

UNITED STATES TAX COURT
WASHINGTON, DC 20217

CECIL K. KYEI,)
)
 Petitioner,)
)
 v.) Docket No. 9118-12.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER

Now before us is the Commissioner’s “Motion for Entry of Decision” filed February 14, 2018 (ECF 48). We will deem the motion to be a motion to dismiss for lack of prosecution and for entry of decision in a reduced amount, and we will order the Commissioner to supplement his motion and order petitioner Cecil K. Kyei to respond.

Background

The IRS issued to Mr. Kyei notices of deficiency (“NODs”) dated January 12, 2012, that determined deficiencies of \$15,518 for 2008, \$12,765 for 2009, and \$26,148 for 2010, plus an accuracy-related penalty under section 6662(a) for each of the three years and an addition to tax under section 6651(a)(1) for 2008 (ECFs 1 & 22). On April 10, 2012, Mr. Kyei timely filed his petition in this Court, disputing those determinations.

Since April 2012 this case has been stayed multiple times by Mr. Kyei’s commencement of bankruptcy proceedings. On June 8, 2015, the parties filed a stipulation (ECF 20) reflecting a settlement of the case, and on June 25, 2015, the Court duly entered decision (ECF 23). However, on November 18, 2015, the Commissioner filed a motion to vacate (ECF 24), advising the Court that Mr. Kyei had filed a bankruptcy petition on November 17, 2014 (i.e., before June 2015,

when the parties filed their stipulation and the Court entered its decision). Because the automatic stay of 11 U.S.C. § 362(a)(8) had deprived this Court of jurisdiction to enter decision in this case, we vacated the decision by order of November 23, 2015 (ECF 25).

Mr. Kyei's latest bankruptcy petition was dismissed on April 4, 2017 (see ECF 40), and we set this case for trial at the Court's Atlanta trial session beginning January 22, 2018. On August 21, 2017, we served Mr. Kyei with notice of that trial date (ECF 41). On December 8, 2017, we served Mr. Kyei with a reminder of that trial date (ECF 43). On January 12, 2018, the Commissioner filed a motion for entry of decision (ECF 44). The motion as it appeared on the Court's electronic record was missing multiple pages. The motion requested "that the Court enter a decision in this case pursuant to the agreement of the parties and in accordance with the attached decision document" (i.e., ECF 23). The motion relied solely on the alleged agreement of June 2015 and not on any default or lack of prosecution under Rule 123(a) or (b). On January 16, 2018, we ordered that the motion would be heard at the trial session on January 22, 2018 (ECF 45).

Mr. Kyei failed to appear when his case was called on January 22, 2018.

By our order of January 26, 2018 (ECF 47), we ordered that the Commissioner's first motion for entry of decision was denied "without prejudice to the filing of a motion that is complete and that explains how an agreement entered into in June 2015 would not have been void by virtue of the automatic stay." We also ordered "that, no later than February 16, 2018, each of the parties shall make an appropriate filing, which shall include the party's recommendation as to further proceedings." Mr. Kyei has made no filing.

On February 14, 2018, the Commissioner filed a second motion for entry of decision (ECF 48). It asks us to enter decision in the amounts of tax stated in the NODs for 2008 and 2010 and in a lower amount for 2009 (i.e., \$7,830), and in lower amounts (but not zero) of penalties and addition to tax. Unlike his first such motion, it was complete, with no pages missing. Like the first motion, the second motion for entry of decision asks us to enter decision on the basis of the June 2015 agreement. However, the motion also states the following about Mr. Kyei's non-communication and non-cooperation in this case:

18. During the period that this case was not stayed by bankruptcy, respondent's counsel has written to petitioner three times requesting that he settle his case in the same manner that it was originally settled.

19. To date, respondent's counsel has not received a reply from petitioner.
20. Petitioner did not respond to the Court's Order of January 16, 2018, directing him to contact respondent's counsel regarding his case, nor did petitioner appear in Court on his trial date of January 22, 2018.
21. Petitioner's telephone number remains out of service.

Discussion

Settlement agreement

It appears that the ostensible June 2015 agreement is in fact not enforceable, because of the automatic stay. Despite our prior order, the Commissioner has not addressed this issue nor attempted to show whether the agreement is void or voidable, see In re Albany Partners, Ltd., 749 F.2d 670, 672 (11th Cir. 1984); see generally Easley v. Pettibone Michigan Corp., 990 F.2d 905, 909-912 (6th Cir. 1993) (discussing the whether violations of the automatic stay are void or voidable), and we will not attempt to explore this issue sua sponte. We therefore will deny the motion insofar as it asks for entry of decision on the basis of the supposed agreement.

Failure to prosecute

However, in view of the facts alleged in the Commissioner's motion, and in view of Mr. Kyei's failure to appear for trial despite our notice of trial (ECF 41), our reminder (ECF 43), and our order of January 16, 2018 (ECF 45), and his failure to make a filing in compliance with our order of January 26, 2018 (ECF 47), it would seem that he has "fail[ed] ... properly to prosecute [this case] or to comply with these Rules or any order of the Court", under Rule 123(b). The Commissioner's motion, though not styled as a motion for dismissal, does refer to that failure. We will therefore treat the Commissioner's recent motion as a motion to dismiss for lack of prosecution.

One issue requires supplementation: Although the motion makes a showing of compliance with section 6751(b)(1) as to the penalties for 2008 and 2009, with a "Civil Penalty Approval Form" dated "12/20/11", the motion makes no such

showing as to the penalty still asserted for 2010, in the amount of \$2,614.80. We do not know whether this omission as to 2010 was an oversight, or whether the Commissioner takes the position that section 6751(b)(1) does not apply to the penalty at issue here, or takes the position that a movant under Rule 123(b) does not bear a “burden of production” pursuant to section 7491(c). We will require the Commissioner to explain his position on this issue.

It is therefore

ORDERED that the Commissioner’s “Motion for Entry of Decision” filed February 14, 2018 (ECF 48), is deemed a motion to dismiss for lack of prosecution. It is further

ORDERED that, no later than March 9, 2018, the Commissioner shall file and serve a supplement to his motion, addressing the issue of burden of production as to penalty for the year 2010. It is further

ORDERED that, no later than March 23, 2018, Mr. Kyei shall file and serve a response to the Commissioner’s motion as supplemented.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
February 20, 2018