IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID KOSS and FREYA KOSS, Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 97-440
UNITED STATES OF AMERICA, Defendant.	:	

M E M O R A N D U M

BUCKWALTER, J. May 8, 1998

Currently pending before the court are Defendant's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment. The government's motion for summary judgment was the subject of an April 6, 1998 hearing. At the close of testimony, I instructed the parties to submit memoranda summarizing their arguments. In addition to their memorandum, Plaintiffs cross-moved for summary judgment.[1]

After consideration of the hearing testimony, and of the parties' prior and subsequent pleadings, I will deny the Government's motion and grant Plaintiffs', for the reasons which follow. The effect of the accompanying Order will be to invalidate -- and to preclude the government from enforcing -- the lien currently lodged against the Kosses in Montgomery County, Pennsylvania. As the Kosses acknowledge, the government

[1] The government did not respond to this cross-motion. Because the Kosses rely upon their post-hearing memorandum to support their cross-motion for summary judgment, I have also considered the government's post-hearing memorandum as a response to the Kosses' cross-motion.

is free to pursue collection of the 1974 Tax Year deficiency through other, non-administrative means.

I. BACKGROUND

Both motions are resolvable by the same issue: whether, after years of litigation,[2] the government sent timely notice to David and Freya Koss ("the Kosses") of their assessment for Tax Year 1974. 26 U.S.C. § 6303 (a). In a February 4, 1998 Order, I converted defendant's motion to dismiss the Kosses' quiet title action into one for Summary Judgment on the timeliness issue and scheduled a hearing. Due to a scheduling problem, only Plaintiffs attended the February 18, 1998 hearing.

I nonetheless entered judgment for the government, because the parties' submissions demonstrated no issue of material fact. The crucial evidence was the Declaration of Charles Felthaus, Acting Chief of the IRS Accounting Branch. His declaration stated that the Certificate of Assessments and Payments, based upon the Kosses' Individual Master File ("IMF")[3] demonstrated conclusively that the government gave timely, computer-generated notice to the Kosses of their Tax Year 1974

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[2] Although more factual background is contained in the February 4, 1998 Memorandum, I note briefly that in 1990, the Court of Appeals for the Third Circuit upheld the Tax Court's determination that the Kosses owed money for Tax Year 1974. The Kosses did not petition the United States Supreme Court for certiorari.

[3] An IMF is a record of a taxpayer's assessments and payments. A Certificate is a certified statement of the data contained in an IMF. Felthaus prepared the Kosses' Certificate.

assessment. A Certificate of Assessment is entitled to a presumption of correctness as to the accuracy of computer-generated notice statements and the Kosses initially made no showing sufficient to question its correctness.

Subsequently, however, I granted the Kosses' motion to reconsider the entry of summary judgment and vacated the Order entering judgment for the government as to the timeliness of notice, after they filed new matter casting substantial doubt on the IRS' position: the Declaration of Carole S. Nelson, a former IRS Revenue Officer. Nelson read certain numbers found in the Kosses IMF -- and excluded from the Certificate -- to constitute a "suppression code," meaning that while the Assessment may have been entered into the IMF on July 19, 1990, the computer command to actually post notice of the assessment to the Kosses was suppressed until after expiration of the time period for them to petition for certiorari from the Order of the Court of Appeals affirming the adverse decision of the Tax Court. (Nelson Declaration at ¶14). Thus, according to Nelson, the presence of the suppression code meant that the IRS did not send timely, computer-generated notice to the Kosses in July, but that such notice was instead posted in October. 26 U.S.C. § 6303(a).

In response, the government filed a declaration by Maureen Siegert, an adviser with the IRS Special Procedures Branch in Pittsburgh, who stated that, regardless of the

timeliness of the computer-generated notice, the Certificate indicated that a “document code” found in 4th and 5th digits of the relevant Document Locator Number (“DLN”) demonstrated that manual, rather than computer-generated notice had been given. Siegert based this view on her interpretation of the transcript that the assessment was a “prompt assessment,” because, she says, prompt assessments were always made manually, meaning by hand delivery or certified mail. Plaintiffs do not dispute that a suppression code would not have affected the sending of manual rather than computer-generated notice. Faced with these two conflicting stories, and lacking enough information to judge their accuracy, I ordered another hearing.

At this second hearing on April 6, 1998, the Kosses, now represented by counsel, put on testimony by Felthaus, Siegert and Mr. Koss. Additionally, the Kosses subpoenaed any documents which Felthaus relied upon in preparing the Kosses’ Certificate of Assessments. (NT at 5-6). In response to this subpoena, the government produced pages from IRS Pub. 6209, a reference material containing “transaction codes” used by the IRS Service Center to describe actions such as payments and assessments in taxpayers’ accounts, but it did not produce either a copy of the notice of assessment or a record of that notice. (NT at 7). Felthaus stated that the IRS “cannot locate a record of the first notice.” (NT at 7).

Although Felthaus conceded the validity of Nelson's characterization of the suppression code and its effect, he also argued, in accordance with the new explanation provided by Siegert, that the document locator number indicated that the IRS gave prompt manual notice to the Kosses. (NT 11-12). Although Felthaus testified that he was unfamiliar with the meaning of the suppression codes, he based his characterization of the manual notice codes on his "experience." On cross, Felthaus again testified that the document locator number indicated a "prompt manual quick assessment," according to Pub. 6209. (NT at 14).

Siegert also testified, again stating that the document locator number on the Kosses' IMF transcript indicated a "prompt" or "quick" assessment, and stating that such an assessment is made whenever a tax is either in jeopardy or the controlling statute is about to expire. Siegert stated that a "prompt" assessment is made to protect collection, and that a "quick" assessment is made to protect the statute from expiring. (NT at 16).

II. DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.

56(c). A fact is material if it might affect the outcome of the case under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A disputed factual matter presents a genuine issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In considering a summary judgment motion, the court is required to accept as true all evidence presented by the non-moving party, and to draw all justifiable inferences from such evidence in that party's favor. Id. at 255.

Initially, I find that the government is not entitled to summary judgment, because it has filed contradictory declarations; disowned its own explanations; and failed to provide hard evidence supporting its latest explanation of how notice was timely given to the Kosses.

Whether the Kosses are entitled to summary judgment is less easily resolved. The IRS has consistently asserted that it sent timely notice to the Kosses on July 19, 1990, and it is no longer contested that notice sent on that date would be timely. Although David Koss has testified that he did not receive any notice of the assessment until October 1990, it is further uncontested that the determinative issue is not whether the Kosses actually received notice, but whether notice was sent.

The Kosses attack the government’s new explanation on two grounds. First, they argue that their case is not the type

in which, under applicable guidelines, the IRS would make manual, as opposed to computer-generated notice. According to the relevant provisions of the Internal Revenue Manual ("IRM"), the IRS makes quick assessments either "when the statutory period for assessment will expire before assessment action can be completed under the regular procedures," or in a second situation not here applicable.[4] IRM 5314.1 (1)(a). The manual further indicates that quick assessment is generally made where the assessment statute expires within ninety days. IRM 5314.1 (2). Additionally, "[a] prompt assessment is a manually processed assessment of a secured return where collection appears to be at risk and the intention is to proceed with collection action immediately following the period for Notice and Demand. . . . [It] is costly in comparison and should only be utilized in extreme circumstances." 5315.1 (1).

Plaintiffs argue that none of these situations apply to them, as they had signed a Form 872-A, which, according to the IRS, and as found by this Court, extended the time for making an assessment until sixty days after the expiration of the time for petitioning for writ of certiorari. See February 4, 1998 Memorandum & Order (finding that the Assessment was timely made and that the government had the better part of 1990 in which to

[4] Quick assessment procedures may also be used for "deficiencies or current additional and delinquent taxes where receivership proceedings are involved or imminent." IRM 5314.1 (1)(b).

make it). According to this calculation, the government had 140 days to make the assessment. I agree with the Kosses that their situation does not appear to have warranted a break from the collection routine, and the government has provided no explanation for why the Kosses qualified for either a quick or prompt assessment. Moreover, the government has proffered no documentation as to how or why a quick or prompt assessment was made.

More importantly, Plaintiffs argue that the government has produced no evidence that manual notice was in fact made, beyond the entrance of code numbers on the IMF transcript.[5] While the Certificate was sufficient to establish a rebuttable presumption that computer-generated notice had been sent, it did not contain the extremely relevant suppression code, and is therefore not due any presumption of correctness. Moreover, the presumption does not apply to manual notice, as it is based upon the apparent regularity of computer commands, and the lack of a paper record for computer-generated, as opposed to manual, notice. See e.g., Gentry v. United States, 962 F.2d 555 (6th Cir. 1992); Geiselman v. United States, 961 F.2d 1 (1st. Cir. 1992); Pursifull v. United States, 849 F.Supp. 597 (S.D. Ohio 1993), aff'd 19 F.3d 19 (6th Cir. 1994).

[5] I agree that the value of Felthaus' testimony is diminished in light of his previous errors in interpreting the Certificate, and his unfamiliarity at the hearing with the Suppression Code.

Aside from the document locator number, the Kosses' Individual Master File ("IMF") is bereft of any evidence that notice was manually made. (Siegert testimony, NT at 17; Felthaus testimony, NT at 7).[6] Based upon the testimony and the parties' submissions, I find that such evidence would include either a copy of the manual notice or a receipt for certified mail, or testimony of the agent who delivered the notice, or, perhaps, notes or testimony from the agent or officer who initiated or supervised manual assessment.

I agree with the Kosses that the government has shown only that the code on the Kosses' IMF indicates that a revenue agent should have manually posted the notice, not that one actually did. In light of the government's failure to offer evidence that timely notice was actually made, I will enter judgment for the Kosses.

An order follows.

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[6] Although Siegert was offered as a witness knowledgeable in IRS procedures, she was unable to explain actual procedures for giving manual notice.

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O R D E R

AND NOW, this 8th day of May, 1998 upon consideration of Defendant's Motion for Summary Judgment; Plaintiff's Cross-Motion for Summary Judgment (Dkt. # 20); the testimony at the April 6, 1998 hearing; and the parties' pleadings, it is hereby **ORDERED** that Defendant's Motion for Summary Judgment is **DENIED**, and Plaintiffs' Motion for Summary Judgment is **GRANTED**, in accordance with the accompanying Memorandum.

It is further **ORDERED** that all Internal Revenue Service liens for Tax Year 1974 attaching to the property and rights to property, both real and personal of Plaintiffs are null and void, and that Defendant shall release all notices of tax liens filed against Plaintiffs relating to their 1974 individual income tax liability.

The Clerk shall mark this case **CLOSED**. Each side to bear its own costs.

BY THE COURT:

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RONALD L. BUCKWALTER, J.