

UNITED STATES TAX COURT
 WASHINGTON, DC 20217

JEVON KEARSE,)	
)	
Petitioner,)	
)	
v.)	Docket No. 14080-14 L.
)	
COMMISSIONER OF INTERNAL)	
REVENUE,)	
)	
Respondent.)	

ORDER

This collection due process (CDP) case is before the Court on respondent’s motion to vacate or revise decision pursuant to Rule 162¹ and respondent’s motion to remand, each filed June 20, 2019. Respondent requests that we vacate or revise our decision, entered May 21, 2019, because he is “unsure of the appropriate way to proceed with collection” and ultimately requests that we remand this case to the Internal Revenue Service (IRS) Office of Appeals (Appeals) for further consideration. Petitioner, in response to each of respondent’s motions, requests that we revise our May 20, 2019, Opinion to hold that the IRS’ assessment of petitioner’s unpaid 2010 Federal income tax liability was invalid because respondent could not prove timely mailing of the May 11, 2012, notice of deficiency at the time of trial.²

In our recent Opinion, T.C. Memo. 2019-53, filed May 20, 2019, we held that the Appeals officer handling petitioner’s CDP hearing request failed to properly perform the verification mandated by section 6330(c), i.e., she failed to properly verify that the assessment of petitioner’s unpaid 2010 Federal income tax

¹Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect at all relevant times.

²Petitioner indicates in the alternative that he has no objection to a remand if we agree with respondent’s perceived interpretation of our Opinion.

liability was preceded by a duly mailed notice of deficiency, and that this failure accordingly constituted an abuse of discretion. We so held because (1) petitioner disputed proper mailing and receipt of a May 11, 2012, notice of deficiency that was addressed to him at his last known address and (2) the record before us showed that the Appeals officer solely relied on the IRS' Integrated Data Retrieval System (IDRS) to make the section 6330(c) verification when she should have secured and accordingly reviewed (but did not) a copy of the May 11, 2012, notice of deficiency and the United States Postal Service (USPS) Form 3877 or equivalent IRS certified mailing list bearing a USPS date stamp or the initials of a postal employee to show proof of mailing of the notice. Pursuant to our Opinion, we then entered an Order and Decision on May 21, 2019, ordering and deciding that the notice of Federal tax lien (NFTL) relating to petitioner's unpaid 2010 Federal income tax liability was not sustained.

The decision to grant a motion to vacate or revise a decision under Rule 162 lies within the discretion of the Court. Kun v. Commissioner, T.C. Memo. 2004-273. The Court generally will grant such a motion only upon a showing of unusual circumstances or substantial error, e.g., mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or other reason justifying relief. See, e.g., Fed. R. Civ. P. 60(b); Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999 (1978).

This Court has remanded cases to the IRS Office of Appeals to clarify the record regarding the basis for an Appeals officer's verification under section 6330(c). See, e.g., Jordan v. Commissioner, 134 T.C. 1, 12-13 (2010) (Jordan I), supplemented by T.C. Memo. 2011-243; Hoyle v. Commissioner, 131 T.C. 197, 203-206 (2008) (Hoyle I), supplemented by 136 T.C. 463 (2011). In other words, where it was unclear what the Appeals officer relied on to verify that the assessment of a taxpayer's liability was preceded by a duly mailed notice of deficiency the Court has ordered a remand. See, e.g., Jordan I, 134 T.C. at 12-13; Hoyle I, 131 T.C. at 204-205; Peterson v. Commissioner, T.C. Memo. 2016-17, at *6-*8; Meyer v. Commissioner, T.C. Memo. 2013-268, at *20-*30; Med. Practice Sols., LLC v. Commissioner, T.C. Memo. 2009-214, slip op. at 22 (Med. Practice I), supplemented by T.C. Memo. 2010-98. Cf. Rivas v. Commissioner, T.C. Memo. 2017-56, at *12 (Court finds remand unnecessary because it considered the Commissioner's proffered stipulated exhibits and testimony at trial as a supplement to the administrative record to clarify and establish that the notice of deficiency was properly mailed to the taxpayer).

Here that is not the case. Rather, in this case it is clear what the Appeals officer handling petitioner's CDP hearing request relied on to determine whether the May 11, 2012, notice of deficiency was sent to petitioner's last known address before assessment of his unpaid 2010 Federal income tax liability. She solely relied on IDRS. However, as we noted in our recent Opinion, see p. 14, when a taxpayer alleges an irregularity with respect to the notice of deficiency, i.e., alleges that he never received the notice (such as in this case), relying solely on IDRS is erroneous. According to IRS guidance, Appeals officers must do more; viz, they must review (1) a copy of the notice of deficiency and (2) the USPS Form 3877 or equivalent IRS certified mailing list bearing a USPS date stamp or the initials of a postal employee. See Internal Revenue Manual (IRM) pt. 8.22.5.4.2.1.1(6) (Nov. 8, 2013). In the Appeals officer's case activity record (which respondent attached to a response he filed with the Court on March 18, 2019, pursuant to a March 11, 2019, Order of this Court), the Appeals officer made in pertinent part the following entry on February 11, 2013: "I did not request the statutory notice of deficiency via ESTAB".³ Her case activity record also shows that she made in pertinent part the following entry on February 14, 2014: "Spoke to AO Cummings who stated that the SNOD⁴ proof of delivery was not secured as it cannot be located." Additionally, the Appeals officer confirmed in a declaration (which respondent also attached to his March 18, 2019, response) that she "was unable to secure the [USPS] Form 3877" with respect to the May 11, 2012, notice of deficiency.

Despite having the benefit of the aforementioned IRM guidance (as well as several decisions of this Court, see, e.g., Jordan I, 134 T.C. at 12-13; Hoyle I, 131 T.C. at 202-205, which unmistakably should have affected her understanding of the section 6330(c) verification requirement), she determined that the assessment of petitioner's unpaid 2010 Federal income tax liability was preceded by a duly mailed notice of deficiency. Her determination in this regard and consequently her determination regarding the section 6330(c)(1) requirement was erroneous. Thus, it is clear that Appeals abused its discretion in sustaining the NFTL with respect to petitioner's 2010 Federal income tax liability; the IRS may not proceed with collection of this liability. See Talbot v. Commissioner, T.C. Memo. 2016-191, at *19-*21 (Appeals officer's failure to satisfy section 6330(c)(1) was an abuse of

³"ESTAB" is a "Command Code" that is used on IDRS to make "requests for original paper documents, copies, information, etc." Internal Revenue Manual pt. 2.3.17.2(1) (Jan. 1, 2010).

⁴"SNOD" denotes "statutory notice of deficiency".

discretion; no remand ordered); Clough v. Commissioner, T.C. Memo. 2007-106, slip op. at 12-18 (same).

Accordingly, we reject respondent's arguments in favor of remanding the case to Appeals and will deny his motion to remand. See Med. Practice I, slip op. at 22-23 n.20 (an Appeals officer "may not give verification short shrift in his CDP hearings and then * * * count on a remand to give him a second chance to fulfill that statutory obligation."); see also Meyer v. Commissioner, at *20 ("[T]he Commissioner may not use a CDP hearing to 'cure' his failure to properly assess a tax." (citing Freije v. Commissioner, 125 T.C. 14, 35 (2005))). As we stated in our recent Opinion, see p. 15, we will hold respondent to his stipulation that he cannot produce a USPS Form 3877, and therefore he cannot prove timely mailing of the May 11, 2012, notice of deficiency. Accordingly, the assessment was invalid. See Hoyle I, 131 T.C. at 205 (and cases cited thereat). We will grant respondent's motion to vacate or revise decision pursuant to Rule 162 only to merely clarify that the assessment was invalid and that respondent may not proceed with collection of petitioner's unpaid 2010 Federal income tax liability.

Premises considered, it is hereby

ORDERED that respondent's motion to remand, filed June 20, 2019, is denied. It is further

ORDERED that respondent's motion to vacate or revise decision pursuant to Rule 162, filed June 20, 2019, is granted in that the Court's May 21, 2019, Order and Decision is stricken from the record and a new Order and Decision will be entered consistent with this Order.

(Signed) Tamara W. Ashford
Judge

Dated: Washington, D.C.
August 9, 2019