

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

JUDITH LEE ALSTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 10936-18 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER OF DISMISSAL AND DECISION**

The petition in this “collection due process” (“CDP”) case is based on a Notice of Determination Concerning Collection Action(s) Under Sections 6320 and/or 6330, dated May 15, 2018, in which the Commissioner determined that a levy is an appropriate collection action with respect to petitioner Judith Lee Alston’s unpaid 2011 income tax liability. Now before the Court is a motion to dismiss for lack of prosecution filed by the Commissioner on April 1, 2019. Ms. Alston filed no response. The motion to dismiss will be granted.

Background

Pretrial proceedings

We set this CDP case for trial at the Court’s session in New York on April 1, 2019, pursuant to our “Notice Setting Case for Trial” that was served November 7, 2018 (Doc. 4), along with our “Standing Pretrial Order” (Doc. 5) explaining the process for preparing for trial. The Notice Setting Case for Trial warned, “Your failure to appear may result in dismissal of the case and entry of decision against you”. The Court served Ms. Alston with a reminder Notice of that trial date on February 19, 2019 (Doc. 11), and again warned that if “you fail to appear at the Trail Session, the case may be dismissed”.

The Court's record reflects that Ms. Alston registered for and was provided remote electronic access (eAccess) to all of the records in this case on July 16, 2018, and that Ms. Alston consented to receive electronic service (eService) of documents filed in this case. The Court's records indicate that none of the electronic filings in this case that were sent to Ms. Alston to her email address of record were returned to the Court as rejected or undelivered.

After the Commissioner filed a motion for summary judgment (Doc. 6), the Court issued its order dated December 21, 2019 (Doc. 9), denying without prejudice the Commissioner's motion. We excused Ms. Alston from responding to the motion for summary judgment, but "we suggest[ed] that she read the Commissioner's motion and attempt to learn the response to a subsequent motion (if the Commissioner files one) or at trial (if he does not)".

When the Commissioner filed on February 14, 2019 (Doc. 10), a motion for an order to show cause why proposed facts and evidence should not be accepted as established, under Rule 91(f), and the Court issued an order to show cause on February 22, 2019 (Doc. 12), Ms. Alston filed no response. The Court therefore, by its order of March 14, 2019 (Doc. 14), made absolute its order to show cause and held that paragraphs 1 through 31 of the Commissioner's proposed stipulation of facts are deemed to be established for the purpose of this case.

#### Trial and subsequent proceedings

On the date of the calendar call in this case--Monday, April 1, 2019--Ms. Alston failed to appear and no one appeared on her behalf. Counsel for the Commissioner appeared and was heard. The Court directed that the case would be recalled later that day and directed Counsel for Commissioner to reach Ms. Alston by telephone and adviser her of the recall. When the case was recalled later that day, Ms. Alston did not appear. At the recall, the Commissioner filed a motion to dismiss the case for lack of prosecution (Doc. 16). In that motion, the Commissioner asks, in the alternative, that we reconsider our order denying his motion for summary judgment. In our order served April 5, 2019 (Doc. 17), we--

ORDERED that petitioner shall file with the Court and serve on respondent a response to the motion to dismiss for lack of prosecution no later than May 1, 2019. In her response, she shall also respond to the Commissioner's motion for summary judgment. If by that date the parties have submitted a stipulated decision document signed by the parties, then petitioner need not file a response to the motion.

Ms. Alston has made no filing in compliance with these instructions. No stipulated decision document has been filed.

### 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.

In addition, under Tax Court Rule 149, which is entitled “Failure to Appear or Adduce Evidence”, the Court may dismiss a case for lack of prosecution if the taxpayer inexcusably fails to appear at trial and does not otherwise participate in the resolution of his case. See Rule 149(a).

Ms. Alston was obligated to appear for trial when her case was called and recalled on April 1, 2019; but despite the Court’s November 7, 2018, notice setting case for trial (Doc. 4), and the reminder notice of February 22, 2019 (Doc. 11), instructing and reminder her to attend the trial, she failed to attend.

When the Commissioner moved to dismiss this case for lack of prosecution, and the Court ordered petitioner to file a response no later than May 1, 2019 (Doc. 17), Ms. Alston filed no response. The Court’s records indicate that none of the filings in this case that were sent to Ms. Alston’s email address of record were rejected or undelivered. For all those reasons we will grant the Commissioner’s motion to dismiss for lack of prosecution, it is

ORDERED that the Commissioner’s motion to dismiss filed April 1, 2019, is granted and this case is dismissed pursuant to Rule 123(b). It is further

ORDERED that the Commissioner determination set forth in the “Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330” underlying this case, dated May 15, 2018, is sustained, and the Commissioner may proceed with a levy to collect petitioner Judith Lee Alston’s unpaid income tax liability for tax year 2011.

**(Signed) David Gustafson  
Judge**

ENTERED: **JUL 19 2019**