



United States Tax Court

Washington, DC 20217

ALL IS WELL
HOMECARE SERVICES, LLC,

Petitioner

v.

COMMISSIONER OF
INTERNAL REVENUE,

Respondent

Docket No. 21210-19L.

ORDER

This is a “collection due process” case brought under I.R.C. section 6330(d),¹ in which petitioner challenges a notice of proposed levy² and a lien notice issued by the IRS. In the briefing of the Commissioner’s motion for summary judgment, a jurisdictional question has arisen as to the proceedings on the lien notice, and we will order more filings from the parties.

Background

The lien notice and the NFTL

As of February 2019, petitioner had unpaid employment tax liabilities for several periods totaling \$131,669. A Revenue Officer prepared a “Notice of Federal Tax Lien” (“NFTL”; Doc. 11 at 30)³ to be filed with the Clerk of the Circuit Court in

¹ Unless otherwise indicated, statutory references are to the Internal Revenue Code (“the Code”, Title 26 of the United States Code) as in effect at the relevant times; and Rule references are to the Tax Court Rules of Practice and Procedure.

² The IRS issued petitioner a “Final Notice of Intent to Levy and Notice of Your Rights to a Hearing” (Doc. 11 at 31) on March 18, 2019, and there is no dispute between the parties that the CDP request mailed on April 17, 2019 (see Doc. 11 at 37) was timely as to the levy notice.

³ The titles of the relevant documents are unfortunately similar. The document that the IRS files in the courthouse is entitled “Notice of Federal Tax Lien”. By means of the NFTL filed in the courthouse, the IRS gives to the world notice of the tax lien that exists on the taxpayer’s property. The document issued to the taxpayer is entitled “Notice of Federal Tax Lien *Filing* and Your Right to a Hearing Under IRC 6320” (emphasis added), which has the distinctive word “Filing” in the title. We call this document “the CDP notice” for the NFTL. By means of this CDP notice, the IRS gives notice to the taxpayer that the IRS has filed the NFTL and that the taxpayer has the right to request a CDP hearing.

Served 12/15/22

Manassas, Virginia. The NFTL states that it was “prepared and signed at Baltimore, MD on this 26th day of February 2019.”

Accompanying the NFTL is a “Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320” (“CDP notice”; Doc. 11 at 29), which bears a date of “03/07/2019”⁴ and states that “[w]e filed a Notice of Federal Tax Lien on 03/07/2019”.

CDP request and hearing

On April 17, 2019 (see Doc. 11 at 37), petitioner submitted a Form 12153, “Request for a Collection Due Process or Equivalent Hearing” (Doc. 11 at 35), which requested a CDP hearing with respect to the NFTL (and with respect to the levy notice, which we do not address in this order). As to the NFTL, IRS Appeals determined that the CDP hearing request was untimely. When it concluded the CDP hearing, IRS Appeals therefore issued, as to the NFTL, a “Decision Letter on Equivalent Hearing” (Doc. 11 at 6) rather than a “Notice of Determination”. The decision letter, dated November 1, 2019, sustained the NFTL. (A “Notice of Determination” (Doc. 11 at 11) issued the same day similarly sustained the proposed levy.)

Tax Court proceedings

On Monday, December 2, 2019, petitioner timely filed its petition. It asked the Tax Court to review the decision letter sustaining the NFTL (and to review the notice of determination sustaining the proposed levy). The Commissioner’s answer (Doc. 5) did not state any jurisdictional issue as to the decision letter and the NFTL.

The Commissioner filed a motion for summary judgment (Doc. 10) asserting the merits of the decision letter (and of the notice of determination). The motion does not ask us to dismiss the petition insofar as it challenges the decision letter. The motion makes no mention of jurisdiction. The motion does assert that the CDP request was untimely as to the CDP notice for the NFTL. It states: “The Hearing Request was timely with respect to the Levy Notice, but untimely with respect to the NFTL, as it was submitted more than 31 days after [the CDP notice for] the NFTL was issued, accounting for weekends and holidays.” (Doc. 10 at 4.)

⁴ Various of the liabilities included in the March 2019 CDP notices had been the subject of previous NFTLs and CDP notices in November 2013, June 2014, October 2015, September 2016, and December 2017 (Doc. 11 at 134-145), but those are not at issue here.

Petitioner's memorandum in response to the motion for summary judgment includes the following as to the untimeliness of the CDP request as to the NFTL:

Respondent[']s Decision letter claims that the Petitioner had 30 days to request a hearing and preserve his rights to petition the tax court. The date [of the CDP request] used to determine timeliness was April 17, 2019. Respondent claims Petitioner's claims [i.e., CDP request] were not timely for the NFTL. It is noticeably clear that Petitioner submitted her OIC before the response date noted on [the CDP notice for] the NFTL,^[5] hence any collection action should be suspended and Petitioner's right to petition this Court preserved. IRC §6331(i)(4) and (5).^[6] Moreover, Petitioner petitioned this Court with respect to the same issues for the same tax periods in 2018, thereby enjoining the authority of the Respondent to issue its Final Notice of Intent to Levy and NFTL pursuant to IRC §6331(i)(4) and (5).^[7] [Doc. 19 at 18.]

The Commissioner's reply (Doc. 25) to that response does not address timeliness or jurisdiction.

⁵ We are unaware of any authority to support the proposition that the submission of an OIC would affect the due date of a CDP request, and we cannot think of any arguable reason that it would.

⁶ Section 6331(i) restricts collection activity in some circumstances as to "any unpaid divisible tax". This provision might apply in this case as to unpaid divisible tax (defined in sec. 6331(i)(2) as employment taxes or trust fund recovery penalty) if it could be shown that petitioner had brought any proceeding "for the recovery of any portion of such divisible tax which was paid by such person" (i.e., a refund suit) and had met the other requirements of section 6331(i). We are not aware of any such showing.

⁷ Petitioner may have intended to cite section 6330(e)(1), which provides circumstances in which a 'levy may be enjoined because of a CDP proceeding. However, the trigger for that provision is "if a hearing is requested under subsection (a)(3)(B)-i.e., a CDP hearing before IRS Appeals requested after the issuance of a notice of intent to levy (or a notice of federal tax lien filing). The previous instance in which "Petitioner petitioned this Court" was Docket No. 25756-18, in which the Commissioner filed a motion to dismiss because no notice of determination had been issued (see Doc. 9 in that case). Petitioner did not oppose. We dismissed Docket No. 25756-18 for lack of jurisdiction by an order of dismissal (Doc. 10) entered December 19, 2019. Letter 5197: a letter rejecting petitioner's offer-in compromise. The event that prompted the filing of the petitioned in that case was the issuance of a Letter 5197 rejecting petitioner's Offer in Compromise." There had been no CDP request in response to a collection notice.

Discussion

I. *Counting issues*

A. *Properly counting the days*

The Commissioner asserts that the CDP notice for the NFTL was “issued” on March 7, 2019, and therefore concludes that the CDP request mailed April 17, 2019, was “untimely with respect to the NFTL, as it was submitted more than 31 days after [the CDP notice for] the NFTL was issued” (Doc. 10 at 4); but we think this “31 days” description of the due date provision is incorrect. Under section 6320(a)(3)(B), the CDP request is due “during the 30-day period beginning on the day after the 5-day period described in paragraph (2)—i.e., “5 business days after the day of the filing of the notice of lien.” Sec. 6320(a)(2). The CDP notice for the NFTL states that “[w]e filed a Notice of Federal Tax Lien on 03/07/2019” (Doc. 11 at 29), which was a Thursday. The 5 business days after Thursday, March 7, 2019, were Friday, Monday, Tuesday, Wednesday, and Thursday, March 14. Day 1 of the “30-day period beginning on the day after the 5-day period” would have been Friday, March 15, and day 30 would have been Sunday, April 14, 2019, so that the last day for timely mailing a CDP request was Monday, April 15, 2019. Consistent with this count, the CDP notice for the NFTL states: “You must request your hearing by 04/15/2019.” By that reckoning, petitioner’s April 17 request was thus two days late.

Petitioner’s opposition states that “[t]his [April 15 deadline] did not consider the 3 business days by which the Lien Notice was received by the Recording Office to be indexed and the 5 business days plus 30 days required by §6320(a)(2)(C).” (Doc. 18, para. 6.) We do not know of any support for this “3 business days” addition to the deadline.

B. *Filing date of the NFTL*

The deadline calculation depends, of course, on whether the CDP notice for the NFTL was correct that the NFTL was filed “on 03/07/2019”. The NFTL (which was to be filed at a Manassas, Virginia, courthouse) must be prepared before it can be filed; and our impression of the IRS’s practice is that the NFTL and the CDP notice for the NFTL are prepared simultaneously well in advance of the courthouse filing. In this instance, the CDP notice for the NFTL says that the CDP notice was “prepared and signed at Baltimore, MD on this 26th day of February 2019.” If the NFTL was indeed prepared simultaneously with the CDP notice for the NFTL, and if they were prepared on February 26, 2019, then the “03/07/2019” filing date on the NFTL was a prediction, not a report of an accomplished fact, and we would not yet know when it was actually filed.

II. *Equitable tolling issues*

Unlike the 90-day deadline of section 6213(a) for filing a deficiency case, *see Hallmark Research Collective v. Commissioner*, 159 T.C. No. 6 (Nov. 29, 2022), the 30-day deadline of section 6330(d)(1) is a non-jurisdictional rule subject to equitable tolling, *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (2022). A remaining question is whether *Boechler* should affect the application of the rule of that one has the right to request a CDP hearing during the 30-day period of section 6320(a)(3)(B). That is, it could be argued that a taxpayer whose CDP hearing request for an NFTL is otherwise untimely might nonetheless be entitled to a CDP hearing if equitable considerations would result in the tolling of the deadline. If so, then standards or criteria should be stated by which IRS Appeals should make a decision about the appropriateness of such tolling in a given instance. There would then arise a question about the standard by which the Tax Court would review IRS Appeals' decision whether to apply equitable tolling.

The parties' filings have not addressed these questions. It is therefore

ORDERED that, no later than January 20, 2023, the Commissioner shall file a supplemental memorandum in support of his motion for summary judgment (and, if it would better reflect his position, a motion to dismiss) that shall discuss the matters raised in this order and shall confirm or correct the statements we have made here. In particular, that memorandum shall include a statement of the Commissioner's position as to (1) the proper means for calculating a deadline under section 6320(a)(3)(B), (2) the date on which the NFTL was actually filed as a matter of fact, and the information supporting that fact, (3) whether the deadline of section 6320(a)(3)(B) is subject to equitable tolling, and if so, (4) the standards IRS Appeals should use in determining whether tolling applies in a given case and the standard by which the Tax Court should review such a determination by IRS Appeals. It is further

ORDERED that, no later than February 17, 2023, petitioner shall file a supplemental memorandum in response to the Commissioner's motion for summary judgment, in which he shall respond to the Commissioner's supplemental memorandum and shall give his own statement as to the four issues stated in the preceding "Ordered" paragraph.

(Signed) David Gustafson
Judge