

UNITED STATES TAX COURT
WASHINGTON, DC 20217

MN

ASHLEY JEFFREY PONTICELLO,)
)
Petitioner,)
)
v.) Docket No. 15483-13S.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

When this case was called from the calendar of the Court's Miami, Florida trial session on March 31, 2014, there was no appearance by or on behalf of petitioner. Counsel for respondent appeared and filed a Motion to Dismiss for Lack of Prosecution.

The Court may dismiss a case at any time and enter a decision against the taxpayer for failure properly to prosecute his case, failure to comply with the Rules of this Court or any order of the Court, or for any cause which the Court deems sufficient. Rule 123(b)¹; Edelson v. Commissioner, 829 F.2d 828, 831 (9th Cir. 1987); McCoy v. Commissioner, 696 F.2d 1234, 1236 (9th Cir. 1983). In addition, the Court may dismiss a case for lack of prosecution if the taxpayer inexcusably fails to appear for trial and does not otherwise participate in the resolution of his claim. Rule 149(a); Brooks v. Commissioner, 82 T.C. 413 (1984), aff'd without published opinion, 772 F.2d 910 (9th Cir. 1985).

A Notice Setting Case for Trial (Trial Notice) was served on petitioner on October 30, 2013, setting trial for March 31, 2014. Petitioner failed to appear for trial on that date, in direct violation of the Trial Notice, which warned that "Your failure to appear may result in dismissal of the case and entry of decision against you."

¹Rule references are to the Tax Court Rules of Practice and Procedure and section references are to the Internal Revenue Code, as in effect for the year in issue.

SERVED Apr 21 2014

Respondent represents in his motion that his Appeals Division contacted petitioner by mail on September 18, 2013, and October 29, 2013, to request information concerning the adjustments in the notice of deficiency and that petitioner did not supply the information. He further represents that his counsel contacted petitioner by mail on February 14, 2014, and that petitioner again failed to provide requested documents. He further represents that his counsel attempted on March 13, 2014, March 21, 2014, and March 28, 2014, to contact petitioner by telephone at the number listed on the petition and that petitioner did not respond.

As petitioner's failure to appear for trial is not excused, we conclude that his case should be dismissed for lack of prosecution.

All of the material allegations set forth in the petition in support of the assignments of error have been denied in respondent's answer. Petitioner has not claimed, or shown eligibility for, any shift in the burden of proof pursuant to section 7491(a). Accordingly, the burden of proof rests with petitioner concerning any error in the determination of the deficiencies, and petitioner has adduced no evidence in support of the assignments of error in the petition. We therefore sustain the deficiencies determined by respondent.

In the notice of deficiency, respondent also determined an accuracy-related penalty under section 6662(a) in the amount of \$1,103.40. The Commissioner generally bears the burden of production with respect to the liability of any individual for any penalty or addition to tax. Sec. 7491(c). However, we have held that where the taxpayer fails to state a claim with respect to a penalty or addition to tax, the Commissioner incurs no obligation to produce evidence in support of the individual's liability pursuant to section 7491(c), see Funk v. Commissioner, 123 T.C. 213, 216-218 (2004); Swain v. Commissioner, 118 T.C. 358, 364-365 (2002), at least where nothing in the record suggests the addition or penalty has been incorrectly computed.

Section 6662(a) imposes a penalty equal to 20 percent of any underpayment of tax attributable to, among other things, a substantial understatement of income tax or to negligence or disregard of rules or regulations. An underpayment of tax for this purpose is defined as the excess of the amount of income tax imposed over the sum of the "amount of tax shown as the 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 tax shown as the tax by the taxpayer on the return", for purposes of computing an underpayment of tax, is reduced by refundable credits claimed, but not below zero. See Rand v.

Commissioner, 141 T.C. __, __ (slip op. at 33) (Nov. 18, 2013). These refundable credits can, however, reduce the “amount shown as the tax by the taxpayer upon his return” below zero for purposes of calculating a deficiency. See sec. 6211(b)(4).

The amount of the deficiency for 2011 that respondent seeks and that we herein sustain (\$5,517) includes \$4,351 attributable to three refundable tax credits that were refunded to petitioner and disallowed in the notice of deficiency: (i) the American Opportunity Credit (\$1,000); (ii) the earned income credit (\$1,430); and (iii) the additional child tax credit (\$1,921). We accordingly find that the deficiency is in part attributable to the refunded tax credits. Those refunded credits did not offset an amount shown as tax by petitioner on the return; they only served to reduce the amount below zero. Consequently, they do not increase petitioner’s underpayment for 2011 for purposes of section 6664(a). Rand v. Commissioner, 141 T.C. at __ (slip op. at 33). Nonetheless, the section 6662(a) penalty of \$1,103 that respondent seeks has been calculated as 20 percent of the deficiency, even though under the Rand holding the deficiency and underpayment are not the same for petitioner. Where, as here, the record demonstrates that the penalty sought by respondent has been erroneously calculated, we conclude that respondent should not be relieved of his burden of production under section 7491(c), regardless of whether petitioner has stated a claim in the petition concerning the penalty.²

In view of the deficiency we sustain herein, the amount of income tax imposed for taxable year 2011 is \$1,166. The tax shown on petitioner’s return is \$0. Petitioner’s underpayment is thus \$1,166. The understatement of income tax is also \$1,166. See sec. 6662(d)(2)(A). That figure is not a substantial understatement, see sec. 6662(d)(1)(A), and respondent has offered no evidence to support a conclusion that the underpayment is attributable to negligence or any other factor listed in section 6662(b). We therefore conclude that the section 6662(a) penalty determined by respondent should not be sustained.

On the basis of the foregoing, it is

²In view of this conclusion, we find it unnecessary to decide whether the petition, filed by a pro se petitioner, should be interpreted as raising a claim of reasonable cause with respect to the penalty, given the petition’s averment of identity theft.

ORDERED that respondent's Motion to Dismiss for Lack of Prosecution is granted, and this case is herewith dismissed for lack of prosecution. It is further

ORDERED AND DECIDED that there is a deficiency in petitioner's 2011 income tax due of \$5,517. It is further

ORDERED AND DECIDED that there is no accuracy-related penalty due from petitioner for taxable year 2011 under the provisions of section 6662(a).

(Signed) Joseph H. Gale
Judge

ENTERED: **APR 21 2014**