

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PETER DAND PRESCOTT & RITA DA SILVA)		
VINT,))	
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Petitioners,))	
)	
v.))	Docket No. 6648-13S.
)	
COMMISSIONER OF INTERNAL REVENUE,))	
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Respondent))	
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ORDER

The petition commencing the above-docketed case was filed on March 21, 2013, and seeks to dispute a notice of deficiency dated January 7, 2013, issued to petitioners with respect to the taxable year 2010. That notice determined a deficiency in income tax in the amount of \$1,841, premised principally upon the inclusion of additional wage and interest income reported to the Internal Revenue Service (IRS) by third-party payors. The wage income of \$3,913 constituted the largest part of the adjustment and had been reflected in a Form W-2, Wage and Tax Statement, issued by the Defense Finance and Accounting Service (DFAS) of the U.S. Department of the Army. In the petition, petitioners maintained that they received neither wages nor a Form W-2 from DFAS for 2010, as petitioner Peter Dand Prescott Vint had retired in 2008.

After respondent answered the petition on May 10, 2013, petitioners on June 3, 2013, filed a Motion To Dismiss, on the stated ground that “Respondent has the burden of proof of establishing that Petitioner received \$3913 in W2 wages from DFAS in 2010” and has failed to carry that burden. Respondent on July 10, 2013, then filed a Response to petitioners’ motion.

Petitioners’ motion, however, suggests a possible misunderstanding of the nature and implications of a dismissal in Tax Court practice. The dismissal of a Tax Court case is not the equivalent of “dismissal” of the underlying notice of deficiency or the determined deficiency in tax.

As recently explained by this Court in Settles v. Commissioner, 138 T.C. 372, 374 (2012):

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In the deficiency context, once a taxpayer has filed a petition with the Tax Court, the taxpayer cannot withdraw that petition. See Estate of Ming v. Commissioner, 62 T.C. 519 (1974). When the Tax Court dismisses a deficiency case for a reason other than lack of jurisdiction, we generally are required by section 7459(d) to enter a decision for the Commissioner for the amount of tax determined against the taxpayer in the notice of deficiency. Id. at 522. Rule 123(d) requires that a decision entered pursuant to a dismissal on a ground other than lack of jurisdiction operate as an adjudication on the merits of the taxpayer's case. [Fn. ref. omitted.]

The above result obtains in part because the rules regarding burden of proof in the Tax Court are essentially the converse of what is stated in petitioners' motion. As a general rule, the Commissioner's determinations are presumed correct, and the taxpayer bears the burden of proving error therein. Rule 142(a), Tax Court Rules of Practice and Procedure; Welch v. Helvering, 290 U.S. 111, 115 (1933). There exist, however, several exceptions that may modify the foregoing general rule.

One is section 7491 of the Internal Revenue Code (I.R.C.), with principles relevant to deficiency determinations set forth in subsection (a). Thus, section 7491(a)(1), I.R.C., may shift the burden to the Commissioner with respect to factual issues affecting liability for tax where the taxpayer introduces credible evidence, but the provision operates only where the taxpayer establishes that he or she has complied under section 7491(a)(2), I.R.C., with all substantiation requirements, has maintained all required records, and has cooperated with reasonable requests for witnesses, information, documents, meetings, and interviews. See H. Conf. Rept. 105-599, at 239-240 (1998), 1998-3 C.B. 747, 993-994.

In a similar vein, section 6201(d), I.R.C., states:

SEC. 6201(d). Required Reasonable Verification of Information Returns.--In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return filed with the Secretary under subpart B or C of part III of subchapter A of chapter 61 by a third party and the taxpayer has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by the Secretary), the Secretary shall have the burden of producing reasonable and probative information concerning such deficiency in addition to such information return.

Here, the early stage of the litigation means that the record at present consists of little more the pleadings and the motion and response now before the Court. As a consequence, petitioners have not yet had an opportunity to appear at trial or otherwise to submit evidence that all prerequisites for a shift of burden under either section 7491(a) or 6201(d), I.R.C., have been met.

Accordingly, it being clear that petitioners are not seeking to have a decision entered against them for the deficiency determined in the notice of deficiency, and therefore to preserve petitioners' opportunity to present evidence in support of their position, it is

ORDERED that petitioners' Motion To Dismiss, filed June 3, 2013, is denied.

(Signed) Robert N. Armen, Jr.
Special Trial Judge

Dated: Washington, D.C.
July 23, 2013