

**UNITED STATES TAX COURT  
WASHINGTON, DC 20217**

RIVKA FAECHER, )  
 )  
 Petitioner, )  
 )  
 v. ) Docket No. 16049-12.  
 )  
 COMMISSIONER OF INTERNAL REVENUE, )  
 )  
 Respondent )

**ORDER TO SHOW CAUSE**

This case was called from the calendar for the New York, New York trial session on September 30, 2013. There was no appearance by or on behalf of petitioner. Respondent’s counsel appeared and lodged with the Court a facsimile of a stipulated decision signed by both parties. A stipulated decision with original signatures of petitioner (dated September 2, 2013) and respondent’s counsel (dated October 17, 2013) was received by the Court on October 21, 2013.

The stipulated decision provides that there are penalties due from petitioner for taxable years 2006, 2007, and 2008, under the provisions of sec. 6662(a), in the amounts of \$200, \$400, and \$400, respectively.<sup>1</sup> The amounts of the penalties indicate that they are premised on understatements of tax for 2006, 2007, and 2008, of \$1,000, \$2,000, and \$2,000, respectively. The amounts of those understatements are the same amounts as the amounts of the deficiencies stipulated for the respective years which, the stipulated decision states, “represent a recapture of the Additional Child Tax Credit.” The notice of deficiency lists the tax shown on the taxpayer’s return for each taxable year as \$0.

Section 6662 imposes a penalty equal to 20% of any underpayment of tax attributable to negligence or a substantial understatement of income tax. Secs. 6662(a), (b)(1), (b)(2). An underpayment of tax is defined as the excess of the amount of income tax imposed over the sum of the “amount of tax shown as the

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<sup>1</sup>Section references are to the Internal Revenue Code, as in effect for the years in issue.

tax by the taxpayer on his return” and any tax previously assessed (or collected without assessment), less any rebates. Sec. 6664(a); sec. 1.6664-2(a), Income Tax Regs. The amount of income tax imposed is the amount of tax imposed under subtitle A for the taxable year less certain credits and payments not relevant here. Sec. 1.6664-2(b), Income Tax Regs. The “amount of tax shown as the tax by the taxpayer on the return”, for purposes of computing the section 6662(a) penalty, is reduced by some refundable credits claimed, including the Additional Child Tax Credit, but not below zero. See Rand v. Commissioner, 141 T.C. \_\_\_, \_\_\_ (slip op. at 33) (Nov. 18, 2013). The stipulated decision that has been submitted computes the section 6662(a) penalty for each year in a manner inconsistent with the holding in Rand v. Commissioner, supra.

Because the stipulated decision was executed by the parties before the Court issued its opinion in Rand, the Court is concerned that imposition of penalties in this case may not be appropriate. If the understatements for the years in issue were computed in accordance with Rand, they--and the resulting accuracy-related penalties--would all be \$0.

Section 7491(c) provides that “the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty \* \* \* imposed by this title [Title 26].” To meet this burden of production, “the Commissioner must come forward with sufficient evidence indicating that it is appropriate to impose the relevant penalty.” Higbee v. Commissioner, 116 T.C. 438, 446 (2001); see also H.R. Conf. Rep. 105-599, at 241 (1998), 1998-3 C.B. 747, 995. Consequently, the Court will direct respondent either to concede the accuracy-related penalties and move that the stipulated decision be treated as a stipulation of settled issues with respect to the remaining issues in the case, or show cause why he has satisfied his burden of production under section 7491(c) that the imposition of section 6662(a) penalties in this case is appropriate.

In consideration of the foregoing, it is

ORDERED that, no later than January 6, 2014, respondent shall either (1) concede the section 6662(a) penalties determined for the years at issue and move that the stipulated decision submitted on October 21, 2013, be treated as a stipulation of settled issues with respect to the remaining issues in this case; or

(2) show cause why he has satisfied his burden of production under section 7491(c) that the imposition of section 6662(a) penalties in this case is appropriate.

**(Signed) Joseph H. Gale**  
**Judge**

Dated: Washington, D.C.  
November 21, 2013