

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DAVID FRANKLIN & RONDA CHING DAY,)	
)	
Petitioner,)	
)	
v.)	Docket No. 1770-12 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

On June 21, 2013, the Court entered an Order of Dismissal and Decision dismissing this case for failure to properly prosecute. On July 18, 2013, the Court received from petitioners a document entitled Motion for Reconsideration and to Vacate, postmarked July 16, 2013. Because a motion so styled would constitute an improper joinder of two motions, *see* Rule 163¹, the Court directed that the submission be filed as petitioners’ Motion to Vacate Decision, and it was timely filed on July 18, 2013.

In their motion, petitioners contend that the decision dismissing this case should be vacated because “[b]oth the Court and respondent were provided written notice” that petitioner David Franklin Day (petitioner) “had to be out of the country on short notice mandated by his employer on the scheduled Trial Date.” While, as more fully discussed below, the Court is not persuaded that the foregoing description of the events leading up to the dismissal of this case is accurate, the Court will nonetheless exercise its discretion and, in the interests of justice, vacate the decision dismissing this case for failure to properly prosecute.

* * *

¹Rule references are to the Tax Court Rules of Practice and Procedure.

When this case was called from the calendar for the trial session of the Court in Honolulu, Hawaii, on Monday, June 10, 2013, the Court was unaware that petitioner had attempted to request a continuance the previous Friday by faxing a letter to the Court's headquarters in Washington, D.C. That is because petitioner faxed the letter to a telephone number that was provided to the parties for the exclusive purpose of transmitting Final Status Reports. The Standing Pretrial Order served on petitioners on January 8, 2013, advised them of that telephone number and its purpose, and further stated: "Only the Final Status Reports may be sent to this fax number; any other documents will be discarded."² When their case was called and petitioners were not present, counsel for respondent reported to the Court that petitioner had advised him the previous Friday that petitioner³ would be out of the country commencing that weekend for two weeks and that he intended to request a continuance from the Court. Respondent's counsel further reported that he had a copy of a June 7, 2013, letter that petitioner advised he would send to the Court. That copy was lodged in the Court's records on June 10, 2013.

In view of petitioners' failure to appear for trial, respondent filed a Motion to Dismiss for Lack of Prosecution at the June 10, 2013 calendar call. On June 21, 2013, the Court granted respondent's motion and entered a decision dismissing the case for lack of prosecution. In doing so, the Court noted that it had not received a request for a continuance from petitioners either before the trial date or as of June 21, 2013.⁴ The Court further observed that in any event, under Rule 133, requests

²Petitioner states in the Motion to Vacate that the telephone number to which he faxed the letter requesting a continuance was given to him by respondent's counsel. To the extent petitioner may be suggesting that respondent's counsel bears the responsibility of insuring that petitioner follows prescribed procedures for communicating with the Court, we reject that suggestion.

³Petitioner has at no point addressed the failure of petitioner Ronda Ching Day to appear for trial.

⁴As previously discussed, the reason the Court had not received a request from petitioners is now clear--the request was faxed to a telephone number that petitioners were advised in writing not to use for that purpose. A search of the Court's electronic records made subsequent to the filing of petitioners' Motion to Vacate revealed that a facsimile transmission was received from petitioner at 9:40 p.m. on Friday, June 7, 2013. That timing, even allowing for the time difference

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for continuances made 30 days or less prior to the date of trial⁵ are ordinarily deemed dilatory and will be denied unless the ground therefor arose during that period or there was good reason for not making the request sooner.⁶ The dismissal for failure to properly prosecute was also premised on petitioners' failure to file a pretrial memorandum and failure to respond to the Court's order to show cause or otherwise participate in the stipulation process.⁷ Both failures were contrary to the

(. . . continued)

between Hawaii and the District of Columbia, would render the request manifestly late when considered in relation to a trial date of 10:00 a.m. on Monday, June 10, 2013. As discussed hereinafter, petitioner's explanation for the timing of his request is not persuasive.

⁵The Notice Setting Case for Trial, scheduling petitioners' trial for the Trial Session beginning on June 10, 2013, was served on petitioners by first class mail on January 8, 2013, approximately 5 months before the trial date.

⁶In his Motion to Vacate, petitioner offers the following as his reason for the 11th-hour continuance request: "Petitioner was unable to re-schedule a last minute requirement of his employer to leave the country or [sic] short notice to conduct business in Vietnam." In his June 7, 2013 letter, however, petitioner describes the circumstances precluding his appearance for trial somewhat differently: "I have had a prior commitment with the University of Hawaii to teach an MBA program in Vietnam for the period June 11 through June 22; * * * I had hoped to be able to get the course dates shifted or another professor to teach the course and have been making efforts to do that so as not to interfere with the Trial date--I have just confirmed this week that neither of those options are possible". Comparing the two, we are persuaded that the June 7 description is the more accurate one. Consequently, we are not persuaded that the ground for the continuance first arose during the 30 days preceding the trial date or that there was good reason for not making the motion sooner than petitioner attempted to make it. Accordingly, sufficient grounds exist in this case to deny a continuance.

⁷With respect to the failure to respond to the Court's order to show cause or otherwise participate in the stipulation process, petitioner argues in the Motion to Vacate that the proposed stipulation of facts "looked acceptable to Petitioner * * * and there was no need to waste time filing unnecessary papers." However, Rule 91(f) and the Court's order to show cause both expressly required an affirmative response from petitioners. Petitioners' failure to respond frustrated respondent's efforts to expeditiously identify the disputed factual issues in the case.

Court's orders and Rules and evidenced a neglect of petitioners' obligation to participate in the efficient resolution of their claims.

Nevertheless, dismissal of a case is a harsh sanction and trial courts should consider less drastic sanctions than dismissal when they are available. See e.g., Edelson v. Commissioner, 829 F.2d 828, 831 (9th Cir. 1987); Henderson v. Duncan, 779 F.2d 1421, 1434 (9th Cir. 1986); Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981). While petitioner's conduct of this litigation thus far is not flawless, we are now satisfied that his (and his co-petitioner's) failure to appear for trial on June 10 did not evidence a disregard of their obligations to pursue their claims. We are also satisfied that an alternative to dismissal exists. Petitioner--recognizing that his failure to appear at the trial set for June 10 could postpone a trial in this case for an additional year if the trial were to be held in Honolulu--offered in his June 7, 2013 letter, and reiterates in his Motion to Vacate Decision, a willingness to have petitioners' case tried in any west coast city. As this is a collection case where prompt resolution is especially important, petitioner's suggestion of an alternate place of trial offers a means to minimize the delays that would otherwise arise from his untimely disclosure of his commitments conflicting with the original trial date. In these circumstances, the Court will vacate its decision of dismissal and, as a less drastic alternative to dismissal, set this case for trial at the Court's trial session in Los Angeles, California, commencing September 9, 2013.

On the basis of the foregoing, it is

ORDERED that petitioners' Motion to Vacate Decision is granted and the Court's Order of Dismissal and Decision entered June 21, 2013 is hereby vacated and set aside. It is further

ORDERED that respondent's Motion to Dismiss for Lack of Prosecution is hereby denied. It is further

ORDERED that the place of trial is changed from Honolulu, Hawaii to Los Angeles, California. It is further

ORDERED that this case is calendared for trial at the Court's trial session scheduled to commence at 10:00 a.m. on September 9, 2013, in Room 1167, Edward R. Roybal Center & Fed. Bldg., 255 E. Temple Street, Los Angeles, CA 90012. It is further

ORDERED that the Court's Standing Pretrial Order dated January 8, 2013 remains in full force and effect except insofar as it references June 10, 2013, as the date of the trial session at which this case will be tried.

This order constitutes official notice of its contents to the parties.

(Signed) Joseph H. Gale
Judge

Dated: Washington, D.C.
July 29, 2013