[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 13, 2008
THOMAS K. KAHN
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No. 08-10136
Non-Argument Calendar

D.C. Docket No. 06-01566-CV-T-24-MAP

ROBERT E. MARSHALL,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(November 13, 2008)

Before DUBINA, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

Appellant Robert E. Marshall ("Marshall") appeals from the district court's order granting the United States' motion for summary judgment and upholding a notice of determination issued by the Internal Revenue Service ("IRS") Office of Appeals against taxpayer Marshall.

In 1999 and 2000, the IRS assessed trust fund recovery penalties against Marshall because his corporation failed to collect, account for, and pay certain employment taxes. In 2005, the IRS issued a Final Levy Notice against Marshall and scheduled a Collection Due Process ("CDP") hearing. Marshall then submitted an Offer in Compromise ("OIC") to the IRS, offering to pay $16,000 in full satisfaction of the trust fund recovery penalties, which totaled $852,115.43. Marshall also provided the IRS with his relevant financial information so that his OIC could be fully evaluated. Although Marshall later withdrew his request for a CDP hearing in January 2006, he continued to engage in discussions with IRS Appeals Officer Darryl Lee regarding a CDP hearing and the OIC. Based on the financial information available, Lee calculated Marshall's reasonable collection potential to be well above Marshall's OIC. Marshall objected to Lee's calculations. Lee agreed to give Marshall until August 3, 2006, to respond to Lee's reasonable collection potential calculations and to supplement the financial information already provided to Lee. However, on July 28, 2006, the IRS issued

Marshall a notice of determination informing him of its decision to sustain the proposed levy. Marshall filed a complaint in district court challenging the notice of determination. The United States filed a motion for summary judgment arguing that there were no genuine issues of material fact for trial as to whether the IRS Appeals Office correctly exercised its discretion in upholding the levy. The district court granted the United States' motion and consequently upheld the notice of determination. Marshall appeals.

We review a district court's order granting summary judgment de novo, reviewing the evidence in the light most favorable to the party opposing the motion. *See Patrick v. Floyd Med. Center*, 201 F.3d 1313, 1315 (11th Cir. 2000).

After reviewing the record and the parties' briefs, we conclude that the district court properly granted summary judgment to the United States. "In a CDP case in which, as here, the amount of the underlying tax liability is not at issue, the trial court and the court of appeals review the determination of the IRS appeals officer for abuse of discretion." *Olsen v. United States*, 414 F.3d 144, 150 (1st Cir. 2005) (citing *Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621, 624–625 (6th Cir. 2005)). The district court reviewing the determination of the IRS appeals officer generally conducts its review on the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct 1241, 1244

(1973). Treasury regulations require an IRS appeals officer to consider: (1) whether the IRS met the requirements of any applicable law or administrative procedure; (2) any issues appropriately raised by the taxpayer; (3) any appropriate spousal defenses raised by the taxpayers; (4) any challenges made by the taxpayer to the appropriateness of the proposed collection actions; (5) any offers by the taxpayer for collection alternatives; and (6) whether any proposed collection action balances the need for the efficient collection of taxes, with the legitimate concern of the person that any collection action be no more intrusive than necessary. Treas. Reg. § 301.6330-1(e)(3)A-E1 (2006).

Because the IRS failed to consider his response to IRS Appeals Officer Lee's reasonable collection potential calculations, Marshall argues that the IRS decided to sustain the Final Levy Notice based on an erroneous assessment of law and facts, and therefore, abused its discretion. The United States argues that there was no abuse of discretion on the part of the IRS. Because Lee fully complied with the requirements of the Internal Revenue Code, the Treasury Regulations, and the Internal Revenue Manual, we agree. Here, the record contains undisputed evidence that Lee considered all relevant financial records submitted by Marshall as well as the IRS's records of Marshall's account. Marshall concedes that while the United States had to consider Marshall's OIC, the United States had no obligation to negotiate the OIC with Marshall. Thus, we agree with the district court that there is no genuine issue of material fact as to whether the IRS abused its discretion to sustain the levy against Marshall.

Accordingly, we affirm the district court's order granting summary judgment in favor of the United States.

AFFIRMED.