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

JESUS R. ROBLES,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 19214-18 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent	)	

O R D E R

This collection due process (CDP) case was scheduled for trial at our session in San Antonio, Texas, which began on December 2, 2019. During that session, the parties submitted a stipulated decision, which the Court later entered. Petitioner Jesus R. Robles now moves to vacate the decision under Rule 162.[1] We will deny his motion.

Background

We called this CDP case during our calendar call on December 2, 2019, to gauge the parties' readiness for trial. After some discussion, we agreed to recall the case later in the day to give the parties time to work on the stipulation of facts required under Rule 91 and to allow Mr. Robles to consult with volunteer attorneys from the State Bar of Texas.

When we recalled this case, Mr. Robles and counsel for respondent stated that they had reached a settlement. The Court inquired of Mr. Robles whether he had consulted with an attorney regarding his case and the proposed settlement. He had. We also emphasized to Mr. Robles that a settlement would end his case. Mr.

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

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Robles indicated that he understood and explained at some length his thinking regarding the case and his reasons for wanting to settle.

We gave the parties additional time to convert the terms of their settlement into a decision document. The parties did so and later that day submitted a fully stipulated decision, signed by both Mr. Robles and counsel for respondent. We entered that decision on December 6, 2019.

Mr. Robles subsequently filed a timely motion to vacate the decision on the ground of newly discovered evidence, which he thereafter supplemented. He argues that the day after entering into the stipulated decision he received additional documents from respondent that have caused him to reconsider the settlement and, in his view, justify vacatur. He contends that these documents show that the same settlement officer was involved improperly in both his 2016 CDP hearing and his 2018 CDP hearing and that there had been no proper mailing of the 2016 notice of determination that concluded his previous CDP hearing. Respondent counters that the documents do not qualify as newly discovered evidence as would support vacating the stipulated decision.

Discussion

I. Governing Standards

Rule 162 provides: "Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit." Although the rule does not specify any standard by which such a motion should be judged, we have long held that a decision to grant a motion to vacate lies within this Court's discretion. See, e.g., Taylor v. Commissioner, T.C. Memo. 2017-212, at *6-*7, aff'd, 731 F. App'x 239 (4th Cir. 2018); see also Seiffert v. Commissioner, T.C. Memo. 2014-61, at *6.

"We often look to rule 60 of the Federal Rules of Civil Procedure as a guidepost by which to resolve Rule 162 motions." Taylor v. Commissioner, at *7; see also Rule 1(b); Seiffert v. Commissioner, at *6-*7; Pietanza v. Commissioner, T.C. Memo. 1990-524, 60 T.C.M. (CCH) 948, 949 (1990), aff'd without published opinion, 935 F.2d 1282 (3d Cir. 1991). Under that rule, a motion to vacate will generally be granted only upon a showing of unusual circumstances or substantial error, such as mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or other reason justifying relief. Fed. R. Civ. P. 60(b); see also

Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999, 1000-1002 (1978); Taylor v. Commissioner, at *7.

As noted above, Mr. Robles asserts that we should vacate the decision because of newly discovered evidence. In deciding whether evidence is "newly discovered", we consider whether: (1) the evidence was discovered following trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that a new trial would probably produce a new result. See Fed. R. Civ. P. 60(b); see also Pietanza v. Commissioner, 60 T.C.M. (CCH) at 949. In the United States Court of Appeals for the Fifth Circuit, to which an appeal of this case would ordinarily lie, see sec. 7482(b)(1)(A), newly discovered evidence must be in existence at the time of trial and not discovered until after trial. See Longden v. Sunderman, 979 F.2d 1095, 1102-1103 (5th Cir. 1992).

II. Analysis

Mr. Robles contends that exhibits to respondent's proposed stipulation of facts, which he received after entering into the stipulated decision, rise to the level of newly discovered evidence. He argues that the exhibits show that the proposed stipulation of facts contained a number of errors and misstatements, and suggests that, had he been in possession of the stipulation exhibits prior to entering into the decision, he would not have done so. In our view, Mr. Robles has failed to show any newly discovered evidence that supports vacating the stipulated decision.

As an initial matter, Mr. Robles argues that an IRS case activity report showing that the same settlement officer was involved in both his 2016 CDP hearing (upholding the filing of a notice of Federal tax lien with respect to Mr. Robles' 2014 Federal tax liability) and his 2018 CDP hearing (upholding a notice of intent to levy regarding the same liability) proves that his 2018 CDP hearing contravened sec. 301.6330-1(d)(1), Proced. & Admin. Regs. This evidence is cumulative, as respondent acknowledged that the same settlement officer was involved in both hearings. In any event, it would not produce a different result as the Treasury Regulations bar "[p]rior involvement * * * in a matter (other than a CDP hearing held under either section 6320 or section 6330)". Sec. 301.6330-1(d)(2), Q&A-D4, Proced. & Admin. Regs. (emphasis added).

Mr. Robles further asserts that certain exhibits show that respondent had not properly mailed the 2016 notice of determination that concluded his previous CDP hearing. Before our trial session, respondent apprised Mr. Robles of respondent's contention that Mr. Robles could not challenge his underlying 2014 liability because he had an opportunity to do so during his 2016 CDP hearing. In support of this position, respondent specifically asserted that a notice of determination was issued to Mr. Robles on August 8, 2016 and that Mr. Robles had not sought review in this Court.

Assuming arguendo that the exhibits back up Mr. Robles' contention that the 2016 notice was not properly mailed, he did not exercise reasonable diligence with respect to evidence of mailing. See Pietanza v. Commissioner, 60 T.C.M. (CCH) at 949; Longden, 979 F.2d at 1103. As the purported recipient of the notice, Mr. Robles plainly was in a position to know if he had received it. He also was well aware of its importance to respondent's case. He nonetheless did not raise this point or seek evidence of mailing before entering into the stipulated decision. He accordingly did not exercise reasonable diligence in this regard. See Pietanza v. Commissioner, 60 T.C.M. (CCH) at 949; Longden, 979 F.2d at 1103.

More generally, Mr. Robles argues that the materials he belatedly received belie respondent's proposed stipulation of facts, which he believes to be riddled with errors and misstatements. The parties represented that Mr. Robles was either the author or recipient of the exhibits to the proposed stipulation, aside from the case activity report and certain IRS transcripts. These materials thus cannot constitute newly discovered evidence. See Pietanza v. Commissioner, 60 T.C.M. (CCH) at 951 ("Evidence is not newly discovered under Federal Rule 60 if it is in the possession of the moving party"). And Mr. Robles' disagreement with a proposed stipulation of facts--never received into evidence, for a trial that never took place--is of no moment.

In essence, Mr. Robles believes that he had a stronger case than he thought when he decided to enter into the stipulated decision. He accordingly wants a second chance. He fails, however, to show newly discovered evidence that supports the drastic step of vacating our decision. Mr. Robles received the proposed stipulation of facts and respondent's pretrial memoranda the week before trial and thus was well aware of respondent's positions (which Mr. Robles vigorously contested in his own pretrial filings). He was either the author or recipient of the bulk of the exhibits to the proposed stipulation and knew their contents. Mr. Robles had the chance to review any exhibits in question when we gave him the opportunity (after calendar call) to meet with respondent and draft a

joint stipulation of facts for use at trial the next day. Finally, Mr. Robles consulted with attorneys and was given time to determine whether he wished to proceed with trial (as originally planned) or settlement.

In short, Mr. Robles has not made the necessary showing of any unusual circumstances or substantial error that warrants vacating our December 6, 2019 decision. Upon consideration of the foregoing, it is

ORDERED that petitioner's motion to vacate or revise pursuant to Rule 162, as supplemented, is denied.

(Signed) Patrick J. Urda
Judge

Dated: Washington, D.C.
March 6, 2020