices of determination. See Pough v. Commissioner, 135 T.C. 344, 351 (2010); Murphy v. Commissioner, 125 T.C. at 320-321. Because there are no genuine issues of material fact, respondent, pursuant to Rule 121, is entitled to judgment as a matter of law relating to the P-W NFTL CDP hearing, P-W Levy CDP hearing, P-H NFTL CDP hearing, 2006 NFTL hearing, and related notices of determination. See Sundstrand Corp. v. Commissioner, 98 T.C. at 520. Upon due consideration of the foregoing, it is

ORDERED that so much of respondent's Redacted Motion for Summary Judgment, filed on November 21, 2012, as supplemented December 9, 2013, as moves for summary judgment relating to the P-W NFTL CDP hearing, P-W Levy CDP hearing, P-H NFTL CDP hearing, 2006 NFTL hearing, and related notices of determination, is granted. Appropriate decisions will be entered in due course. It is further

ORDERED that so much of respondent's Redacted Motion for Summary Judgment, filed on November 21, 2012, as supplemented December 9, 2013, as moves for summary judgment relating to the P-H Levy CDP hearing and related notice of determination, is denied. It is further

ORDERED that Petitioners' Motion for Summary Judgment, filed on October 16, 2012, as supplemented on that same date, is denied. It is further

ORDERED that respondent may proceed with the collection actions, as determined in the notices of determination relating to the P-W NFTL CDP hearing, P-W Levy CDP hearing, P-H NFTL CDP hearing, and 2006 NFTL CDP hearing.

**(Signed) Maurice B. Foley**  
**Judge**

Dated: Washington, D.C.  
April 21, 2015