NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1638

BARRY CHARLES PORTNOY,
Appellant

v.

COMMISIONER OF INTERNAL REVENUE

On Appeal from the United States Tax Court
(IRS No. 13701-13L)
Tax Court Judge: Ronald L. Buch

Submitted Under Third Circuit L.A.R. 34.1(a) on June 6, 2024

Before: HARDIMAN, PORTER, and AMBRO, *Circuit Judges*.

(Filed: August 9, 2024)

OPINION*

PORTER, *Circuit Judge*.

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Barry Portnoy appeals the Tax Court's order awarding summary judgment to the Commissioner of Internal Revenue (the "Commissioner"), thereby sustaining the Commissioner's notice of intent to levy for unpaid trust fund recovery penalties and notice of federal tax liens against him. Because the Commissioner's motion for summary judgment was filed during an automatic stay of the Tax Court proceedings triggered by Portnoy's contemporaneous bankruptcy proceedings, we will vacate and remand.

I

Due to business troubles, Barry Portnoy's business was delinquent on over one million dollars in employee payroll taxes. As a result, the IRS held him personally liable for these taxes under I.R.C. § 6672. When Portnoy did not pay his tax assessments, the agency issued a tax lien. The parties dispute various issues, including how much notice was afforded to Portnoy during years of tax proceedings and appeals, but the fact that Portnoy's notice of proceeding in bankruptcy court preceded the Commissioner's motion for summary judgment in the Tax Court resolves this case.

The Commissioner filed the summary judgment motion on August 15, 2014 in the effort to collect on Portnoy's tax obligation, more than two weeks after Portnoy filed a bankruptcy petition triggering the Bankruptcy's Code automatic stay. 11 U.S.C. § 362(a)(1). On September 3, 2014, the Tax Court learned of the bankruptcy petition and issued an order staying all proceedings until the conclusion of the bankruptcy, though it continued to request status reports from the parties for the next several years. After the bankruptcy concluded in April 2021, the Tax Court lifted its stay and issued an order granting the Commissioner's previously filed motion for summary judgment. Portnoy appealed.[1]

II

We exercise plenary review over a tax court's grant of summary judgment. *Duquesne Light Holdings, Inc. & Subsidiaries v. Commissioner of Internal Revenue*, 861 F.3d 396, 403 (3d Cir. 2017). "[A]nd the summary judgment standard in Tax Court Rule 121 is identical to that contained in Federal Rule of Civil Procedure 56[.]" *Id.* (citation omitted).

The Commissioner's summary judgment motion has a fatal defect. Summary judgment motions filed after the automatic stay are void. *Constitution Bank v. Tubbs*, 68 F.3d 685, 691–92 (3d Cir. 1995). "Once a stay is in effect, without relief from the bankruptcy court, 'the parties themselves [can] not validly undertake any judicial action material to the . . . claim against' the debtor." *Id.* at 692 (quoting *Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1207 (3d Cir. 1991)) (alterations in original). This prohibition on judicial action "includes the filing of motions, which are void *ab initio*[.]" *Id.* So, the Commissioner acted when his hands were tied. The Commissioner's motion for summary judgment is therefore void.

Resisting *Tubbs*' clear command, the Commissioner argues that by providing Portnoy thirty days from the termination of his bankruptcy proceedings to respond, the Tax Court "treated the motion as filed anew." Comm'r Supp. Br. at 2. But the Tax

[1] The Tax Court had jurisdiction under I.R.C. § 6330(d)(1). We have jurisdiction over Portnoy's appeal under I.R.C. § 7482(a)(1).

Court's treatment of its proceedings cannot change the effect of the automatic stay. Similarly, the Commissioner stresses that after Portnoy's bankruptcy concluded and the automatic stay was lifted, Portnoy repeatedly failed to respond to the Tax Court's orders. But whether the motion was void is logically prior to Portnoy's lackluster motion practice. Indeed, even if Portnoy had been diligent in responding to the Tax Court's orders, that would not change the status of the motion for summary judgment.

Second, the Commissioner argues that the greater power of the Tax Court to grant summary judgment sua sponte necessarily includes the lesser power of treating its post-bankruptcy orders as a summary judgment motion. Post-hoc recharacterizations of the Tax Court's order cannot cure a motion that was void from the start.

Third, the Commissioner stresses that Portnoy "failed to assert" the automatic stay. Comm'r Supp. Br. at 3. This argument eludes the fact that "[t]he stay is 'automatic' because it is triggered upon the filing of a bankruptcy petition regardless of whether the other parties to the stayed proceeding are aware that a petition has been filed." *Tubbs*, 68 F.3d at 691. Otherwise, the stay would be manual rather than automatic.

Finally, the Commissioner argues that the purpose of the automatic stay is not furthered by a remand at this late stage in the proceedings. We disagree. We explained in *Tubbs* that

> [t]he purpose of the automatic stay is twofold: (1) to protect the debtor, by stopping all collection efforts, harassment, and foreclosure actions, thereby giving the debtor a respite from creditors and a chance "to attempt a repayment or reorganization plan or simply be relieved of the financial pressures that drove him into bankruptcy;" and (2) to protect "creditors by preventing particular creditors from acting unilaterally in self-interest to obtain payment from a debtor to the detriment of other creditors."

Id. (quoting *Maritime*, 959 F.2d at 1204). The automatic stay's protection of the debtor would be eroded if a party in a parallel proceeding were permitted to file motions during its duration. And, at bottom, the Tax Court's proceedings are a "collection effort."

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Accordingly, we will vacate and remand the order of the Tax Court.