

UNITED STATES TAX COURT
WASHINGTON, DC 20217

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

ORDER OF DISMISSAL AND DECISION

The case is now before the Court on a motion to dismiss for lack of prosecution made by the Commissioner on February 14, 2018 (ECF 49). The Commissioner supplemented his motion on March 8, 2018 (ECF 51). Mr. Kyei was required to file a response by March 23, 2018, but he filed no such response. The Court will grant the motion to dismiss, as supplemented, and dismiss the case pursuant to Rule 123(b).

Background

The Court's order of February 20, 2018 (ECF 50), recounts many of the facts pertinent to the Commissioner's motion to dismiss, as supplemented, and they will not be repeated here in detail. In summary:

Previous decision vacated

This is a deficiency case involving the years 2008, 2009, and 2010. The case has been pending for 6 years. From April 2012 to September 2014, petitioner Cecil K. Kyei was in bankruptcy multiple times. After the stay was lifted by order dated November 4, 2014 (ECF 17), the parties filed a stipulation (ECF 20) reflecting a settlement of the case. Thereafter, a stipulated decision was submitted by the parties and was entered by the Court on June 25, 2015 (ECF 23).

Subsequently, 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), thereby rendering applicable the provisions of 11 U.S.C. § 362(a)(8). As a result of Mr. Kyei's bankruptcy filing, by order of November 23, 2015 (ECF 25), we granted the motion to vacate and set aside its decision because the Court lacked jurisdiction to enter the stipulated decision in this case. Mr. Kyei's latest bankruptcy petition was dismissed on April 4, 2017, and the stay was lifted by our order of July 25, 2017 (ECF 40).

Subsequent pretrial proceedings

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 a notice of that trial date (ECF 41). That notice warned, "Your failure to appear may result in dismissal of the case and entry of decision against you." The Court served Mr. Kyei with a reminder notice of that trial date on December 8, 2017 (ECF 43), and again warned that if "you fail to appear at the Trial Session, the case may be dismissed."

Prior to the session, the Commissioner filed on January 12, 2018 (ECF 44), a motion for entry of decision requesting "that the Court to 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 as it appeared on the Court's electronic record was incomplete because it was missing multiple pages. That 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). By order of January 16, 2018 (ECF 45), we ordered that the motion would be heard at the January 22, 2018, trial session in Atlanta.

Trial session and subsequent proceedings

On the date of the calendar call for the trial session to which this case was assigned--Monday, January 22, 2018--Mr. Kyei failed to appear.

By order of January 26, 2018 (ECF 47), the Court denied the Commissioner's motion for entry of decision "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." By that same order the Court instructed the parties to make a filing by February 16, 2018, that

included “the party’s recommendation as to further proceedings.” Mr. Kyei has never complied with this order.

On February 14, 2018, the Commissioner filed a motion, which the Court treated as a motion to dismiss for lack of prosecution (ECF 49). The Court served an order on February 20, 2018 (ECF 50), ordering the Commissioner to file a supplement to his motion addressing the issue of the burden of production as to the penalty for the year 2010. The Court ordered Mr. Kyei to file and serve a response, on or before March 23, 2018, to the Commissioner’s motion as supplemented.

On March 8, 2018, the Commissioner complied with the Court’s order of February 20, 2018, and filed a first supplement to his motion to dismiss (ECF 51). In that supplement, the Commissioner states “that he cannot meet the burden of production under section 6751(b) for petitioner’s 2010 tax year... Respondent now concedes the penalty of \$2,614.80 in full for petitioner’s 2010 tax year.”

The motion to dismiss, as supplemented, details Mr. Kyei’s non-communication and non-cooperation in this case. The motion as supplemented, asks us to enter decision based upon amounts contained in the notices of deficiency for 2008 and 2010 and in a reduced amount of \$7,830 for 2009, and lower amounts of penalties and addition to tax for 2008 and 2009, as well the concession by the Commissioner for the penalty for tax year 2010. Mr. Kyei’s response was due by March 23, 2018, but he has not filed a response.

Discussion

Rule 123(b) of the Tax Court Rules of Practice and Procedure, provides as follows:

(b) Dismissal: For failure of a petitioner properly to prosecute or to comply with these Rules or any order of the Court or for other cause which the Court deems sufficient, the Court may dismiss a case at any time and enter a decision against the petitioner.

Further, Rule 149, entitled “Failure to Appear or Adduce Evidence”, provides that the Court may dismiss a case for failure properly to prosecute if, without excuse, the taxpayer fails to appear at trial. See Rule 149(a).

Mr. Kyei was obligated to appear for trial on January 22, 2018; but despite the notice of August 21, 2017 (ECF 41), setting case for trial, despite the notice of December 8, 2017 (ECF43), instructing and reminding him to attend the trial, and despite our order of January 16, 2018 (ECF 45), he failed to attend. He failed to file responses in compliance with our orders of January 17, 2018 (ECF 47), and February 20, 2018 (ECF 50), and has made no other communication with the Commissioner or the Court. Mr. Kyei has failed to participate in this case, and his noncompliance with the Court's orders and rules prompts us to grant the Commissioner's motion to dismiss as supplemented, and to enter decision against him pursuant to Rule 123(b).

It is therefore

ORDERED that the Commissioner's motion to dismiss for lack of prosecute, as supplemented, is granted, and this case is dismissed pursuant to Rule 123(b) for Mr. Kyei's failure to properly prosecute the case. It is further

ORDERED AND DECIDED that there are deficiencies in income tax due and penalties and additions to tax due from petitioner Cecil K. Kyei for the tax years 2008, 2009, and 2010, as follows:

<u>Year</u>	<u>Deficiency</u>	<u>Additions to Tax/Penalties</u>	
		<u>Pursuant to I.R.C.</u>	
		<u>§6662(a)</u>	<u>§6651(a)(1)</u>
2008	\$15,518.00	\$1,551.80	\$4,017.40
2009	7,830.00	783.00	n/a
2010	26,148.00	00.00	n/a

Said amounts are less than the notice of deficiency due to some concessions made by respondent.

(Signed) David Gustafson
Judge

ENTERED: **APR 16 2018**