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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.