

ACTION ON DECISION

Subject: Zapara v. Commissioner, 652 F.3d 1042 (9th Cir. 2011), No. 08-74173, aff'g 126 T.C. 215, denying reconsideration 124 T.C. 223 (2005), No. 9480-02.

Issue: Whether in a post-jeopardy levy Collection Due Process hearing, the Tax Court has the authority to order a credit to the taxpayer for the Service's failure to comply with I.R.C. § 6335(f).

Discussion: The Service served a jeopardy levy on the taxpayers' stock accounts and provided taxpayers with a post-levy CDP notice under section 6330(f). During the Appeals CDP hearing, taxpayers asked the Settlement Officer to sell the stock. The stock was not sold, and it declined in value.

The Tax Court held that the Service violated section 6335(f) when it failed to either sell the stock or make a determination that it was not in the best interests of the United States to sell the stock within 60 days of taxpayers' request to sell. To remedy this violation, the Tax Court remanded the case to Appeals for determination of the value of the stock as of the 60th day. 124 T.C. 223 (2005), reconsideration denied 126 T.C. 215 (2006). Based on Appeals' valuation, the Tax Court ordered the Service to credit the taxpayers \$47,501.06 against their tax liabilities.

On appeal, the Ninth Circuit rejected the Service's argument that the Tax Court lacked jurisdiction under section 6330 to address the disposition of levied property, and that section 7433 provides the exclusive means for seeking damages for a violation of section 6335(f). Specifically, the Ninth Circuit held that the Tax Court had jurisdiction to review the Service's failure to comply with section 6335(f) because section 6330(c)(2) permits taxpayers to raise "any relevant issue" relating to the unpaid tax or proposed levy in a CDP hearing. The Ninth Circuit also held that, when the Service did not comply with the statutory mandate in section 6335(f), the Service assumed the risk of depreciation and therefore became responsible for any decrease in the stock price. Finally, finding that the relief granted by the Tax Court was a specific remedy, which was to reduce the taxpayers' liability, the appellate court held that it was not an award of damages under section 7433.

Section 6330(a) provides the taxpayer notice and an opportunity for a CDP hearing before levy. During a CDP hearing, the taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy, including ... challenges to the appropriateness of collection actions." Section 6330(c)(2)(A)(ii). If collection of tax is in jeopardy, the taxpayer will be given a notice of the opportunity for a CDP hearing after the jeopardy levy. Section 6330(f). The Tax Court has jurisdiction under section 6330(d) to review a post-jeopardy levy CDP hearing. Dorn v. Commissioner, 119 T.C. 356 (2002). The owner of any property seized by levy may request that the Service sell such property within 60 days of the request. Section 6335(f). The Service must either sell the property or notify the owner of the property that compliance with the request to sell is not in the best interest of the United States. Id.

We agree with the Tax Court and the Ninth Circuit that the taxpayer can raise issues regarding the sale of the levied-upon property at the CDP hearing, since the request to sell seized property relates to the "unpaid tax" under section 6330(c)(2)(A).

The Service, however, disagrees that the Tax Court has authority to order a credit to the taxpayer for the Service's failure to comply with section 6335(f). Section 7433 is the exclusive remedy for recovering damages resulting from the reckless, intentional or negligent disregard of any provision or regulation in connection with the collection of tax, including any violation of section 6335(f). An action for damages under section 7433 must be brought in a district court. The relief ordered by the Tax Court was a substitute remedy to compensate the taxpayers for the monetary damages sustained as a result of the Service having failed to sell the stock or otherwise respond to their request to sell. Section 6335(f) only requires that the Service sell the property or provide notice to the taxpayer and does not provide for any entitlement to monetary relief.

We do not agree with and do not acquiesce in the decision of the Ninth Circuit affirming the Tax Court's authority to order a credit to the taxpayer. Although we disagree with the decision of the court, we recognize the precedential effect of the decision for cases appealable to the Ninth Circuit, and therefore will follow it with respect for cases within that circuit at the present time. We will, however, continue to litigate in all other circuits our position that section 7433 is the exclusive remedy for recovering damages resulting from the reckless, intentional or negligent disregard of any provision or regulation in connection with the collection of tax, including any violation of section 6335(f).

Recommendation: Nonacquiescence

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