

ACTION ON DECISION

SUBJECT: Moore v. Commissioner, T.C. Memo. 2006-171, T.C. Docket No. 11634-05L

Issue:

Whether prohibited ex parte communications during a collection due process hearing before the Office of Appeals may be remedied by sharing the content of the communications with the taxpayer and allowing the taxpayer an opportunity to respond.

Discussion:

The Service filed a Notice of Federal Tax Lien against the Taxpayer relating to assessed and unpaid taxes. The Taxpayer requested a CDP hearing pursuant to IRC §§ 6320 and 6330 and, during the CDP hearing, submitted an offer-in-compromise. During consideration of the OIC, several communications occurred among the Appeals Officer, an Offer Specialist assigned to review the OIC and two Revenue Officers who had previously been involved in the collection of the taxes at issue. These employees exchanged telephone calls and emails regarding the Revenue Officers' concerns that the Taxpayer may have transferred assets to a nominee and may have retained an interest in particular parcels of real property titled in third parties' names. Although the Taxpayer did not participate in these discussions, she was subsequently informed through her attorney of the content of the communications and was given an opportunity to explain the alleged asset transfers and the extent of her interest in the properties. The Appeals Office issued a Notice of Determination rejecting the OIC in part because of the Taxpayer's history of using nominee or alter ego entities to conceal assets. The Taxpayer filed a petition for review of the Notice of Determination. The Tax Court held that the discussions among the Service employees violated the prohibition of ex parte communications set forth in section 1001(a)(4) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 689 (1998), and implemented by Revenue Procedure 2000-43, 2000-2 C.B. 404. The court ordered the case to be remanded to the Appeals Office to identify and apply an appropriate administrative remedy to avoid prejudicing the Taxpayer as a result of the ex parte communications. The court further concluded that, if the appropriate remedy was a new CDP hearing before a new Appeals Officer, all references to the prohibited ex parte communications, including any copy of the opinion, should be deleted from the administrative file.

We agree that prohibited ex parte communications occurred because the Appeals Officer engaged in discussions with the Revenue Officers regarding substantive issues in the case without the participation of the Taxpayer or her representative. See Rev.

THIS DOCUMENT IS NOT TO BE RELIED UPON OR OTHERWISE CITED AS
PRECEDENT BY TAXPAYERS

Proc. 2000-43, Q & A-5, -6 and -21. We disagree that these violations warranted a remand of the case to the Office of Appeals and the deletion of all references to the prohibited ex parte communications, including any copy of the Tax Court's opinion, from the administrative file.

The court in this case should have invoked the harmless error rule and found that the Appeals Officer did not abuse her discretion. Courts have ruled that an abuse of discretion does not occur if the Service makes a mistake in a CDP hearing that ultimately causes no prejudice or does not affect the ultimate determination. See, for example, cases in which courts have held that the Service's refusal to honor a taxpayer's request for a recorded CDP hearing is harmless. Borchardt v. United States, 338 F. Supp. 2d 1040, 1045 (D. Minn. 2004); Boyd v. United States, 322 F. Supp. 2d 1229 (D.N.M. 2004), aff'd, 121 Fed. Appx. 348 (10th Cir. 2005); Meyer v. Commissioner, T.C. Memo. 2005-81. See generally Intercargo Ins. Co. v. United States, 83 F.3d 391, 394 (Fed. Cir. 1996); Air Canada v. Dept. of Transportation, 148 F.3d 1142, 1156-57 (D.C. Cir. 1998).

Even though the information was received through prohibited ex parte communications, the Appeals Officer cured the violations of the ex parte communications rules by disclosing the information to the Taxpayer and giving the Taxpayer adequate opportunity to respond. In this case, the violations of the ex parte communication rules constitute harmless error. A remand to the Office of Appeals was, therefore, unnecessary. Furthermore, striking any reference to the prohibited ex parte communications from the administrative record prevented the Appeals Officer from making an accurate determination based upon all relevant evidence.

Recommendation:

Nonacquiescence.

Reviewers:

Charles W. Gorham
Attorney, Branch 1
Collection, Bankruptcy & Summonses

Approved:

DEBORAH A. BUTLER

THIS DOCUMENT IS NOT TO BE RELIED UPON OR OTHERWISE CITED AS
PRECEDENT BY TAXPAYERS

Associate Chief Counsel
(Procedure and Administration)