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

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| PETER E. HENDRICKSON & DOREEN M. HENDRICKSON, | ) | |
| Petitioners, | ) | |
| v. | ) | Docket No. 6863-14. |
| COMMISSIONER OF INTERNAL REVENUE, | ) | |
| Respondent | ) | |

**O R D E R**

This case is before us on the Hendricksons' Motion to Vacate or Revise Pursuant to Rule 162. Because the Hendricksons fail to show grounds for relief from our decision, we deny their motion.

Background

Mr. and Mrs. Hendrickson are tax protestors.[1] In 2002 and 2003, the Hendricksons filed joint returns frivolously claiming $0 in wages. The Hendricksons also filed $0 returns for 2004, 2005, and 2006.

In 2007, a Federal District Court in Michigan issued a judgment against the Hendricksons in an erroneous refund suit. The judgment ordered the Hendricksons to return money they received as an erroneous refund after they misrepresented their income on their 2002 and 2003 tax returns. The Court also issued a permanent injunction against the Hendricksons, prohibiting them from filing any false or frivolous claims with the IRS.

Eventually the IRS issued notices of deficiency for those same years, and in March 2017, we held a trial on the deficiencies and penalties stemming from the

[1]People who make "frivolous anti-tax arguments" and file fraudulent zero-returns are often called "tax protestors" or "tax defier[s]." Wnuck v. Commissioner, 136 T.C. 498, 502 n. 2 (2011).

Hendricksons' 2002 through 2006 tax returns. On February 11, 2019, we issued a memorandum opinion in this case, T.C. Memo. 2019-10. In that opinion, we held that the Hendricksons received taxable income and thus had tax deficiencies in the years before the Court. Concluding that the Hendricksons had not filed valid returns, we also upheld section 6651(f) penalties for fraudulent failure to file.

We entered a decision on July 2, 2019. On July 31, 2019, the Hendricksons timely filed a Motion to Vacate or Revise Pursuant to Rule 162. In their motion to revise, the Hendricksons continue to contest the deficiencies. Their motion outlines four reasons why the Hendricksons believe we erred in our judgment.

First, the Hendricksons claim the Commissioner was collaterally estopped from determining a deficiency against the Hendricksons for the 2002 and 2003 tax years. The Hendricksons reason that the Federal District Court's judgment requiring them to return their erroneous refund precludes the Commissioner from seeking deficiencies against the Hendricksons for those years. They argue that not only is the Commissioner precluded from seeking tax deficiencies, but that we are estopped from issuing any judgment against the Hendricksons for the 2002 and 2003 tax years.

Second, the Hendricksons argue that we lack jurisdiction to determine section 6651(a)(1) or 6651(f) penalties.[2] They claim that the Commissioner never determined penalties before or during the trial. The Hendericksons argue that because the Commissioner did not determine penalties, we lack jurisdiction to do so.

Third, the Hendricksons allege the Commissioner's substitute for returns are fraudulent. The motion refers to trial exhibits used to determine the Hendricksons' liabilities. These trial exhibits quote Cracking the Code: The Fascinating Truth About Taxation in America. Mr. Hendrickson wrote Cracking the Code in 2003 as a guide for evading tax obligations.[3]

The Hendricksons claim the Commissioner made "false assertion[s]" because the Substitute for Returns stated that Cracking the Code defines taxable

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[2]Unless otherwise indicated, all section references are to the Internal Revenue Code (Code) at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[3]See Waltner v. Commissioner, T.C. Memo 2014-35, for a synopsis of Cracking the Code.

"income" only as money paid from the federal government. According to the Hendricksons, this assertion on the trial exhibits is "tainted with falsehoods" and rose to the level of making this Court "the victim of an outright fraud".

Fourth, and finally, the Hendricksons assert that Mr. Hendrickson is entitled to dependency exemptions. The motion states the Commissioner knew the Hendricksons had minor dependent children during the relevant tax years yet failed to allow dependency exemptions for the children when calculating the Hendrickson's deficiencies. The motion also asserts Mr. Hendrickson deserves dependency exemptions for his 2004 and 2006 tax years, claiming Ms. Hendrickson as a dependent for those years.

## Discussion

Rule 162 authorizes a party to file a motion to vacate or revise a decision, with or without a new or further trial, within 30 days after the decision has been entered. Whether to grant or deny such a motion is within this Court's discretion.[4]

Although Rule 162 does not articulate a standard by which we evaluate a motion to vacate or revise, Rule 1(b) provides that where there is no applicable rule of procedure, we look to the Federal Rules of Civil Procedure. We have often referred to Rule 60 of the Federal Rules of Civil Procedure (and cases applying that rule) to assist us in resolving issues raised in a motion to vacate or revise.[5] Federal Rule of Civil Procedure 60(b) provides that, on motion and on such terms as are just, a court may relieve a party of a judgment for mistake, inadvertence, surprise, or excusable neglect, newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial, fraud, or because the judgment is void, or has been satisfied, released, or discharged.

### Collateral Estoppel & Res Judicata

The Hendricksons' claim of collateral estoppel or res judicata as relief from judgment fails. If a party neglects to raise an issue on brief or amend previous

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[4]See Heim v. Commissioner, 872 F.2d 245, 246 (8th Cir. 1989), aff'g T.C. Memo. 1987-1; Angle v. Commissioner, T.C. Memo. 2016-27, at *6, aff'd, 699 F. App'x 703 (9th Cir. 2017).

[5]Estate of Miller v. Commissioner, T.C. Memo.1994-25; Pietanza v. Commissioner, T.C. Memo.1990-524, aff'd. without published opinion, 935 F.2d 1282 (3rd Cir. 1991).

filings, that issue is considered waived.[6] The Hendricksons raised collateral estoppel regarding the erroneous refund suit in their initial petition to this Court. They failed to raise this issue again in their post-trial briefs. The issue of collateral estoppel for the erroneous refund suit is thus waived due to the Hendricksons' failure to address the issue on brief.

Even if the collateral estoppel issue was not waived, the Hendricksons' claim would fail on the merits. Res judicata generally prevents parties from relitigating the same cause of action and "applies to a claim if it was, or could have been, litigated as part of the cause of action in a prior case."[7] Collateral estoppel, or issue preclusion, "provides that once an issue of fact or law is 'actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.'"[8]

The Sixth Circuit, the circuit to which this case is appealable, has established a four-part test to determine when collateral estoppel bars relitigation of a case:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.[9]

An erroneous refund suit seeks recovery through civil action of refunds erroneously made; it does not determine a deficiency.[10] The issue on which this Court entered a decision was the Hendricksons' tax deficiencies.

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[6]Rives v. Commissioner, 8 T.C.M. (CCH) 1094, 1095 (1949); Lysek v. Commissioner, T.C. Memo 1975-293, 34 T.C.M. (CCH) 1267, 1277 (1975).

[7]Morse v. Commissioner, T.C. Memo. 2003-332, 86 T.C.M. (CCH) 673, 676-677 (2003) (citing Commissioner v. Sunnen, 333 U.S. 591, 597-598 (1948)), aff'd, 419 F. 3d 829 (8th Cir. 2005); See Trost v. Commissioner, 95 T.C. 560, 566 (1990).

[8]Morse V. Commissioner, 86 T.C.M. (CCH) at 677 (quoting Montana v. United States, 440 U.S. 147, 153 (1979)).

[9]United States v. Cinemark USA, Inc., 348 F.3d 569, 583 (6th Cir. 2003).

[10]Sec. 7405(b).

Using the Sixth Circuit's test, we can see that the Commissioner was not collaterally estopped from asserting deficiencies nor was this Court collaterally estopped from rendering judgment on those deficiencies. Deficiencies—the precise issue raised in this case—were not an issue in the erroneous refund suit.[11] Because the deficiencies were not at issue in the prior case, there was no outcome on that issue in the prior case. While the prior proceeding did result in a final judgment on the merits of whether there was an erroneous refund, the Commissioner did not have an opportunity to raise the deficiency issue because the Hendricksons had not yet submitted a valid return.[12] Therefore, collateral estoppel does not survive on the merits.

Penalty Jurisdiction

This Court has jurisdiction to determine penalties against the Hendricksons. The Hendricksons allege that they should be relieved of the section 6651(f) penalties because the Commissioner "never made determinations of additions to tax for years 2002, 2003 and 2004 * * * nor asserted claims therefor at or before the hearing". But this is not true. On Form 866A, Explanation of Items, sent to the Hendricksons along with their Notice of Deficiency, the Commissioner stated that for years 2002, 2003, and 2004 section 6651(f) penalties were appropriate if section 6663 penalties did not apply. This Court has jurisdiction over additions to tax if the Commissioner asserts the claim at or before the hearing.[13] Because the Commissioner asserted penalties in the Notice of Deficiency, this Court had jurisdiction over penalties.

Fraudulent Substitutes For Returns

The Commissioner did not produce fraudulent substitutes for returns and this Court was not the "victim" of the Commissioner's "fraud." The Hendricksons'

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[11]Amended Judgment and Order of Permanent Injunction, United States v. Hendrickson, No. 06-11753 (E.D. Mich. May 2, 2007).

[12]Amended Judgment and Order of Permanent Injunction, United States v. Hendrickson, No. 06-11753 (E.D. Mich. May 2, 2007) (where the judgment ordered the Hendricksons to file amended tax returns for 2002 and 2003).

[13]Sec. 6214(a); Mohamed v. Commissioner, T.C. Memo. 2013-255, at *15-16 (2013).

accusation that the Commissioner produced fraudulent substitutes for returns and misled this Court is frivolous.[14]

Dependency Exemptions

The Hendricksons are not entitled to dependency exemptions because they never preserved the issue. The Hendricksons never pled dependency exemptions and may not do so now. New issues that are not based on fraud, mistake, or lack of consent are not sufficient to vacate or revise a decision.[15] Federal Rule of Civil Procedure 60(b) provides that a court may relieve a party of judgment upon the finding of newly discovered evidence. The presence of the Hendricksons' minor dependent children during the relevant tax years is not newly discovered evidence to the couple. Nor is Mrs. Hendrickson newly discovered to Mr. Hendrickson.

Conclusion

The Hendricksons have raised no issue requiring that we grant their Motion to Vacate or Revise. Accordingly, it is

ORDERED that the Petitioners' Motion to Vacate or Revise Pursuant to Rule 162 is denied.

**(Signed) Ronald L. Buch**
**Judge**

Dated: Washington, D.C.
October 22, 2019

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[14]See Crain v. Commissioner, 737 F.2d 1417, 1417 (5th Cir. 1984) ("We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit.").

[15]Slojewski v. Commissioner, T.C. Memo. 2005-117, 89 T.C.M. (CCH) 1308, 1310 (2005).