

ILLINOIS INDEPENDENT
TAX TRIBUNAL

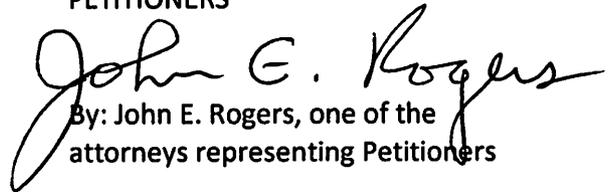
John E. and Frances L. Rogers,)	
)	
Petitioners,)	
)	14 TT 153
v.)	
)	
ILLINOIS DEPARTMENT)	Judge Brian F. Barov
OF REVENUE,)	
)	
Respondent.)	

NOTICE OF MOTION

To: Jennifer Kieffer
Special Assistant Attorney General
Illinois Department of Revenue
100 West Randolph Street, 7-900
Chicago, IL 60601
312-814-1

PLEASE TAKE NOTICE that on May 25, 2015, petitioners filed the attached Motion For Rehearing in the above captioned case with the Illinois Independent Tax Tribunal, 160 N. LaSalle, Room N506, Chicago, Illinois.

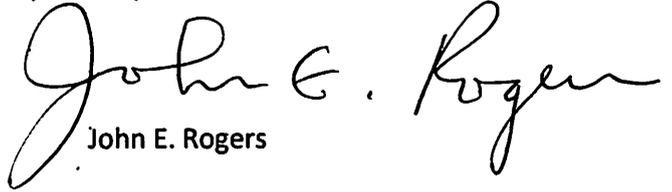
JOHN E. AND FRANCES L. ROGERS,
PETITIONERS


By: John E. Rogers, one of the
attorneys representing Petitioners

Rogers & Associates
2525 Gross Point Road
Evanston, IL 60201
312-376-1910
FAX 312-275-8180
jer@jerogers.com
ARDC No. 2365677

PROOF OF SERVICE

I, John E. Rogers, an attorney, state that I have this 25th day of May, 2015, served the foregoing Notice of Motion and the attached Motion upon the person to whom said Motion is directed, by email to Jennifer.Kieffer@Illinois.gov.


John E. Rogers

ILLINOIS INDEPENDENT
TAX TRIBUNAL

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OF REVENUE,)	
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MOTION FOR REHEARING

Petitioners, John E. Rogers and Frances L. Rogers, husband and wife, (“petitioners”) hereby move the Illinois Independent Tax Tribunal for a rehearing of these proceedings for failure to maintain a written transcript of the hearing which occurred on February 7, 2015, as reported by the court to the parties on February 11, 2015, by email.

The Illinois Tax Tribunal Act provides for an official court reporter in 735 ILCS 1010/1-40. 735 ILCS 1010/1-75 requires a stenographic transcript of the hearing before the court be included in the “record”. Section 1-75 uses the word “shall” and compliance is not discretionary with the tribunal.

A written transcript of the hearing is required for petitioners to file their appeal with the First District Court of Appeals which has appellate jurisdiction in this case. If no written transcript is maintained by the ITT then for this proceeding there is no third party to provide a bystanders’ report of the approximately one hour of oral argument which transpired at the

hearing that was held. Even if there were such a report it would be unreliable no matter who provided it.

A written transcript is also required by the Illinois Administrative Procedures Act, 5 ILCS 100/10-35 for a record to be complete.

Additionally, within ten days of the hearings the IRS Appellate Division renewed its promise of a hearing on the merits of the 2002 mere computational adjustment. See Exhibit A hereto. That notice together with the original notice of hearing dated December 14, 2014, Exhibit B, makes clear that there is an open issue of fact yet to be determined, i.e. the petitioners' adjusted gross income for 2002. Another open issue of fact is the split of adjusted gross income between Mr. and Mrs. Rogers pursuant to Mrs. Rogers' extant petition for 2002 innocent spouse relief. This honorable tribunal cannot issue a summary judgment order in the face of such open issues of fact.

Lastly, petitioners will be filing a Petition for Mandamus against the IRS in the Northern District of Illinois requesting that the court order the IRS to conduct the hearing on the petitioners' 2002 income tax liability and the issuance of a final notice of determination which will empower the United States Tax Court with jurisdiction in the matter which it previously has ruled it does not have without a final notice of determination as to petitioners' 2002 federal adjusted gross income among other matters.

LEGAL ARGUMENT

Illinois Income Tax is imposed on the petitioners for 2002 based on their federal adjusted gross income as adjusted by Illinois modifications. That very issue is now pending at IRS Appeals. See Exhibits A and B.

The "Notice" was issued by the Department on June 9, 2014, assessing tax in the amount of \$72,000 and interest in the amount of \$37,153.56 for the taxable period 2002. Petitioners understand that the "Notice" (attached to the Petition) was based on a communication from the IRS to which petitioners are not privy. Petitioners have not enjoyed discovery in this case to determine the validity of the respondent's purported IRS statements of finality.

The IRS refused to respond to petitioners' numerous requests for a hearing on the merits of the matter as provided for by federal statutes and due process. The petitioners are currently filing a complaint for mandamus against the IRS to timely hold the hearing on the merits and issue a final notice of determination of petitioners' federal adjusted gross income for 2002.

Jurisdiction and final determination of petitioners' 2002 adjusted gross income lies with the United States Tax Court once IRS Appeals has issued a final notice of determination for petitioners' adjusted gross income for the 2002 tax year. Therefore it is appropriate for this court to stay proceedings in this case at least until a final determination is made at the federal court level.

Petitioners believe that five key factors witness this courts grant of the stay requested:

1. Petitioners should win on the merits in United States Tax Court for the reasons set forth in their original Tax Court Petition. 735 ILCS 5/3 – 111(a)(1)(iii).
2. The State of Illinois will not be irreparably harmed because it receives money with interest when the matter is finally resolved. Indeed petitioners have offered to settle the matter and pay the State of Illinois the correct amount of tax at 3% of \$375,000 plus interest. \$375,000 is 75% of the actual loss claimed by petitioners on their 2002 income tax return. 735 ILCS 5/3 – 111(a)(1)(ii).
3. There no other interested parties to whom the stay could injure. 735 ILCS 5/3 – 111(a)(1)(ii).
4. The stay would promote public policy that the correct determination of petitioners' 2002 adjusted gross income be made and that the State of Illinois not be unjustly enriched at the expense of petitioners. 735 ILCS 5/3 – 111(a)(1)(iii).
5. A refund action against a bankrupt respondent to correct this court's error is no remedy.

All five factors weigh heavily in favor of a stay. A stay is an injunction appealable by the State of Illinois to the appellate court of Illinois. Such appeal would not be well received for the reasons stated in this motion.

Illinois common law also authorizes this court to issue a stay and requires that a stay be issued. In *Khan v. BDO Seidman, LLP et. al.*, 2012 IL App (4th) 120359, 977 NE2d 1236, 365 IllDec 137, the Illinois appellate court ruled that when the same or overlapping issues were already on appeal to the Supreme Court of Illinois it was appropriate to stay proceedings at the trial court level until the final determination was made by the Supreme Court. Petitioners believe that a

comparable situation of duality of jurisdiction with a superior court on the merits arises in this case. The Khan court also relied on existing case law found in *Shaw v. Citizens State Bank of Shipman*, 185 Ill App. 3d 79 (1989) in which the appellate court ruled that a stay of proceedings until resolution of an appeal to the Illinois Supreme Court was appropriate and not an abuse of discretion. The Khan court also relied on its prior decision in *Wiseman v. Law Research, Inc.*, 133 Ill. App. 2d 790 (1971) in enforcing the stay to avoid contradictory decisions.

Federal common law buttresses this court's authority to issue a stay in these proceedings. Federal law does not even require the other court's decision to be dispositive in order to justify a stay. See *Landis v. North American Company*, 299 U.S. 248, 254 (1936). Here the dispositive nature of the United States Tax Court hearing requires a stay of these proceedings at least until the Tax Court has ruled.

Petitioners are entitled to the stay based on the conduct of the State of Illinois. The Notice attempts to tax petitioners on "net income" of \$1,184,185 from Abingdon when they had not received any such income. Petitioners claim the appropriate tax result is the straight forward disallowance of 75% of petitioners' -\$495,000 reported loss from Abingdon in 2002. Petitioners offered to settle the case on that basis in written interchanges prior to issuance of the Notice. The State is proceeding on incorrect, misleading information from federal government clerks which has never been forced to withstand scrutiny.

The IRS did not audit the tax returns of the petitioners or of Abingdon for 2002 contrary to the statements made by respondent in the Notice. Only Wacker-Madison was audited. The IRS made no attempt to deal with the provisions of the Abingdon allocation of income and deductions set forth in the Abingdon operating agreement or otherwise, particularly allocations

of cash. The IRS accordingly allocated to petitioners cash income from Abingdon in which the petitioners never partook.

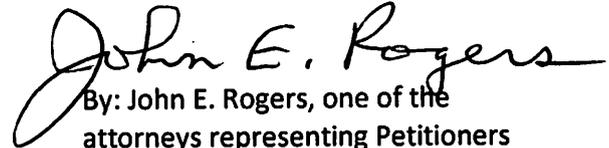
Petitioners pursued a Collection Due Process hearing at which the miscalculations of the IRS would be reviewed and corrections made. See the notice of hearing which the petitioners received over two years ago which is attached to the petition. Numerous telephone calls to the appeals officer in Fresno went unanswered. The IRS adjustments are not final until the hearing is held and the appeals officer issues a notice of final determination which is appealable to the US Tax Court.

Lastly, the stay of proceedings enables petitioners to pursue their sole remedy at law, their petition to the United States Tax Court.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons Petitioners respectfully request that this honorable court stay all proceedings in this case pending a final determination of petitioners 2002 adjusted gross income by IRS Appeals and the United States Tax Court in a newly filed tax court petition.

JOHN E. AND FRANCES L. ROGERS,
PETITIONERS


By: John E. Rogers, one of the
attorneys representing Petitioners

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2525 Gross Point Road
Evanston, IL 60201
312-376-1910
FAX 312-275-8180
jer@jerogers.com
ARDC No. 2365677

(A)

Internal Revenue Service
Appeals Office
P.O. Box 24018
Fresno, CA 93779-4018

Date: February 18, 2015

JOHN E & FRANCES L ROGERS
162 ABINGDON AVE
KENILWORTH IL 60043

Department of the Treasury

Person to Contact:

Monica L Garcia
Employee ID Number: 1000158382
Tel: 559-456-5750
Fax: (855) 248-3520
Contact Hours: 7:00 a.m. - 2:30 p.m.

Refer Reply to:

AP:CO:FRC:MLG

In Re:

Collection Due Process - Levy

Tax Period(s) Ended:

12/2002

Dear Mr. & Mrs. Rogers:

We have received your Form 12153, Request for a Collection Due Process Hearing. We are transferring your file to your nearest Appeals office to address the liability issues you raise. They will contact you to schedule your hearing. We feel that office can better assist you in resolving your issues. The newly assigned Settlement Officer will evaluate your issues and will contact you with a scheduled hearing. The Officer will consider the facts in your case and try to resolve any dispute you may have.

Please be prepared to submit your supporting documents to substantiate the liability issues set forth on the Form 12153.

You may contact me at the number listed above with any questions about the Appeals process or you may research our website at www.irs.gov/appeals for more information.

Sincerely,



Monica L Garcia
Settlement Officer

(B)

Internal Revenue Service
Appeals Office
P.O. Box 24018
Fresno, CA 93779-4018

Department of the Treasury

Person to Contact:
Monica L Garcia
Employee ID Number: 1000158382
Tel: (559) 456-5750
Fax: (855) 248-3520
Contact Hours: 7:00am -2:30pm

Date: December 22, 2014

JOHN E & FRANCES L ROGERS
162 ABINGDON AVE
KENILWORTH IL 60043

Refer Reply to:
AP:FW:FRC:MLG
In Re:
Collection Due Process - Levy
Social Security or Employer
Identification Number:
xxx-xx-8779
Tax Period(s) Ended:
12/2002

Appeals Received Your Request for a Collection Due Process Hearing

Dear Mr. & Mrs. Rogers:

Appeals received your request for a Collection Due Process (CDP) Hearing in March of 2012. Your case was previously assigned to prior Settlement Officers who are no longer a part of our office. I have been assigned to your case. Please accept my apologies for the significant delay in your case. There has been a prior review of your account by the Service, which may have affected the Appeal; therefore, your case was being monitored by the prior Settlement Officers.

I have scheduled a telephone conference call for you both on February 9, 2015 at 8:30 a.m. Pacific Time. This call will be your primary opportunity to discuss with me the reasons you disagree with the collection action and/or to discuss alternatives to the collection action.

I will call you at (847) 853-9646 as indicated on your CDP request.

If this time is not convenient for you, the phone number has changed, or you would prefer your conference to be held by face-to face at the Appeals office closest to your current residence, the school you attend or your place of employment or if you are a business, your business address, or by correspondence, please let me know by January 12, 2015. I will discuss with you **eligibility requirements** and if there are any offices that may be more convenient for you (e.g., Appeals office nearest place of employment or school) when you contact me.

Your CDP hearing request regarding proposed levy action on the following tax period was timely: Form 1040, for tax period December 31, 2002. During your hearing, and until any appeals become final for these tax periods, the legal collection period is suspended and no levy action may be taken.

Our office is separate from, and independent of, the IRS office taking the action that you disagree with. We review and resolve disputes in a fair and impartial manner by weighing the facts according to the law and judicial decisions.

During the hearing, I must consider:

- Whether the IRS met all the requirements of any applicable law or administrative procedure
- Any legitimate issue(s) you wish to discuss. These can include:
 1. Collection alternatives to levy such as full payment of the liability, installment agreement, offer in compromise or temporary suspension of collection action if the action imposes a hardship condition. Although they may not be considered an "alternative" to a notice of lien filing, these collection options may also be discussed at a lien hearing.
 2. Challenges to the appropriateness of collection action. If this is a lien hearing, you may ask us to determine if the notice of lien filing was appropriate and if you qualify for a lien withdrawal or other lien options.
 3. Spousal defenses, when applicable.
 4. Whether you owe the amount due, but only if you did not receive a statutory notice of deficiency or have not otherwise had an opportunity to dispute your liability with Appeals.

In considering your case, I will balance the IRS' need for efficient tax collection and your legitimate concern that the collection action be no more intrusive than necessary

You are entitled to have your conference with an Appeals employee who has had no **prior involvement** with the tax periods at issue (other than a prior CDP hearing), either in Appeals or *in the Compliance (Collection or Examination) division*. I do not recall any previous involvement with these tax periods; however, if you believe I have had previous involvement, please call me immediately to discuss. If I have been involved but you would still like me to conduct your hearing, you may waive your right to have another Appeals employee consider your case.

Regarding the liability you are raising:

You may not be able to dispute the liability because pursuant to IRC § 6330(c)(2)(B) if you received a Statutory Notice of Deficiency or otherwise had an opportunity to dispute the liability, you may not raise as an issue the amount or existence of the underlying assessment. Based on my review of your account, you signed a waiver or agreement consenting to the assessment. I have requested the administrative file for further review.

Collection Alternative

Although you did not request a collection alternative, discussion of such will be addressed during the hearing if needed. In addition, you must have filed all federal tax returns to date. Please complete the following form in order to be considered for a collection alternative:

- A signed, completed Collection Information Statement (Form 433-A for individuals) and all **required attachments to substantiate your income and expenses** such as the last 3 months of current bank statements (showing all activity), earning statements, current

Profit/Loss statement, proof of expenses, etc. Please refer to Publication 1854 for instructions at www.irs.gov.

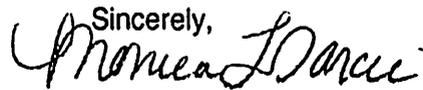
Please send me the items requested above by **January 12, 2015**. I cannot consider collection alternatives at your conference **without this information**. I am enclosing the applicable forms and a return envelope for your convenience.

At the conclusion of the hearing, we will issue a **determination letter** as required by law for the **tax periods for which your CDP hearing request was received timely**. If you do not agree with our determination you may appeal the case to the appropriate court. *We will provide* information about the appropriate court in your determination letter.

The Office of Appeals may ask the Collection function to review, verify and provide their opinion on any new information you submit. You will receive any comments, and you will have an *opportunity* to respond

If you do not participate in the conference or respond to this letter, the determination letter that we issue will be based on your CDP request, any information you previously provided to this office about the applicable tax periods, and the Service's administrative file and records.

Please contact me with any questions or concerns you have regarding this letter or the CDP procedures. My telephone number is listed above.

Sincerely,


Monica L Garcia
Settlement Officer

Enclosures:
Form 433-A
Envelope