

UNITED STATES TAX COURT
WASHINGTON, DC 20217

STEVEN L. ERTELT,)	
)	
Petitioner,)	
)	
v.)	Docket No. 10739-14 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER AND ORDER AND DECISION

This case is before us on petitioner’s Motion to Vacate or Revise Pursuant to Rule 162 and a Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161, each filed April 3, 2017.¹ In his motions, petitioner requests that the Court consider that respondent failed to verify that proper procedures were followed in the issuance of the notice of deficiency.² Petitioner specifically asserts that the notice of deficiency issued to him “was not issued by the Secretary or a duly authorized delegate of the Secretary as mandated by * * * [section] 6212.”

Procedural History

On May 12, 2014, petitioner filed a letter with the Court. By order dated May 23, 2014, the Court ordered petitioner to file a proper amended petition on or before July 7, 2014. Petitioner mailed a letter to the Court on July 8, 2014,

¹All Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code, as amended.

²The Court notes that the motions petitioner filed are substantially similar to motions filed in Kaebel v. Commissioner, T.C. Memo. 2017-37, Snodgrass v. Commissioner, T.C. Memo. 2016-235, and Goselin v. Commissioner, T.C. Dkt. No. 6293-14L (Mar. 10, 2017), each of which request the Court to take judicial notice of Muncy v. Commissioner, 637 F. App’x 276 (8th Cir. 2016), vacating and remanding T.C. Memo. 2014-251.

indicating he was confused by the Court's May 23, 2014, order. By order dated July 15, 2014, the Court recharacterized petitioner's letter as a motion for extension of time to file the amended petition and ordered the amended petition to be filed by August 5, 2014. The amended petition was filed August 8, 2014, challenging a notice of determination issued for 2008 and 2009 and alleging, among other things, that petitioner never received a notice of deficiency for the years in issue and therefore had not had an opportunity to challenge the underlying liability.

On January 13, 2015, we gave notice that this case would be tried at the Tax Court's San Francisco, California, session beginning June 15, 2015. On June 5, 2015, the parties filed a motion to submit this case without a trial under Rule 122 and a stipulation of facts. An order and decision entered July 24, 2015, vacated and set aside the submission of the case under Rule 122 and sustained the notice of determination. The Court explained that petitioner failed to produce evidence in support of issues on which he has the burden of proof and advised petitioner "that we might also infer that this proceeding was commenced primarily for delay and that a penalty not in excess of \$25,000 under section 6673 might be justified on a fuller record."

Petitioner thereafter filed a motion to vacate or revise pursuant to Rule 162 on August 24, 2015, arguing that he did not have an opportunity to challenge the underlying liability because no notices of deficiency were received and that no notices of deficiency were produced. Respondent filed a response to the motion to vacate on September 15, 2015. On September 18, 2015, the Court vacated the July 24, 2015, order and decision and remanded the case to the Office of Appeals for clarification of the record as to whether a statutory notice of deficiency for 2008 and 2009 was sent to petitioner's last known address. The September 18, 2015, order also reminded petitioner of the warning in the July 24, 2015, order and decision "of the possibility of a penalty not to exceed \$25,000 under Internal Revenue Code section 6673."

In response to the order dated September 18, 2015, respondent remanded the case to its Office of Appeals and a Supplemental Notice of Determination was issued on November 25, 2015, and filed as an exhibit in this case on December 16, 2015. The Supplemental Notice of Determination concluded that notices of deficiency for 2008 and 2009 were mailed to petitioner's last known address.

On January 28, 2016, we gave notice that this case would be tried at the Tax Court's San Francisco, California, session beginning June 20, 2016. Respondent

filed a motion for summary judgment on April 21, 2016, to which petitioner filed an objection on May 23, 2016. By order dated May 26, 2016, respondent's motion for summary judgment was denied because issues of fact remained regarding alleged defects in United State Postal Service Form 3877.

On May 31, 2016 petitioner filed a motion to remand arguing that the Office of Appeals "issued the supplemental notice of determination without performing the proper verification" that the notices of deficiency were mailed to petitioner's last known address. Respondent filed a pretrial memorandum on June 6, 2016, and on June 13, 2016, filed a response to petitioner's motion to remand. On June 14, 2016, the court denied petitioner's motion to remand.

On June 20, 2016, a trial was held and this case was submitted. Although the parties were to file simultaneous briefs on August 19, 2016, and respondent did so, petitioner filed a motion for extension of time to file his brief. Petitioner's request was granted and petitioner filed his brief on September 21, 2016. Petitioner also filed on September 21, 2016, a motion to reopen the record requesting the Court to take judicial notice of two undated screenshots of the U.S. Postal Service (USPS) website.

On March 1, 2017, the Court issued a Memorandum Findings of Fact and Opinion (T.C. Memo. 2017-41) holding that Settlement Officer (SO) Macaulay did not abuse her discretion in sustaining the proposed collection action set forth in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 for 2008 and 2009, dated April 7, 2014, and supplemented November 25, 2015. In the Memorandum Findings of Fact and Opinion, the Court warned petitioner "that he may expect a penalty in the future if he persists, despite our warning, in maintaining groundless positions or instituting or maintaining proceedings primarily for delay." [TCM p.20] The Court also entered a decision on March 1, 2017.

Discussion

I. Rule 161

Reconsideration under Rule 161 serves the limited purpose of correcting substantial errors of fact or law and allows the introduction of newly discovered evidence that the moving party could not have introduced, by exercise of due diligence, in the prior proceeding. Estate of Quick v. Commissioner, 110 T.C. 440, 441 (1998) (citing Westbrook v. Commissioner, 68 F.3d 868, 879-880 (5th Cir.

1995), aff'g per curiam T.C. Memo. 1993-634). The granting of a motion for reconsideration rests within the discretion of the Court, and we usually do not exercise our discretion absent a showing of unusual circumstances or substantial error. Estate of Quick v. Commissioner, 110 T.C. at 441; CWT Farms, Inc. v. Commissioner, 79 T.C. 1054, 1057 (1982), aff'd, 755 F.2d 790 (11th Cir. 1985). Petitioner has not demonstrated any unusual circumstances or substantial error in his motion or provided the Court with newly discovered evidence.

Reconsideration is not the appropriate forum for rehashing previously rejected legal arguments or tendering new legal theories to reach the end result desired by the moving party. Estate of Quick v. Commissioner, 110 T.C. at 441-442; Stoody v. Commissioner, 67 T.C. 643, 644 (1977). A motion for reconsideration is also not a proper mechanism to rectify a failure of proof at trial. See Estate of Quick v. Commissioner, 110 T.C. at 441-442; Vincentini v. Commissioner, T.C. Memo. 2009-255, aff'd, 429 F. App'x 560 (6th Cir. 2011). Because petitioner seeks to introduce a new legal theory that he did not argue in any of his previous filings with the Court--including his post-trial brief--his motion for reconsideration is without merit. Petitioner has failed to demonstrate unusual circumstances or substantial error to justify the relief he seeks in the motion.

II. Rule 162

The disposition of a motion under Rule 162 to vacate or revise a decision rests within the Court's discretion, and such motions generally will not be granted absent a showing of unusual circumstances or substantial error, e.g., mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or other reason justifying relief. See e.g., Rule 1(b) (cross-referencing the Federal Rules of Civil Procedure); Fed. R. Civ. P. 60(b); Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999, 1001-1002 (1978); Brewer v. Commissioner, T.C. Memo. 2005-10; Kun v. Commissioner, T.C. Memo. 2004-273. Petitioner has not demonstrated any grounds justifying the relief sought in his motion. Rather, petitioner seeks to introduce a new issue not raised in his pleadings, at trial, or on brief. A motion to vacate or revise is also inappropriate for this purpose. See Stoody v. Commissioner, 67 T.C. at 644. Because petitioner seeks to introduce a new issue not raised in his pleadings, at trial, or on brief, petitioner's motion is without merit under Rule 162. Petitioner has failed to show any exceptional circumstances that would justify the relief he seeks in his motion.

III. Judicial Notice

Nevertheless, for the sake of completeness, the Court will briefly address petitioner's requests that the Court take judicial notice of Muncy v. Commissioner, 637 F. App'x 276 (8th Cir. 2016), vacating and remanding T.C. Memo. 2014-251. In Muncy v. Commissioner, 637 F. App'x 276, the taxpayer argued that because the notice of deficiency issued to him had not been issued by a duly authorized delegate of the Secretary, it was null and void, and the Court lacked jurisdiction. The Tax Court held that the case did not involve the legitimacy of the notice of deficiency, that the lack of proper delegation of authority was not an issue, and that the taxpayer's arguments regarding the Court's jurisdiction were frivolous. Id. The U.S. Court of Appeals for the Eighth Circuit held that the Tax Court erred by "declining to address the legitimacy of the * * * [notice of deficiency]" and concluded that the record was too undeveloped for a determination to be made on the legitimacy of the notice. Id. at 277.

Muncy does not apply here. Unlike the taxpayer in Muncy, petitioner did not raise in his pleadings, at trial, or on brief the issue he has raised in these motions. Petitioner's case was before the Court on a notice of determination concerning collection action and in his amended petition petitioner alleged he never received of a notice of deficiency for the years in issue and "therefore has never had a chance to challenge the liability of the proposed tax." At trial and in his brief, petitioner's only argument was that respondent could not prove that he received the notice of deficiency, not that the notice of deficiency was improperly issued. See Rule 331(b)(4) ("Any issue not raised in the assignments of error shall be deemed to be conceded.").

Moreover, petitioner had multiple opportunities to raise the delegation of authority issue presented in Muncy and he failed to do so. The Eighth Circuit decided Muncy on March 2, 2016, and through and until the date of the decision in this case on March 1, 2017, petitioner filed several documents including an objection to respondent's motion for summary judgment, a motion to remand, a post-trial brief, and a motion to reopen the record, in addition to a trial that was held on June 20, 2016.

Despite petitioner's failure to timely raise the delegation of authority issue, we considered the issue and we agree with respondent that petitioner's arguments are without merit. Arguments concerning delegation of authority have been rejected and characterized as frivolous. Batsch v. Commissioner, T.C. Memo. 2016-140, at *16 (citing Winslow v. Commissioner, 139 T.C. 270, 274, 276

(2012); Roy v. Commissioner, T.C. Memo. 2012-246, at *15, *16 n.6; Grunstead v. Commissioner, 136 T.C. 455, 460-461 (2011)); see also Banister v. Commissioner, T.C. Memo. 2015-10, at *9, aff'd, 664 F. App'x 673 (9th Cir. 2016).³ In Banister, T.C. Memo. 2015-10, at *7, the taxpayer argued, among other things, that the notice of deficiency was invalid because it was not signed by an authorized person; the Court dismissed the taxpayer's arguments as frivolous and imposed a penalty under section 6673. On November 16, 2016, the Ninth Circuit, Banister, 664 F. App'x 673, affirmed the Court's decision and imposed an additional penalty under section 6673.

Regarding the opportunity to challenge the underlying liability, in its Memorandum Findings of Fact and Opinion, the Court concluded that "petitioner did not properly raise his underlying liabilities during the CDP hearing, and therefore he cannot dispute them in this proceeding." Ertelt v. Commissioner, T.C. Memo. 2017-41, at *18. However, the Court further observed that "in this proceeding petitioner has raised no meaningful dispute as to his underlying liabilities." Id.

IV. Section 6673 Penalty

Petitioner has ignored the Court's warnings and reminders in the order and decision entered July 24, 2015, the order dated September 18, 2015, and the Memorandum Findings of Fact and Opinion filed March 1, 2017. Despite these warnings, petitioner has persisted in protracting these proceedings and in so doing, he has convinced us that he has instituted these proceedings primarily for delay. He has wasted and continues to waste the time and resources of this Court and of respondent. It is apparent that mere warnings will not suffice to deter petitioner from this course of conduct. To effect the purpose of section 6673 to deter such conduct, see Bagby v. Commissioner, 102 T.C. 596, 614 (1994), we believe that imposition of penalty under section 6673 is appropriate.

³This case is appealable to the Court of Appeals for the Ninth Circuit. Accordingly, under Golsen v. Commissioner, 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971), this Court is not bound by the Eighth Circuit's decision in Muncy, but rather by the decisions of the Ninth Circuit.

Upon due consideration and for the above stated reasons, it is

ORDERED: That petitioner's Motion to Vacate or Revise Pursuant to Rule 162 filed April 3, 2017, is granted in that the Court's Order and Decision entered March 1, 2017, is vacated and set aside. It is further

ORDERED: That petitioner's Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161 filed April 3, 2017, is denied. It is further

ORDERED: That petitioner's motion to reopen the record filed September 21, 2016, is denied. It is further

ORDERED AND DECIDED: That respondent may proceed with the collection action as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 dated April 7, 2014, and as supplemented on November 25, 2015, upon which notices this case is based. It is further

ORDERED AND DECIDED: That, on the Court's own motion, petitioner shall pay to the United States a penalty in the amount of \$1,000 pursuant to I.R.C. section 6673(a).

**(Signed) Michael B. Thornton
Judge**

ENTERED: **MAY 19 2017**