United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1407 **September Term, 2017**

FILED ON: MAY 22, 2018

CHARLES J. WEISS,
APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
APPELLEE

On Appeal from the Decision
of the United States Tax Court

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the United States Tax Court and the briefs and arguments of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED AND ADJUDGED that the Tax Court's judgment against Weiss be affirmed for the reasons set forth in the memorandum filed simultaneously herewith.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

M E M O R A N D U M

This case involves the proper construction of a tax statute governing the timeliness of a request for an IRS collection due process (CDP) hearing. In relevant part, the statute providing for CDP hearings establishes the IRS must provide notice of the right to a hearing at least thirty days before levying:

> (1) In general
>
> No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made.
>
> (2) Time and method for notice
>
> The notice required under paragraph (1) shall be—
>
> . . .
>
> > (C) sent by certified or registered mail, return receipt requested, to such person's last known address;
>
> not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

26 U.S.C. § 6330(a)(1)-(2). The statute further specifies that the notice must include the taxpayer's right to request a CDP hearing "during the 30-day period under paragraph (2)." § 6330(a)(3)(B).

Appellant Charles Weiss appeals from a judgment of the Tax Court, which sustained an IRS CDP hearing upholding a notice of intent to levy. 147 T.C. 179 (2016). Weiss claims that

after receiving a notice of intent to levy, he intentionally filed an untimely request for a CDP hearing based on the date on the notice of intent to levy rather than the date of its mailing. The IRS treats an untimely request for a CDP hearing as a request for an equivalent hearing. Treas. Reg. § 301.6330-1(i)(1). Unlike a CDP hearing, an equivalent hearing does not suspend the limitations period for collection. *Compare* 26 U.S.C. § 6330(e)(1), *with* Treas. Reg. § 301.6330-1(i)(2), Q&A-I3. Thus, Weiss claims the limitations period has run and his tax liability is uncollectable. Although the position of the IRS is at best troubling and Weiss's argument is not without persuasive force, we ultimately conclude that the language of the governing statute is consistent with the position of the government, and we therefore affirm.

Weiss owes significant tax liability going back over three decades. The statute of limitations for collection is only ten years, 26 U.S.C. § 6502(a)(1), but Weiss suspended the limitations period three times by filing for bankruptcy. The limitations period was to expire, however, in July 2009. On February 11, 2009, an IRS revenue officer generated a final notice of intent to levy addressed to Weiss and attempted to hand deliver it. He failed when a dog blocked Weiss's driveway. The letter, still bearing the date February 11, was mailed two days later on February 13.

Weiss's wife received the letter February 17, opened it and discarded the envelope, leaving the notice of intent to levy for her husband to find. Weiss, an attorney, found the letter and accompanying IRS publications later that day and read them. He filled out a form request for a CDP hearing, dating it March 13, 2009. Weiss testified that he mailed the CDP request on March 14. Although the IRS requested and Weiss mailed a revised CDP form, for our purposes the original form is the crucial one.

The settlement officer assigned to Weiss's CDP case decided that the statute of limitations did not bar collection, and performed the other tasks required for a CDP hearing. The officer determined that the limitations period had not run because Weiss timely requested the CDP hearing. She reasoned that the mailing date of the notice of intent to levy started the thirty-day period for a timely request, rather than the date printed on the letter. Accordingly, she concluded that Weiss's March 14 mailing of the request was timely. A telephone hearing was scheduled for January 22, 2010, and Weiss was represented at the hearing by counsel. During the hearing, Weiss argued that the date on the notice of intent to levy controlled rather than the date of mailing. The settlement officer then sought an opinion from the IRS Chief Counsel as to which date controlled. The Chief Counsel provided an opinion concluding that the thirty-day period for requesting a CDP hearing runs from the date on which the notice of intent to levy was mailed. A notice of determination sustaining the levy was issued and Weiss petitioned the Tax Court for review.

In the Tax Court, Weiss raised a variety of issues, but his primary argument was that the date on the notice of intent to levy triggers the period for requesting a CDP hearing, not the date of mailing. The Tax Court resolved this and all other issues against Weiss and sustained the IRS collection action. Weiss timely appealed to this court and raises the same issue: does the thirty-day period for requesting a CDP hearing begin to run from the date on the notice or the date of its mailing? We review de novo the Tax Court's judgment on this question of law. *Byers v. Comm'r of IRS*, 740 F.3d 668, 675 (D.C. Cir. 2014).

The IRS argues that the plain text of the statute establishes that the thirty-day period for Weiss to request a CDP hearing began to run on the date of the mailing, February 13, 2009. In

this case, this period was extended to March 16 because its last day fell on a weekend. *See* 26 U.S.C. § 7503. IRS's receipt of the request on March 16 was therefore within the thirty-day period for a timely request. Weiss timely requested a CDP hearing, the limitations period was suspended, and his taxes remain collectible. Thus, the IRS contends the plain text of the statute forecloses Weiss's argument on this point.

While the language of the statute, like much of the Internal Revenue Code, may not be "plain" in the sense of being *easily* understood, nonetheless it is plain in the relevant legal sense that properly analyzed, it is unambiguous as to the question before us. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). To summarize the issue, the IRS must send a certain notice to taxpayers informing them that if they seek a certain type of remedial hearing, they must do so within thirty days and that action within that thirty-day period suspends the limitations period. The IRS sends the notice, puts a date on it, but contends that the date does not control the commencement of the thirty-day period. The taxpayer admits that he received the notice, intentionally let the thirty days run from the date on the notice rather than the putative date of mailing in order to deliberately avoid tolling the statute of limitations. Needless to say, the IRS continues to insist on the relevance of the date of mailing. The date of mailing may not have been apparent to the taxpayer who first opened the envelope. The IRS further cavalierly dismisses any reliance that the taxpayer may have placed on its misleading document. For example, the IRS suggests that the taxpayer would have been free to go online and find out the meaning of the governing law for himself. Oral Argument at 14:11-23. Never mind that the language is the typical convoluted prose of tax statutes, which, perhaps at times because of an intentional legislative care to cover all circumstances, is clear at the first reading only to those

learned at the law. The IRS further suggests that a taxpayer who really wanted a CDP hearing would "fill in the form and send it back to the IRS well before the thirty days had run . . . ." *Id.* at 13:30-47. The IRS offers no reason why any period prior to the expiration of the thirty days is relevant. The IRS also argues that "taxpayers are charged with knowledge of the law . . . ." *Id.* at 12:50-55. Hardly a helpful suggestion when the issue at hand is the interpretation of a statute.

Nonetheless, in spite of the unappealing proposition that we must side either with a taxpayer deliberately attempting to manipulate the Code to prevent paying his own taxes or a government agency that seems not to care whether it provides the citizenry with notice of their rights and liabilities, we must decide whether the date on the notice or the date of mailing governs. The taxpayer's position has the advantage of common sense. But the government's position has the insurmountable advantage of compliance with the language of the statute. That is to say, what the statute requires is "the notice . . . shall be . . . *sent* by certified or registered mail, return receipt requested . . . not less than thirty days before the date of the first levy . . . ." (emphasis added). In this case, the undisputed evidence is that the notice was "sent," that is mailed, no more than thirty days before Weiss's March 14 mailing. Therefore the statute was tolled.

We note in parting the court's hope that few taxpayers will be as anxious as Weiss to manipulate the law in order to attempt to extinguish tax liabilities. We further hope that few agencies will be as careless with dates and especially with the rights of the citizens as the IRS in this case. Nonetheless, unattractive as the position of the IRS may be, it does comport with the language of the statute and the apparent meaning of the word "send." We therefore affirm the decision of the Tax Court.

Weiss raises other challenges to the conduct of the CDP hearing and the Tax Court's findings of fact. Having considered these challenges, we conclude that none presents grounds for reversal of the Tax Court's judgment. *Bartko v. SEC*, 845 F.3d 1217, 1219 (D.C. Cir. 2017) (addressing "in detail only those arguments that warrant further discussion").

For the foregoing reasons, we affirm the Tax Court's judgment in full.