

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DRC

EBERTO CUE,)
)
Petitioner(s),)
)
v.) Docket No. 21404-18SL.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioner and to respondent a copy of the pages of the transcript of the trial in the above case before Judge Joseph Robert Goeke at Miami, Florida containing his oral findings of fact and opinion rendered at the trial session at which this case was heard.

In accordance with the oral findings of fact and opinion, a decision will be entered for petitioner.

(Signed) Joseph Robert Goeke
Judge

Dated: Washington, D.C.
December 2, 2019

SERVED Dec 03 2019

1 Bench Opinion by Judge Joseph Robert Goeke
2 November 15, 2019
3 Eberto Cue v. Commissioner
4 Docket No. 21404-18SL

5 THE COURT: The Court has decided to render oral
6 findings of fact and opinion in this case, and the
7 following represents the Court's oral findings of fact and
8 opinion. The oral findings of fact and opinion shall not
9 be relied upon as precedent in any other case.

10 This case was conducted under section 7463(a) of
11 the Internal Revenue Code, which the petitioner elected.
12 Pursuant to section 7463(b) ^{the} ~~that~~ decision we enter in this JRG
13 case shall not be reviewed in any other court. This
14 opinion is rendered pursuant to section 7459(b) and Rule
15 152 of the Tax Court Rules of Practice and procedure.
16 Hereinafter, references to sections are to the Internal
17 Revenue Code in affect for the years at issue in this
18 case.

19 In this case the petitioner challenges the
20 filing of a federal tax lien for the years 2013 and 2014,
21 income tax liabilities. The underlying liabilities,
22 penalties, and interest are not in dispute. This Court
23 has jurisdiction under section 6320(b)(4) and section
24 6330(d)(1). The petitioner filed forms 1040 for taxable
25 years 2013 and 2014, but the petitioner failed to fully



1 pay each respective liability for those years. Respondent
2 assessed the tax liabilities, penalties, and interest.
3 For two years before respondent filed the Notice of
4 Federal Tax Lien in this case, the petitioner's tax
5 liability was deemed uncollectable by respondent. The
6 letter 3172 Notice of Federal Tax Lien Filing and Your
7 Right to a Hearing Under IRC Section 6320 was issued by
8 the respondent on May 3, 2018. This notice advised the
9 petitioner that respondent had filed a federal tax lien
10 due to unpaid income taxes for the years 2013 and 2014.

11 During the period while petitioner's taxes were
12 deemed uncollectable, the petitioner did take steps to pay
13 an outstanding obligation to the authority that ran his
14 condo association, and sold a parking space for \$17,000.
15 This event and petitioner's employment, which was obtained
16 over this two-year period may have triggered respondent's
17 scrutiny of petitioner's situation two years after his tax
18 liability was deemed uncollectable, but in any event,
19 respondent determined to file a Notice of Federal Tax
20 Lien. After the filing of the Notice of Federal Tax Lien
21 on June 1, 2018, the petitioner mailed Form 12153, Request
22 for a Collection Due Process Hearing to the respondent.
23 Petitioner requested that the notice of Federal Tax Lien
24 be withdrawn, because of his currently non-collectable
25 status, but he did not contest the underlying tax



1 liabilities or propose collection alternatives.

2 Respondent acknowledged the receipt of the Form
3 12153, and advised the petitioner that he would have an
4 opportunity to discuss his disagreements relative to the
5 filing of the Notice of Federal Tax Lien, and seek
6 collection alternatives in a letter dated July 31, 2018.
7 On August 13, 2018 the settlement officer held a telephone
8 conference with the petitioner. The settlement officer
9 had prepared three options, which she proposed to the
10 petitioner during that conference. These options would
11 lead to the withdrawal of the Notice of Federal Tax Lien,
12 based upon the settlement officer's representations to the
13 petitioner on the telephone call. This is verified by the
14 settlement officer's notes. These three options were that
15 the petitioner enter into a direct debt installment
16 agreement for \$475 a month to pay off the account within
17 60 months; second, that the petitioner fully pay his tax
18 liabilities; and third, that the petitioner provide
19 documentation showing that he would lose his job if, in
20 fact, the Notice of Federal Tax Lien was not withdrawn.

21 Petitioner had made the representation that the
22 Notice of Federal Tax Lien would have major repercussions
23 on his employment with the bank, if in fact, it was not
24 withdrawn. Following the phone call, petitioner sent a
25 letter dated August 14, 2018 together with the



1 documentation in support of his position that the lien
2 would adversely affect his employment. He noted that he
3 was licensed in his position with the bank, and he sent
4 information which demonstrated that his license could be
5 in jeopardy if he had outstanding tax liens. Among the
6 documents the petitioner submitted was a document which
7 showed that he had to authorize the licensing officials to
8 do a credit check on him, and that if this credit check
9 demonstrated outstanding federal tax liens that would be
10 noted by the licensing officials adversely to his request
11 to renew his license, which he had to renew every year
12 based upon his position with the bank.

13 The settlement officer considered this
14 information, but made a determination that the petitioner
15 was already in breach of the licensing requirements, apart
16 from the Notice of Federal Tax Lien filing. The
17 settlement officer did not seriously consider petitioner's
18 documentation, which would demonstrate that he would lose
19 his job if, in fact, the Notice of Federal Tax Lien was
20 not withdrawn. The Notice of Determination subsequently
21 was issued based upon the settlement officer's
22 determination that the Notice of Federal Tax Lien should
23 not be withdrawn. On September 26, 2018, in that Notice
24 of Determination the settlement officer explained as
25 follows. "On August 27, 2018 the officer called you and



1 explained that the lien would not be withdrawn. The
2 officer explained in the documentation that you sent it
3 clearly stated that a person has shown that he is not
4 financially responsible when he has shown a disregard in
5 the management of his or her own financial condition. The
6 officer explained that you already met that criteria when
7 you owed the federal government, and when your home was
8 foreclosed. The officer advised that she will be
9 sustaining the lien, and the account will remain in
10 currently non-collectable status. You had no further
11 questions."

12 Subsequently, the petitioner filed a timely
13 petition in this Court to seek review of this
14 determination. The Notice of Determination also contains
15 the following information. "The filing of the federal tax
16 lien makes the IRS a secured creditor, which protects the
17 government in the event that you sell assets or file
18 bankruptcy. You failed to demonstrate that the Notice of
19 Federal Tax Lien was overly intrusive, or that better
20 alternatives are available, and it is my judgment that the
21 Notice of Federal Tax Lien balanced the efficient
22 collection of taxes with your legitimate concern that the
23 collection action be no more intrusive than necessary."

24 Following the Notice of Federal Tax Lien,
25 petitioner, based upon his responsibilities pursuant to

1 the license he had received, discussed his status with his
2 employer and his supervisor. After some discussion with
3 other authorities within the bank, the petitioner was
4 advised on August 19, 2018 as follows. "You are ineligible
5 to remain in your current position due to your outstanding
6 tax lien."

7 Subsequently, petitioner lost his position with
8 the bank, as he was not able to obtain a position in the
9 bank for which his license was not required. Petitioner
10 testified that he remains unemployed to this day and has
11 supported himself through unemployment benefits and the
12 assistance of his wife up to this point. It's noteworthy
13 that petitioner's loss of his position eliminates his
14 ability to make reasonable payments on his tax liability,
15 and that the conditions set by the settlement officer
16 included an amount which the petitioner could not possibly
17 pay given his financial status. It is noteworthy that
18 neither the petitioner nor the settlement officer proposed
19 a lesser amount of monthly payments as a way that the
20 petitioner could avoid a Notice of Federal Tax Lien
21 filing.

22 When the underlying tax liability is properly at
23 issue, the Court decides the issue of liability de novo,
24 Sego v. Commissioner, 114 T.C. 604, 610 (2000). Since the
25 underlying tax liability is not at issue in this case, the

1 Court will review the appeals officer's determination
2 based upon an abuse of discretion standard. Giamelli v.
3 Commissioner, 129 T.C. 107, 114 (2007). It is well
4 established that when considering the collection
5 alternative and balancing that alternative with the
6 intrusion on the taxpayer, the appeals office must
7 consider the relevant evidence that has been provided by
8 the taxpayer. Olsen v. United States, 414 F.3d 144 (1st
9 Circuit 2005). In applying the abuse of discretion standard
10 this Court must determine whether the appeals officer
11 exercised discretion in an arbitrary,^{or} capricious,^{was} or
12 without sound basis in law. ~~fashion~~, Battle v.
13 Commissioner, T.C. Memo 2009-171, and Woodral v.
14 Commissioner, 112 T.C. 19 (1999).

15 This case boils down to the conditions provided
16 by the settlement officer to the taxpayer and whether the
17 analysis made by the settlement officer of the condition
18 relative to the loss of employment was reasonable, or was
19 arbitrary. There's no dispute that the settlement officer
20 provided the three conditions I've outlined previously.
21 Her analysis that the petitioner was already exposed to
22 losing his license, because of his failure to pay the
23 taxes overlooked the fact that the petitioner had been
24 employed for some time, and was in a position to generate
25 income, which ultimately may have been used to pay the tax

1 liability.

2 The petitioner placed his tax obligations behind
3 debt associated with his residence, and he had a history
4 of not paying his tax liabilities after having experienced
5 financial setbacks in the end of the first decade of this
6 century. However, it was unreasonable for the settlement
7 officer to overlook the impact of the lien and its public
8 filing on the petitioner's employment. Her failure to
9 seriously consider the petitioner's assertions that he
10 would lose his position demonstrates that the settlement
11 officer did not seriously intend to act on the third
12 condition that she provided the petitioner in the
13 telephonic hearing. While we believe that petitioner
14 could have been more aggressive over the course of his
15 pending liability in trying to reach a payment agreement,
16 and we note that the petitioner failed to follow through
17 on two prior agreements, the fact that the settlement
18 officer did not seek a reasonable payment from the
19 petition demonstrates that the settlement officer was not
20 actually interested in generating collection from the
21 petitioner, but merely wished to sustain the Notice of
22 Federal Tax Lien.

23 Given these circumstances, we believe the
24 settlement officer's actions were arbitrary and
25 capricious, and we sustain the petitioner's argument that



1 the Notice of Federal Tax Lien should be withdrawn. We
 2 note that having lost his job the petitioner is ~~is~~ less
 3 likely ~~a position~~ to actually make payments on his federal
 4 tax liability, which is unfortunate. ~~And we~~ ^{we} do not look
 5 at his current situation and the government's need to
 6 maintain the ability to collect from the equity petitioner
 7 might have in his condo in analyzing this situation.
 8 Rather, we look at the actual analysis of the settlement
 9 officer, contemporaneous with the determination, which was
 10 made in this case, that analysis we find to be arbitrary
 11 and capricious.

12 Therefore, a decision will be entered for the
 13 petitioner.

14 This concludes the Court's oral findings of fact
 15 and opinion in this case.

16 (Whereupon, at 9:46 a.m., the above-entitled
 17 matter was concluded.)

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