

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DENNISON R. HEUER, JR.,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 5076-14.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioner and respondent a copy of the pages of the transcript of trial in the above case before Judge Kathleen Kerrigan at Philadelphia, Pennsylvania, on January 13, 2015, containing her oral findings of fact and opinion rendered at the conclusion of the trial session at which the case was heard.

In accordance with the oral findings of fact and opinion, a decision will be entered for respondent.

**(Signed) Kathleen Kerrigan
Judge**

Dated: Washington, D.C.
January 23, 2015

SERVED Jan 26 2015

Capital Reporting Company

3

1 Bench Opinion by Judge Kathleen Kerrigan

2 January 13, 2015

3 Dennison R. Heuer, Jr. v. Commissioner

4 Docket No. 5076-14

5 THE COURT: The Court has decided to render
6 the following as its oral findings of fact and
7 opinion, which shall not be relied upon as precedent
8 in any other case. This Bench Opinion is made
9 pursuant to the authority granted by section 7459(b)
10 of the Internal Revenue Code (Code) and Rule 152 of
11 the Tax Court Rules of Practice and Procedure.

12 Unless otherwise indicated, all section references
13 are to the Code in effect for the year in issue, and
14 all Rule references are to the Tax Court Rules of
15 Practice and Procedure.

16 By notice of deficiency dated January 6,
17 2014, respondent determined a deficiency of \$6,898
18 and a penalty pursuant to section 6662(a) of \$1,380
19 for tax year 2011.

20 Trial of this case was conducted on January
21 12, 2015, in Philadelphia, Pennsylvania. Petitioner
22 represented himself. Jonathan E. Behrens represented
23 respondent. The parties stipulation of facts and
24 attached exhibits were admitted into evidence. We
25 find the following facts:

Capital Reporting Company

4

1 FINDINGS

2 Petitioner resided in Delaware when he
3 filed the petition.

4 Petitioner had not reached the age of 59-
5 1/2 as of December 31, 2011. During tax year 2011,
6 petitioner received a distribution in the amount of
7 \$68,983 from his 401(k) qualified retirement plan.
8 ADP Inc. Retirement Services issued a Form 1099-R,
9 Distributions From Pensions, Annuities, Retirement or
10 Profit-Sharing, Plans, IRAs, Insurance Contracts,
11 etc., to- petitioner reporting a distribution of
12 \$68,983.

13 Petitioner filed his 2011 Federal income
14 tax return on November 13, 2012. He reported the
15 \$68,983 distribution from his 401(k) qualified
16 retirement plan on his 2011 Form 1040, U.S.
17 Individual Income Tax Return. Petitioner did not
18 report on his 2011 Form 1040 an additional tax equal
19 to 10% of the \$68,983 distribution from his 401(k).
20 Petitioner prepared his own tax return.

21 OPINION

22 In general, the Commissioner's determinations in
23 a notice of deficiency are presumed correct, and the
24 taxpayer bears the burden of showing that those
25 determinations are erroneous. Rule 142(a); INDOPCO,

Capital Reporting Company

5

1 Inc. v. Commissioner, 503 U.S. 79,84(1992); Welch v.
2 Helvering, 290 U.S. 111,115(1933). Pursuant to
3 section 7491(a), the burden of proof as to factual
4 matters may shift to the Commissioner under certain
5 circumstances.

6 We decide this case without regard to the
7 burden of proof. Accordingly, we need not decide
8 whether section 7491(a) applies in this case.

9 Insofar as section 7491(c) is concerned, we note that
10 pursuant to that section, the Commissioner bears the
11 burden of production with respect to any penalty,
12 addition to tax, or additional amount. Even if the
13 10% additional tax under sec. 72(t) is an "additional
14 amount" for which respondent bears the burden of
15 production, respondent has met such burden by
16 demonstrating that petitioner had not reached the age
17 of 59-1/2, the year in which he received the
18 distribution in issue. See Milner v. Commissioner,
19 T.C. Memo. 2004-111 n.2; H. Conf. Rept. 105-599, at
20 241 (1998), 1998-3 C.B. 747,995.

21 Section 72(t) imposes an additional 10% tax
22 on the amount of an early distribution from a
23 qualified retirement plan (such as a 401(k)401k) that
24 fails to satisfy one of the statutory exceptions of
25 section 72(t)(2). Petitioner has the burden of proof

Capital Reporting Company

6

1 regarding his entitlement to any of the exceptions
2 provided in section 72(t). See Matthews v.
3 Commissioner, 92 T.C. 351,361-2(1989), aff'd, 907
4 F.2d 1173 (D.C. Cir. 1990). We have repeatedly held
5 that we are bound by the list of statutory
6 exceptions. Arnold v. Commissioner, 111 T.C.
7 250,255(1998), Schoof v. Commissioner, 110 T.C. 1,11
8 (1998).

9 Petitioner contends that he made the
10 withdrawal from his 401(k) due to financial hardship.
11 He testified that by making the withdrawal he was
12 able to retain his employees and eventually sell his
13 company. He testified further that the new owners of
14 his company retained the employees. Without making
15 the withdrawal from his retirement account,
16 petitioner believed that he would be unemployed.

17 We have considered similar claims in the
18 past and have observed that there is ^{no}~~not~~ authority in KK
19 the Code, the legislative history, or caselaw for a
20 general financial hardship exception to the
21 imposition of the 10% additional tax on early
22 distributions. See Arnold v. Commissioner, 111 T.C.
23 at 255; Dollander v. Commissioner, T.C. Memo 2009-
24 187; Milner v. Commissioner, T.C. Memo 2004-111.
25 While we are sympathetic to petitioner's position,

Capital Reporting Company

7

1 the Court may not add an exception to section 72(t)
2 by judicial fiat and we are obliged to ~~the~~ apply the **KK**
3 law as written. See Iselin v. United States, -270
4 U.S. 245,250-51 (1926). Therefore, petitioner's
5 withdrawal from his retirement account is subject to
6 the 10% additional tax penalty.

7 Section 6662(a) imposes a penalty equal to
8 20% of the portion of the underpayment of tax
9 attributable to a taxpayer's negligence, disregard of
10 rules or regulations, or substantial understatement
11 of income tax. Sec. 6662(a),(b)(1),(2). Respondent
12 has determined that petitioner's underpayment for the
13 taxable year 2011 is attributable to a substantial
14 underpayment of income tax. There is a substantial
15 understatement of income tax if the amount of the
16 understatement exceeds the greater of 10% of the tax
17 required to be shown on the return or \$5,000. Sec.
18 6662(d)(1)(A). Petitioner's understatement of tax
19 was greater than \$5,000.

20 Section 6662(d)(2)(B) provides that an
21 understatement attributable to an item may be reduced
22 where the relevant facts were disclosed and the
23 taxpayer had a reasonable basis for treatment of that
24 item. Section 6664(c)(1) provides that the accuracy-
25 related penalty is not imposed on any portion of an

Capital Reporting Company

8

1 underpayment if the taxpayer can establish that he
2 acted with reasonable cause and in good faith.
3 Petitioner has the burden of proving reasonable cause
4 and good faith. See Higbee v. Commissioner, 116 T.C.
5 438,446-7(2001).

6 Petitioner prepared and filed his own tax
7 returns. This is not a situation of omission of
8 income or an exaggeration of deductions, but rather
9 the proper reporting of income governed by the Code,
10 the regulations, and the interpretation of the
11 relevant statutory provisions by numerous cases. On
12 the record before us, we are satisfied that
13 petitioner acted in good faith and with reasonable
14 cause with respect to that portion of the
15 underpayment relating to the 10% additional tax under
16 section 72(t). See Dollander v. Commissioner, T.C.
17 Memo 2009-187. Therefore, petitioner is not liable
18 for a penalty pursuant to section 6662(a).

19 We sustain the deficiency as determined by
20 respondent with the exception of the section 6662(a)
21 penalty, and a decision will be entered for
22 respondent.

23 This concludes the Court's oral Finding of
24 Fact and Opinion in this case.

25 (Whereupon, at 2:02 p.m., the above-entitled

Capital Reporting Company

9

1 matter was concluded.)

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25