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UNITED STATES TAX COURT

ALPHONSE MOURAD,)
)
 Petitioner,)
)
 v.) Docket No. 18038-05L
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent.)

OPENING BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

This is an appeal from a Notice of Determination Concerning Collection Action(s) Under Section 6230 and/or 6330 issued following a Collection Due Process [hereinafter "CDP"] Hearing.

The Honorable Joseph H. Gale heard this case on May 22, 2007, in Boston, Massachusetts. The evidence in this case consists of the pleadings; a Stipulation of Facts with Exhibits 1-J through 10-J; Exhibits 11-P through 16-P; and the testimony of Petitioner Alphonse Mourad.

The Court requested the parties file simultaneous briefs on or before August 6, 2007 and reply briefs on or before September 19, 2007.

QUESTIONS PRESENTED

1. Whether the petitioner's underlying tax liability for the tax year 1995 is correct.
2. Whether the petitioner's underlying tax liability for the tax year 1999 is correct.
3. Whether respondent's determination to proceed with the proposed levy action is proper.

RESPONDENT'S REQUEST FOR FINDINGS OF FACT

1. Petitioner resided in Massachusetts at the time the petition in this case was filed. (Stip., ¶ 1)
2. Petitioner filed his income tax return for the tax year 1995 reporting taxable interest in the amount of \$311,476.00, a Schedule E loss in the amount of \$256,136.00, a net operating loss in the amount of \$55,340.00, and a tax liability in the amount of \$5,613.00. (Stip., ¶ 2; Exhibit 1-J)
3. Respondent received petitioner's income tax return for the tax year 1995 on November 15, 1999. (Stip., ¶ 2; Exhibits 1-J and 3-J).
4. Petitioner made no payments with the 1995 income tax return or estimated payments prior to the filing the 1995 income tax return. (Exhibits 1-J and 3-J)
5. Respondent assessed a tax in the amount of \$5,613.00 for the tax year 1995 on March 20, 2000. (Exhibit 3-J)
6. Respondent assessed a late filing penalty, pursuant to I.R.C. § 6651(a)(1), in the amount of \$1,262.92 for the 1995 tax year on March 20, 2000. (Exhibit 3-J)
7. Respondent assessed a failure to pay penalty, pursuant to I.R.C. § 6651(a)(2), in the amount of \$1,234.86 for the tax year 1995 on March 20, 2000. (Exhibit 3-J)

8. Respondent assessed interest in the amount of \$2,607.89 for the tax year 1995 on March 20, 2000. (Exhibit 3-J)

9. Petitioner filed his income tax return for the tax year 1999 reporting income in the amount of \$310,692.00 and a tax liability in the amount of \$536,931.00. (Stip. ¶ 3; Exhibit 2-J)

10. Respondent received petitioner 1999 income tax return on December 14, 2004. (Stip. ¶ 3; Exhibits 2-J and 4-J)

11. Respondent assessed a tax in the amount of \$107,502.02 for the 1999 tax year on February 7, 2005. (Exhibit 4-J)

12. Petitioner made no payments with the 1995 income tax return or estimated payments prior to the filing the 1995 income tax return. (Exhibits 2-J and 4-J)

13. Respondent assessed a late filing penalty, pursuant to I.R.C. § 6651(a)(1), for the 1999 tax year in the amount of \$24,187.95 on February 7, 2005. (Exhibit 4-J)

14. Respondent assessed a failure to pay tax penalty, pursuant to I.R.C. § 6651(a)(2), for the 1999 tax year in the amount of \$26,875.50 on February 7, 2005. (Exhibit 4-J)

15. Respondent assessed interest for the 1999 tax year in the amount of \$45,898.19 on February 7, 2005. (Exhibit 4-J)

16. On April 13, 2005, respondent sent, via certified mail, a Final Notice of Intent to Levy and Notice of Your Right to a

Hearing (Letter 1058) for the tax years 1995 and 1999.

(Stip. ¶ 6; Exhibit 5-J)

17. Petitioner timely requested a Collection Due Process [hereinafter "CDP"] Hearing. (Stip. ¶ 7; Exhibit 6-J)

18. Petitioner had a telephonic CDP Hearing on July 29, 2005 with Appeals Officer James Payton. (Stip. ¶ 8)

19. During his CDP hearing, petitioner presented no collection alternatives. (Stip. ¶ 8)

20. During his CDP hearing, petitioner presented no documentation disputing his income tax liabilities for the tax years 1995 and 1999. (Stip. ¶ 8; Tr. p. 16, line 22 through p. 17, line 5)

21. On August 24, 2005, respondent issued a Notice of Determination sustaining the proposed levy action. (Stip. ¶ 9; Exhibit 7-J)

V&M Management, Inc.

22. V&M Management [hereinafter "V&M"] was an S Corporation in which the petitioner was the sole shareholder. (Tr. p. 19, lines 12-14; Exhibits 8-J, Schedule K-1; Exhibit 9-J, Schedule K-1; and Exhibit 10-J, Schedule K-1)

23. The principal asset of V&M was the Mandela Apartments, a Section 8, or low-income housing project. (Tr. 19, lines 7-14)

24. In 1996, V&M voluntarily declared a Chapter 11 bankruptcy (Docket No. 96-10123-CJK, USBC, District of Massachusetts) and Stephen S. Gray [hereinafter "Trustee"] was appointed as Trustee. (Tr. p. 23, lines 12-17; Exhibit 12-P)

25. On September 26, 1997, a joint plan of reorganization proposed by the Trustee, Mandela Residents Cooperative Association, Beacon Residential Properties, and Winter Hill Federal Savings Bank was confirmed by the U.S. Bankruptcy Court for the District of Massachusetts. (Exhibit 12-P, pp. 99-102, p. 119 lines 19-20)

26. The Trustee was the only duly authorized representative of the Debtor V&M during the bankruptcy proceeding. (Exhibit 12-P, p. 74, lines 5-8)

27. The Trustee sold the Mandela Apartments and its related assets on December 18, 1997 in a group of three year installment sales. (Exhibits 8-J, 9-J, and 10-J, specifically Forms 6252 of each exhibit)

28. The Trustee was a co-applicant on a low income housing tax credit application [hereinafter "tax credit"] in 1997. (Exhibit 11-P; Exhibit 12-P, p. 74, line 5-8 and pp. 75-6, lines 4-22)

29. The Trustee helped to secure the tax credits on behalf of the new owners of the Mandela Apartments. Mourad v. Commissioner, 387 F.3d 27, 31 (1st Cir. 2004).

30. The Trustee testified that, as part of V&M's proposed joint plan of reorganization, the tax credits would be syndicated to provide the funds to make the plan payments to V&M's bankruptcy creditors. (Exhibit 12-P, p. 45, line 12 through p. 46, line 23)

31. Petitioner has the burden of proof to show that the underlying tax liabilities for 1995 and 1999 are not correct. (Tr. p. 17, line 22 through p. 18, line 2)

ULTIMATE FINDINGS OF FACT

32. Petitioner failed to meet his burden of proof to show that the underlying tax liabilities assessed by the respondent for the tax years 1995 and 1999 are incorrect. (Entire record)

33. Respondent's determination to proceed with the proposed levy action was proper.

POINTS RELIED UPON

Petitioner did not timely file his income tax returns for the tax years 1995 and 1999. The income tax return for the tax year 1995 was accepted as filed and assessed. The income tax return for the tax year 1999 incorrectly reported a tax liability in the amount of \$536,739.00 based upon a reported income of \$310,692.00. Respondent, using the statutory "math error" procedures, recalculated a tax of \$107,502.02 and assessed the lower tax liability. Petitioner's request for a Collection Due Process [hereinafter "CDP"] hearing disputed the underlying tax liabilities for 1995 and 1999. Petitioner presented no documentation to the Appeals Officer to show that the underlying tax liabilities for 1995 and 1999 tax years were incorrect.

Petitioner was the sole shareholder of V&M Management, Inc. [hereinafter "V&M"], an S Corporation, whose major asset was a low income housing project. Petitioner voluntarily declared a Chapter 11 bankruptcy on behalf of V&M. A Chapter 11 Trustee ("Trustee"), with the authority of the Bankruptcy Court, sold the housing project and related assets in a group of installment sales. The final

installment payments on those sales were due and were made during tax year 1999.

Petitioner alleges that the Trustee owned the property at the time of its sale and should be responsible for any tax due in 1999. This is incorrect. The Trustee, as the duly authorized representative of the Debtor V&M, sold V&M's assets under the bankruptcy court's authority to pay V&M's creditors. The filing of the bankruptcy petition by V&M did not change its tax status as an S Corporation. Petitioner, as the sole shareholder of V&M, was still required to report any profit/income from the sale of V&M's assets over the course of the installment sale period.

Petitioner further alleges that if he is liable for the 1999 tax liability, he should be entitled to claim low income housing tax credits [hereinafter "tax credits"] applied for by the Trustee in 1997¹. The tax credits belonged to V&M, the owner of the project, and not to the petitioner. The tax credits were syndicated, as part of V&M's bankruptcy plan, to make funds available for the Trustee to pay V&M's bankruptcy creditors.

¹ The tax credits may have been applied for in 1997 but were not granted until 1998. Mourad v. Commissioner of Internal Revenue, 387 F.3d 27, pp. 31-2 (1st Cir. 2004).

Petitioner had the burden of proof to show that the underlying tax liabilities for 1995 and 1999 were incorrect. Petitioner failed to meet his burden. Petitioner has never made any proposals for collection alternatives to the levy proposed by respondent.

ARGUMENT

- I. PETITIONER FAILED TO MEET HIS BURDEN TO SHOW THAT THE UNDERLYING TAX LIABILITIES FOR TAX YEARS 1995 AND 1999 ARE INCORRECT.

The issue of the underlying tax liability may be raised at a Collection Due Process [hereinafter "CDP"] hearing when the taxpayer has not otherwise had the opportunity to dispute such liability. Montgomery v. Commissioner, 122 T.C. 1, 8-9 (2004). Petitioner did not receive a statutory notice of deficiency for the 1995 and 1999 tax years. Petitioner has not had a prior opportunity to dispute the assessed tax liabilities for the tax years 1995 and 1999. Petitioner, therefore, was entitled to raise the issue of the underlying tax liabilities at the CDP hearing. See I.R.C. § 6330(c)(2)(B).

Petitioner failed to produce any documents or provide any evidence at his CDP hearing to show that the outstanding tax liabilities for the tax years 1995 and 1999 were incorrect. Petitioner merely stated he made no profit from V&M, his S Corporation. In fact, petitioner admitted that he was more interested in pursuing the tax issues in the Tax Court than engaging in an effective administrative process with the Appeals Officer.

Petitioner is entitled to a trial de novo on the underlying tax liabilities for tax years 1995 and 1999. Jones v. Commissioner, 338 F.3d 463 (5th Cir. 2003; H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Session at p. 266 (1998)). Petitioner has the burden of proof, under I.R.C. § 7491, to prove that the underlying tax liabilities for the tax years 1995 and 1999 are incorrect². (Tr. p. 16 line 14 through p. 18 line 2)

A. The 1995 Tax Liability.

Petitioner had an extension until October 15, 1996 to file his 1995 income tax. I.R.C. §§ 6072(a) and 6081. Respondent received petitioner's 1995 income tax return on November 15, 1999, more than three years past the extended due date. The 1995 income tax return had a reported tax liability in the amount of \$5,613.00, which was assessed on March 20, 2000. Petitioner made no payment with the return and made no estimated payments prior to the filing of the return.

² At the trial of this matter, the Court found there was no shifting of the burden of proof and that petitioner had the burden of proof to show that the tax liabilities for the years at issue were incorrect. I.R.C. § 7491(c) provides that respondent has the burden of proof with respect to any liability for an addition to the tax. It is respondent's position that respondent has met its burden of proof with respect to the assertion of the additions to the tax under section 7491(c) through the evidence submitted in the Stipulation of Facts and exhibits thereto.

Petitioner alleges that he is entitled to an investment interest expense carryforward from the 1994 tax year which would reduce his tax liability to zero. Section 163 provides that a non-corporate taxpayer may deduct investment interest for any taxable year to the extent of any net investment income. I.R.C. § 163(d)(1). Petitioner attached Form 4952 (Investment Interest Expense Deduction) to his 1995 tax return claiming an Investment Interest Expense in the amount of \$965,226.00 which he intended to carryforward to tax year 1996. Petitioner reported no net investment income in the tax year 1995 based upon Form 4952 and was not entitled to deduct any investment interest in 1995³.

Section 6651(a)(1) provides for addition to the tax for failure to file an income tax return on the due date unless such failure is due to reasonable cause and not due to willful neglect. I.R.C. § 6651(a)(1). Petitioner presented no evidence to show that there was reasonable cause for his failure to timely file his 1995 income tax return on or before October 15, 1996. Petitioner is liable for the addition to the tax under section 6651(a)(1) for the 1995 tax year.

³ However, Petitioner was allowed to deduct the entire investment income expense carryforward on his 1997 return. Mourad v. Commissioner, 121 T.C. 1, Fn. 6 (2003).

Section 6651(a)(2) provides for an addition to the tax for failure to timely pay any tax due on an income tax return, unless such failure is due to reasonable cause and not due to willful neglect. The reasonable cause standard is a one-time test to be passed or failed at the payment due date. Estate of Hartsell v. Commissioner, T.C. Memo. 2004-211. Petitioner presented no evidence to show that there was reasonable cause for his failure to timely pay his 1995 income tax return on or before October 15, 1996. Petitioner is liable for the addition to the tax under section 6651(a)(2) for the tax year 1995.

Section 6601 provides that if any amount of tax is not paid on or before the last date proscribed for payment, interest will accrue from the due date of the tax until paid. I.R.C. § 6601(a). Interest is considered a tax and subject to interest accruals. I.R.C. § 6601(e)(1). Interest shall also accrue on additions to the tax, as applicable. I.R.C. § 6601(e)(3). Petitioner was assessed tax, additions to the tax, and interest at the time that he filed his 1995 income tax return. Statutory interest accrues on the unpaid assessed balance. Petitioner has not met his burden to prove that the underlying tax liability for the 1995 tax year is incorrect.

B. The 1999 Tax Liability.

Petitioner's income tax return for the 1999 tax year was due April 15, 2000. I.R.C. § 6072(a). Respondent received petitioner's 1999 income tax return on December 14, 2004, more than four years late. The 1999 income tax return included a Form K-1 from V&M Management, Inc.. Petitioner reported income in the amount of \$310,692.00 and a tax liability in the amount of \$536,739.00. Respondent utilized the "math error" procedures of I.R.C. § 6213(b)(1) to recalculate a tax liability in the amount of \$107,502.03. The reduced tax liability and applicable statutory additions were assessed on February 7, 2005.

Petitioner was the sole shareholder of V&M Management, Inc. [hereinafter V&M], an S Corporation, whose major asset was the Mandela Apartments, a low income housing project in Roxbury, Massachusetts. On January 8, 1996, petitioner voluntarily declared a Chapter 11 bankruptcy on behalf of V&M. A Chapter 11 Trustee, Stephen S. Gray [hereinafter "Trustee"], was appointed by the U.S. Bankruptcy Court for the District of Massachusetts. On December 18, 1997, the Trustee, with the authority of the Bankruptcy Court, sold the housing project and related assets in a group of installment sales. V&M's corporate income tax returns for

1997, 1998, and 1999, signed by the Trustee, indicate that the V&M assets were sold in a three year installment sale with the final installments of the installment sale due and made in tax year 1999.

Petitioner disputes that he had any taxable income from the sale of V&M assets in 1999 since the assets were sold in 1997 and he was not the owner when the assets were sold. The filing of a bankruptcy petition by V&M did not terminate its valid S Corporation election and the income of V&M was taxable to the petitioner as the sole shareholder of V&M. See Mourad v. Commissioner, 121 T.C. 1,8 (2003), aff'd., Mourad v. Commissioner, 387 F.3d 27 (1st Cir. 2004). Gross profit from an installment sale is recognizable in the year of receipt. I.R.C. § 453(c). Petitioner, as the sole shareholder of V&M, was required to report any profit/income over the course of the installment sale period. I.R.C. § 1366. The last year of the installment period was 1999.

Petitioner argues that if he is liable for the tax liability from the sale of V&M's assets, then he should be entitled to the low income housing credits of I.R.C. § 42 [hereinafter "tax credits"] to offset any resulting tax liability. This is the same unsuccessful argument he made

in this Court and before the First Circuit for the 1997 tax year, the first year of the installment sale. See Mourad v. Commissioner, 121 T.C. 1, 8 (2003), aff'd., Mourad v. Commissioner, 387 F.3d 27 (2004). The First Circuit found that the Trustee helped to secure the tax credit on behalf of the new owners of the housing complex and the tax credit was granted in 1998. Mourad v. Commissioner, 387 F.3d at 31. Furthermore, there is no evidence on the record that any tax credits were applied for or available for the 1999 tax year.

At the time V&M declared bankruptcy, V&M, and not the petitioner, owned the Mandela Apartments. The Trustee appointed by the Bankruptcy Court had various fiduciary duties which included the collection and reduction to money of V&M's bankruptcy estate property and the filing of a plan of reorganization. See 11 U.S.C. §§ 704 and 1106. At V&M's plan confirmation hearing, the Trustee admitted that he was a co-applicant for the tax credits. The Trustee testified that the tax credits were essential for the success of the proposed joint plan of reorganization because the tax credits would be syndicated to provide the funds for the plan payments to V&M's creditors. Since petitioner testified that he was personally liable for V&M's debts, he

received a benefit when the plan of reorganization was confirmed. Mourad v. Commissioner, 121 T.C. 1, 6 (2003).

Section 6651(a)(1) provides for addition to the tax for failure to file an income tax return on the due date unless such failure is due to reasonable cause and not due to willful neglect. I.R.C. § 6651(a)(1). Petitioner presented no evidence to show that there was reasonable cause for his failure to timely file his 1999 income tax return on or before April 15, 2000. Petitioner is liable for the addition to the tax under section 6651(a)(1) for the 1999 tax year.

Section 6651(a)(2) provides for an addition to the tax for failure to timely pay any tax due on an income tax return, unless such failure is due to reasonable cause and not due to willful neglect. The reasonable cause standard is a one-time test to be passed or failed at the payment due date. Estate of Hartsell v. Commissioner, T.C. Memo. 2004-211.

Petitioner made no payment when he filed his 1999 income tax return and no estimated payments prior to the filing of the income tax return. Petitioner presented no evidence to show that there was reasonable cause for his failure to timely pay his 1999 income tax return on or

before April 15, 2000. Petitioner is liable for the addition to the tax under section 6651(a)(2) for the 1999 tax year.

Section 6601 provides that if any amount of tax is not paid on or before the last date proscribed for payment, interest will accrue from the due date until paid.

I.R.C. § 6601(a). Interest is considered a tax and subject to interest accruals. I.R.C. § 6601(e)(1). Interest shall also accrue on additions to the tax, as applicable.

I.R.C. § 6601(e)(3). Petitioner was assessed tax, additions to the tax, and interest at the time that he filed his 1999 income tax return. Statutory interest accrues on the unpaid assessed balance. Petitioner has not met his burden to prove that the underlying tax liability for the tax year 1999 is incorrect.

II. RESPONDENT'S DETERMINATION TO PROCEED WITH THE LEVY ACTION BALANCED EFFICIENT TAX COLLECTION WITH THE LEVY'S POTENTIAL INTRUSIVENESS.

Section 6330(c)(3) provides that the determination of an appeals officer must take into consideration (1) verification that the requirements of applicable law and administrative procedures have been met; (2) relevant issues raised by the taxpayer; (3) whether any proposed collection action balances the need for the efficient collection of

taxes with the legitimate concern of the person that any collection be no more intrusive than necessary. The Notice of Determination details the actions taken by the Appeals Officer to ensure the requirements of section 6330(c) were met.

At the CDP hearing, petitioner merely alleged that he made no profit from a company known as V&M Management. Petitioner presented no documentation or provided any evidence to substantiate his allegations. In fact, petitioner did not utilize the administrative process at all. He had a telephonic hearing and advised the officer that he was more interested in pursuing his tax issues in the Tax Court. Petitioner never discussed or offered any collection alternative to the levy. The Appeals Officer advised petitioner that he would receive a determination based upon the conference and information contained in the administrative file. Respondent's determination to proceed with the proposed levy action was appropriate given the lack of any evidence to support petitioner's allegations that the underlying tax liabilities for the 1995 and 1999 tax years was incorrect.

CONCLUSION

It follows that the determination of the Commissioner of Internal Revenue should be sustained.

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