

**UNITED STATES TAX COURT**  
**WASHINGTON, DC 20217**

GWENDOLYN L. KESTIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 18254-17 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

On June 4, 2018, the Court received from petitioner Gwendolyn Kestin a document entitled “Motion to Set Aside Dismissal with Motion to Vacate for Lack of Subject Matter Jurisdiction and Procedural Rule Violations and Judicial Canon Violations”. The title of her motion reflects a misunderstanding of this case and its posture. We will recharacterize her motion, will deny it, and will warn her of the potential of a penalty under section 6673(a).

**Background**

The IRS determined that Mrs. Kestin’s amended return for 2014 was “frivolous” for purposes of the penalty of section 6702(a). When the IRS assessed the resulting penalties and filed a notice of lien in order to collect them, Mrs. Kestin requested and was granted a “collection due process” hearing under section 6330(d) before the Office of Appeals of the Internal Revenue Service (“IRS”). When Appeals sustained the filing of the notice of lien, Mrs. Kestin filed in this Court a 123-page petition (ECF 1) that certainly disputes this determination.

Mrs. Kestin filed a motion (ECF 20), complaining about--and evidently misunderstanding--the Clerk’s filing of her petition. We attempted to correct her misunderstanding, and we denied her motion (ECF 21).

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The Commissioner acknowledged that Mrs. Kestin is entitled under section 6330(c)(2)(B) to challenge the IRS's determination that she is liable for the penalties, and he filed a motion for summary judgment (ECF 27) defending the IRS's determination and asking us to sustain it. Mrs. Kestin filed an opposition (ECF 33). We granted the Commissioner's motion in part, holding that the amended return was indeed frivolous (ECF 36), and we set the case for trial on the remaining issues.

Mrs. Kestin then filed a motion (ECF 43) to dismiss her own case for supposed lack of jurisdiction. Our order dated May 18, 2018 (ECF 45), set out in four brief sections the reasons that Mrs. Kestin is mistaken in arguing that we lack jurisdiction over her case, and denied her motion to dismiss. We confirmed that "[t]his case will be called for trial in Winston-Salem as scheduled at 10:00 a.m. on Monday, May 21, 2018."

Mrs. Kestin failed to appear at trial. In this case the Commissioner bears the burden of production under section 7491(c) and the burden of proof under section 6703(a); and even though Mrs. Kestin did not appear, the Commissioner put on his case. Of course, because she failed to appear, Mrs. Kestin put on no evidence. The Court ordered the filing of post-trial briefs. (See ECF 46, 48.)

In her recent "Motion to Set Aside ...", Mrs. Kestin repeats her previous arguments about the supposed mishandling of her petition and repeats the previous arguments that she made in opposition to the Commissioner's motion for summary judgment and in support of her motion to dismiss, which previous arguments we did not sustain (see ECF 21, 36, 45), but she does not rebut the reasoning of our orders. In an additional challenge to our holding that her amended return for 2014 was frivolous, she now contends--

Petitioner did not petition this Court for an independent determination of the civil penalty. Such a petition is not found in I.R.C. § 6330(d) and would violate I.R.C. § 7421(a) ...

--yet she argues at length why her return was not frivolous and why she does not owe the penalties. She persists with the frivolous contention that she is--

a private sector citizen (non-federal employee[] and employed by a private sector company (non-federal entity) as defined in 3401(c)(d). I am not employed in a "trade" or "business" nor am I an "officer of a

corporation,” nor do I hold a public office. Therefore I did not receive privileged, taxable “wages”[.] [Motion at 8.]

### Discussion

#### I. The characterization of Mrs. Kestin’s motion

Mrs. Kestin calls her recent filing a “Motion to Set Aside Dismissal with Motion to Vacate for Lack of Subject Matter Jurisdiction and Procedural Rule Violations and Judicial Canon Violations”.

First, there has been no “dismissal” as to Mrs. Kestin that could be set aside under Rule 123(c) or any other rule. The Commissioner has not moved to dismiss Mrs. Kestin’s case. The only motion to dismiss her case that has been filed is one that she filed herself, which we denied for good reasons (not answered by her) in our order dated May 18, 2018 (ECF 45). Her case is still pending.

Second, no decision has yet been entered in this case that could be vacated under Rule 162 or any other rule. Rather, the case was tried in Mrs. Kestin’s absence on May 21, 2018, as scheduled, and decision will be entered in due course. There is no decision in place that we could vacate.

#### II. The merits of her motion

Mrs. Kestin’s motion has no merit. Her arguments are frivolous. Most of her submission repeats arguments that we have already disposed of.

As we have explained (see ECF 36 at 9-10), there do seem to be (depending on the facts), for some of the penalties assessed against Mrs. Kestin, questions whether she can be held liable for the penalties. We cannot tell whether she has noticed our analysis, and she has not addressed these issues.

#### III. Section 6673(a)

Mrs. Kestin is advised that section 6673(a) authorizes the Tax Court to require the taxpayer to pay the United States a penalty of as much as \$25,000 whenever it appears to the Court that the taxpayer instituted or maintained the proceeding before the Court primarily for delay or that the taxpayer’s position in the proceeding is frivolous or groundless. See Leyshon v. Commissioner, T.C. Memo. 2015-104. This penalty under section 6673(a), which penalizes taking

frivolous positions in litigation, is separate and distinct from the section 6702(a) penalties at issue in this case, which penalize frivolous returns filed with the IRS.

We therefore urge Mrs. Kestin, in the preparation of her post-trial brief, to forego the frivolous positions she has advanced so far and, instead, to make non-frivolous arguments grounded in fact and law. We warn Mrs. Kestin that her continued persistence in advancing frivolous positions might result in the imposition of a penalty under section 6673(a).

It is therefore

ORDERED that the Clerk of the Court shall recharacterize her motion as petitioner's motion for reconsideration. It is further

ORDERED that petitioner's motion for reconsideration is denied. It is further

ORDERED that our order of May 25, 2018, remains in effect, pursuant to which the Commissioner's opening brief is due no later than August 20, 2018, and Mrs. Kestin's answering brief is due no later than September 19, 2018.

**(Signed) David Gustafson  
Judge**

Dated: Washington, D.C.  
June 7, 2018