

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

PA

VICTOR MAURICE BROWN & )  
KIMBERLY DENISE BROWN, )  
 )  
Petitioners, )  
 )  
v. ) Docket No. 20102-17.  
 )  
COMMISSIONER OF INTERNAL REVENUE, )  
 )  
Respondent )

**ORDER**

By notice issued May 31, 2018 (Doc. 19), this case was scheduled for trial at the Court’s trial session in Atlanta beginning April 29, 2019. (See also Doc. 33 (order denying continuance), and Doc. 41 (notice reminding the parties of trial).) However, the Commissioner filed a motion for entry of decision (Doc. 35), which we granted by our Order and Decision entered March 22, 2019 (Doc. 43). Now pending before the Court is a motion to vacate (Doc. 46) filed by petitioners Victor Maurice Brown and Kimberly Denise Brown. We will order that the Browns’ motion to vacate be heard on April 29, 2019, at the Atlanta trial session for which this case had been scheduled.

Background

No mention of refund in the petition

The petition (Doc. 1) filed by Victor Maurice Brown and Kimberly Denise Brown challenges the IRS’s determination of a deficiency in their 2015 income tax. The petition makes no mention of a refund or overpayment (and does not cite section 6512(b)(1), which is the statute that gives us jurisdiction to determine an overpayment in a deficiency case).

SERVED Apr 24 2019

The Brown's filed a "Motion for Improved Pleadings" (Doc. 6), but that, too, makes no mention of a refund or overpayment that might be due to them for 2015.

No mention of refund in response to the motion for entry of decision

On February 28, 2019, the Commissioner filed a motion for entry of decision (Doc. 35), which announced the Commissioner's concession of this case and requested that the Court enter decision holding "[t]hat there is no deficiency in income tax due from, nor overpayment due to, petitioners for the taxable year 2015." The Commissioner's motion stated (at 12-13, n.9):

In the documents petitioners provided to respondent's Appeals Office, petitioners did appear to allege that they had overreported their wage income on their 2015 tax return. However, none of petitioners' documents, or documents that respondent has obtained from third-party payors, supports this claim. Moreover, respondent does not believe that petitioners are pursuing this issue. They have not responded to respondent's counsel's repeated requests for supporting documents, nor did they raise this issue in their February 13, 2019, or February 25, 2019, letters, which purported to list those issues that petitioners contend remain unresolved in this case.

We ordered the Browns to file a response and directed that "their response shall begin with a succinct statement of the decision that they believe the Court should enter in this case \* \* \*." (Doc. 36.)

Their response (Doc. 42) included a section captioned "Statement of the Decision the Court Should Enter", but it was not at all succinct. It is about 2-1/2 pages long, with more than 800 words. It explicitly recounts facts from non-suit years, asks for Ms. Brown's employer to be brought in as a "defendant", etc. It makes no mention of any refund or overpayment that might be due to the Browns for 2015. The motion and its attachments do discuss wages for 2014 (which are not at issue here); but as far as we can tell, neither the 6-page response nor its Exhibit A (a 21-page "Proposed Stipulation of Facts", consisting of 152 paragraphs with sub-paragraphs) mentions wages for the year 2015.

No refund ordered in the “Order and Decision”

We granted the Commissioner’s motion in our “Order and Decision” entered March 22, 2019 (Doc. 43), and we “ORDERED AND DECIDED that there is no deficiency in income tax due from, nor overpayment due to, petitioners for the taxable year 2015.” The Browns quoted this (at p. 1, n.2) in a “Pretrial Memorandum for Petitioners” (Doc. 45) that they filed April 16, 2019; but that memorandum otherwise includes no mention of any refund or overpayment that might be due to the Browns for 2015.

Refund apparently requested in the motion to vacate

In their motion to vacate (Doc. 46), filed April 23, 2019, the Browns apparently assert--for the first time in any filing in this case--a claim for an overpayment of tax for 2015. They do so by stating at 2, para. 6):

[T]he Court overlooked (excusable neglect) paragraphs 13(h), 25, 26 and 34(h) [of the petition (Doc. 1)] during its decision that “there is nothing left for us to decide,” and relative to its Order & Decision that there is no “overpayment due to, petitioners for the taxable year 2015.”

The cited paragraphs 13(h), 25, and 26 appear in a 22-page “Exhibit D” to the petition, and they state that the Browns reported wages, federal income tax withheld, and state income tax withheld on their 2015 Federal income tax return in accordance with a Form W-2 issued by Ms. Brown’s employer for 2015 and that the amounts were “inaccurate”. Paragraph 34(h) later asks the Court to “grant the Browns all other relief the court deems just and proper”. But again, neither the petition nor any of its attachments alleged any overpayment or requested any refund.

In now quantifying the “inaccura[cy]” in the Browns’ 2015 return, their motion to vacate appears to assert (at pages 3-4, paras. 10-11) that the Browns reported Ms. Brown’s wages in an amount that was too great by \$232. We note that the top marginal income tax rate in 2015 was 39.6%, see I.R.C. sec. 1(a), so that this issue might yield for the Browns an overpayment of as much as \$92--plus interest--though it might not be that amount if they were in a lower bracket for 2015, which we cannot tell.

Upcoming hearing on April 29, 2019

We will order that argument be heard on the Browns' motion to vacate at the Court's upcoming trial session in Atlanta, Georgia, on April 29, 2019, and we will call the case at that session to hear this motion. If we were to grant the Browns' motion under Rule 162, then it would appear that they must also move for leave to amend their petition under Rule 41(a) to plead the existence of an overpayment and request a refund thereof. If that motion were also granted, then we would conduct a trial at that April 29 trial session, at which the issue would evidently be whether the Browns over-reported their 2015 income by \$232. Presumably the Browns would have the burden of proof on that issue. See Rule 142(a)(1).

It is

ORDERED that the Court will hear argument from the parties on the Browns' motion to vacate, during or shortly after the calendar call at 10:00 a.m. Monday, April 29, 2019, in Room 1136 (on the 11th Floor) of the Russell Federal Building & Courthouse, 75 Ted Turner Dr., S.W., Atlanta, Georgia 30303. It is further

ORDERED that, after this order has been served, the Chambers Administrator for the undersigned Judge shall telephone both of the parties and, if either of them has not yet seen it, she shall read to them the fourth page of this order.

**(Signed) David Gustafson  
Judge**

Dated: Washington, D.C.  
April 24, 2019