United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1186 **September Term, 2017**

FILED ON: JUNE 5, 2018

FRANK COLACURCIO, JR.,
APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
APPELLEE

On Appeal from the Decision
of the United States Tax Court

Before: GARLAND, *Chief Judge*, and KAVANAUGH and SRINIVASAN, *Circuit Judges*.

J U D G M E N T

The court considered this appeal on the record from the United States Tax Court, and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has given the issues full consideration and has determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). For the reasons stated below, it is hereby

ORDERED AND ADJUDGED that the judgment of the Tax Court be **AFFIRMED**.

In December 2013, the Internal Revenue Service sent Frank Colacurcio, Jr. a Notice of Intent to Levy, in an attempt to collect nearly $500,000 in unpaid income taxes for the 2009 to 2011 tax years. Colacurcio requested a due process hearing before the IRS Office of Appeals. At the hearing, Colacurcio proposed satisfying his tax liabilities on an installment payment plan instead of through the IRS's levy action. He explained that he co-owned two undeveloped land parcels in the State of Washington, and that he intended to sell the parcels and use the proceeds to pay the IRS. Colacurcio asked the IRS to accept monthly payments until he and his co-owners could finalize a sale of the parcels.

On August 18, 2014, the IRS issued a Notice of Determination sustaining the levy to collect Colacurcio's unpaid taxes. Colacurcio petitioned for review in the United States Tax Court, arguing that the IRS had abused its discretion in rejecting the installment plan. The Tax Court held multiple hearings and remanded the case for the IRS to consider additional information about the status of Colacurcio's properties and the terms of the proposed installment plan. After a hearing, the IRS issued a Supplemental Notice of Determination, in which it again rejected the

proposed installment plan. The IRS determined that the plan was neither an effective nor an efficient means of collection given the indefiniteness of Colacurcio's plans to sell the two parcels.

When Colacurcio again petitioned for review in the Tax Court, the IRS moved for summary judgment, which the court granted. The court concluded that, for two reasons, the IRS had not abused its discretion in rejecting Colacurcio's proposed installment plan: First, Colacurcio had proposed, and failed to meet, several different timetables for payment; and second, the proposed installment plan did not specify a maturity date or final payment amount. Thus, the court determined that the proposed installment plan would "result in further delays in collection." Joint App'x 1041.

Colacurcio appeals, arguing that the Tax Court erred in granting the IRS's motion for summary judgment. We review the Tax Court's decision de novo, while reviewing the IRS's underlying determination for abuse of discretion. *See Eshel v. Commissioner*, 831 F.3d 512, 517 (D.C. Cir. 2016); *Byers v. Commissioner*, 740 F.3d 668, 675 (D.C. Cir. 2014). We affirm the Tax Court's grant of summary judgment in favor of the IRS.

First, Colacurcio argues that there is a genuine question as to whether the proposed installment plan was "open-ended and indefinite," as the Tax Court characterized it. J.A. 1041. The record supports the Tax Court's characterization. The proposed installment plan—under which Colacurcio would make $500 monthly payments for two years, followed by $3,000 monthly payments—had no definite end date or final payment amount. Rather, the plan would convert from monthly payments to a final lump-sum payment only when one of the parcels reached its maximum sale value and was actually sold. And Colacurcio gave no indication that such a sale would take place within a reasonable period of time. In those circumstances, we reject Colacurcio's argument that there was a genuine dispute over the indefiniteness of the plan.

Second, Colacurcio contends that the IRS, in denying the proposed installment plan, failed adequately to consider the ineffectiveness of using a levy to collect the unpaid taxes. He asserts that a levy is an ineffective means of collection because the IRS would have to sell the properties at a price below market value. And if the sale price was too low, the levy action would not fully satisfy his tax liabilities.

But the task before the IRS was to determine whether to accept the proposed installment plan as an alternative to the noticed levy. In making that determination, the IRS needed to assess whether the plan "balance[d] 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." 26 U.S.C. § 6330(c)(3). The IRS properly balanced those factors here. Considering the repeated changes Colacurcio made to the proposed installment plan, his inability to meet the deadlines by which he pledged to sell the properties, and his withholding of requested financial information, the IRS reasonably determined that the proposed installment plan was not an appropriate or effective collection method in this case. As a result, the IRS did not abuse its discretion in concluding that the levy was the only available means for collection.

Third, Colacurcio argues that the IRS gave inadequate consideration to the progress he had made in preparing the two parcels for sale—specifically, progress he had made after the IRS had issued its Supplemental Notice of Determination. At the time of Colacurcio's supplemental

submissions to the IRS regarding his properties, however, the Tax Court had resumed its review of the IRS's determination. The IRS did not abuse its discretion by declining to continuously reconsider its determination with every subsequent update. At any rate, Colacurcio does not allege that his actions to prepare the parcels would have made them immediately saleable—indeed, the Tax Court provided him additional time to conduct a sale of the properties, to no avail. To date, Colacurcio has offered no more definite plans for the sale of either parcel.

Fourth, Colacurcio contends that the IRS misapplied two provisions of its Internal Revenue Manual (IRM). We note, as an initial matter, that the Manual's provisions are merely guidance, *i.e.*, "directory rather than mandatory," and lacking the "force and effect of law." *Marks v. Commissioner*, 947 F.2d 983, 986 n.1 (D.C. Cir. 1991). In any event, the IRS did not run afoul of either of the provisions in the Manual.

Under the first provision, an installment agreement "may be granted" if a taxpayer does not immediately sell her equitable assets to pay the IRS due to certain enumerated reasons, all tied to the particular circumstances of her case. *See* IRM § 5.14.2.1.2(2). In Colacurcio's view, the IRS was required to—but did not—consider the fact that he needed additional time to sell the parcels because of other ownership interests in, and several encumbrances on, the properties. But the IRS did consider that fact, acknowledging that there had been "some legitimate delays for processes that allow sale of the properties." J.A. 71. The IRS also found, however, that Colacurcio was not working expeditiously to secure sale of the properties; nor did his proposed plan offer a definitive timeline for sale and payment to the IRS. Considering all of the circumstances, the IRS determined that the proposed installment plan was not an appropriate means of collection. We see no basis to disturb that reasonable determination.

The second provision describes the propriety of using a levy as applied to three categories of taxpayers: those who "will pay," those who "can't pay," and those who "won't pay." IRM § 5.10.1.3. On Colacurcio's reading of the Manual, the provision means that a levy is appropriate only for a taxpayer who "won't pay," not for a "will pay" taxpayer, the group into which he says he fits. As the Manual notes, however, even when the IRS places a taxpayer into one of the three categories, the decision whether to seize his property is "not automatic in any case"; rather, the "determining factor" is always the "taxpayer's current situation." *Id.* As explained above, the IRS fully considered the circumstances surrounding Colacurcio's ability to pay his tax liabilities, and reasonably determined that the levy—not the proposed installment plan—was the appropriate course of action.

Moreover, Colacurcio's contention that he is a "will pay" taxpayer—that is, one who, among other things, "[r]equire[s] a reasonable period of time to sell an asset," *id.*—is belied by the record. As the IRS observed, Colacurcio had not made any progress towards a property sale that would satisfy his tax liability, nor had he provided a date by which he would be able to do so. And the proposed installment plan was designed to continue indefinitely without a specific maturity date. We therefore reject Colacurcio's assertion that he is a "will pay" taxpayer, and we uphold the IRS's decision to reject the proposed installment plan.

We have considered Colacurcio's remaining arguments in favor of reversal and conclude that they lack merit.

Pursuant to D.C. Cir. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. 41(b); D.C. CIR. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk