

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

JUSTIN ALEXANDER BOYTE,)
)
 Petitioner,)
)
 v.) Docket No. 2524-19.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER OF DISMISSAL AND DECISION

This case was calendared for trial at the trial session commencing March 9, 2020, in Columbia, South Carolina. On February 5, 2020, respondent filed a Motion to Dismiss for Failure to Properly Prosecute (Motion to Dismiss), wherein he requests that this case be dismissed for failure to properly prosecute and that a decision be entered sustaining the deficiency for petitioner’s 2016 taxable year as determined in the notice of deficiency. That same day the Court issued an Order directing petitioner to file, on or before February 19, 2020, a response to the Motion to Dismiss. The Court’s Order warned petitioner that failure to respond could result in dismissal of the case and entry of a decision against him. The copy of the Order mailed to petitioner was not returned as undeliverable. To date, petitioner has not responded to the Motion to Dismiss.

When this case was called from the calendar on March 9, 2020, there was no appearance by or on behalf of petitioner.

A Notice Setting Case for Trial (Trial Notice), setting a trial date in this case for March 2, 2020, was mailed on October 7, 2019, to petitioner at the address he provided in his Petition. The Trial Notice warned: “Your failure to appear may result in dismissal of the case and entry of decision against you.” This mailing was not returned.

A Standing Pretrial Order was attached to the Trial Notice. The Standing Pretrial Order directed petitioner, among other things: (1) to communicate and cooperate with respondent’s counsel regarding settlement or, if the case could not

be settled, the preparation of a stipulation of facts; (2) to identify in writing and exchange with respondent's counsel, no later than February 14, 2020, any documents or materials that petitioner expected to offer at trial; (3) to serve on respondent's counsel and file with the Court a pretrial memorandum no later than February 14, 2020; and (4) to be present on the trial date and prepared to try the case. The Standing Pretrial Order warned: "The Court may impose appropriate sanctions, including dismissal, for any unexcused failure to comply with this Order."

A Notice of Change of Trial Judge and Date of Session (Change Notice), was mailed to petitioner on December 11, 2019, at the address he provided in his Petition. The Notice of Change moved the trial date in this case to March 9, 2020, and advised that the Standing Pretrial Order for the trial session remained in full force and effect and that the location of the place of trial remained the same. This mailing was not returned.

A third Notice (Reminder Notice), mailed on January 24, 2020, to petitioner at the address he provided in his Petition, reminded him that his case had been set for trial on March 9, 2020, and warned that failure to appear could result in its dismissal. This mailing was not returned.

During the period after this case was set for trial, respondent's counsel sent petitioner several letters seeking his cooperation in preparing this case for trial. Respondent's counsel also attempted to contact petitioner by telephone on several occasions. However, petitioner has not responded to respondent's counsel's repeated attempts at communication.¹ Additionally, petitioner has not filed a pretrial memorandum in this case.

The Court may dismiss a case at any time and enter a decision against the taxpayer for failure properly to prosecute his case, failure to comply with the Rules of this Court or any order of the Court, or for any cause which the Court deems

¹Respondent's specific allegations concerning petitioner's failure to cooperate are detailed in the Motion to Dismiss, which petitioner had an opportunity to dispute either by filing a response thereto or by appearing at trial on March 9, 2020. Given petitioner's failure to dispute respondent's allegations, and the absence of any evidence to the contrary, we treat them as established for purposes of the Motion to Dismiss.

sufficient. Rule 123(b);² Stearman v. Commissioner, 436 F.3d 533, 535-537 (5th Cir. 2006), aff'g T.C. Memo. 2005-39; Bauer v. Commissioner, 97 F.3d 45, 48-49 (4th Cir. 1996); Edelson v. Commissioner, 829 F.2d 828, 831 (9th Cir. 1987), aff'g T.C. Memo. 1986-223. In addition, the Court may dismiss a case for failure to properly prosecute if the taxpayer inexcusably fails to appear for trial and does not otherwise participate in the resolution of his claim. Rule 149(a); Tello v. Commissioner, 410 F.3d 743, 744 (5th Cir. 2005); Rollercade, Inc. v. Commissioner, 97 T.C. 113, 116-117 (1991).

Petitioner has failed to properly prosecute this case. Petitioner did not appear for trial on March 9, 2020, despite being warned by the Trial Notice, Standing Pretrial Order, and Reminder Notice that failure to appear could result in dismissal of the case and entry of a decision against him. Moreover, petitioner has failed to cooperate with respondent's counsel to prepare for trial or otherwise resolve this case as directed in the Standing Pretrial Order. Furthermore, petitioner has failed to file a pretrial memorandum as directed by the Standing Pretrial Order. Finally, petitioner has failed to comply with the Court's Order directing him to file a response to respondent's Motion to Dismiss, despite being warned that a failure to respond could result in a dismissal of the case and entry of a decision against him.

Petitioner's failure to appear for trial and failure to comply with the terms of the Standing Pretrial Order requiring pretrial preparation have prejudiced respondent by causing him to expend resources that could have been expended elsewhere. See Jarvis v. Commissioner, 735 F. App'x 21 (Mem), 22 (2d Cir. 2018); Tebedo v. Commissioner, 676 F. App'x 750, 752 (10th Cir. 2017); cf. Pickett v. Commissioner, 240 F. App'x 883, 884 (2d Cir. 2007) (finding the Commissioner prejudiced where taxpayers refused to appear for trial, thereby forcing "the agency to waste its resources in pointless litigation, thus diverting its ability to collect taxes elsewhere"). Moreover, petitioner's failure to appear for trial and failure to comply with the Standing Pretrial Order and Court's Order dated February 5, 2020, have hindered the Court's management of its docket. See Tebedo v. Commissioner, 676 F. App'x at 752 (finding taxpayer's "interference with the judicial process" was "obvious" where "he failed to comply with any of the court's orders, and decided not to appear for trial with no advance notice to the court"); Franklin v. Commissioner, 297 F. App'x 307, 309-310 (5th Cir. 2008)

²All Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code of 1986, as amended and in effect for the year at issue.

(finding “a clear record of * * * delay and contumacious conduct” where taxpayer failed to appear for trial, failed to cooperate with the Commissioner, failed to comply with a court order, and failed to file a pretrial memorandum as directed by the standing pretrial order). None of petitioner’s failures are excused.

We have balanced petitioner’s interest in being heard, which has been diminished by his failure to meaningfully participate in these proceedings, against the Court’s responsibility to manage its docket, and we have concluded that dismissal is warranted. See Jarvis v. Commissioner, 735 F. App’x at 22; cf. Harris v. Commissioner, 748 F. App’x 387, 389 (2d Cir. 2018); Pickett v. Commissioner, 240 F. App’x at 884. We have also considered the efficacy of lesser sanctions and concluded that such sanctions would be futile in view of petitioner’s previous disregard of the Court’s warnings. See Tebedo v. Commissioner, 676 F. App’x at 752 (finding that where taxpayer “consistently failed to obey the court’s orders, there * * * [was] no reason to think a lesser sanction would have been effective”); Franklin v. Commissioner, 297 F. App’x at 309 (“Lesser sanctions are futile when, despite a judge’s explicit warnings, a plaintiff neither cooperates nor appears at trial.”).

Accordingly, we conclude that it is appropriate to dismiss petitioner’s case for failure to properly prosecute. See Tebedo v. Commissioner, 676 F. App’x at 752 (affirming dismissal for failure to prosecute where taxpayer failed to comply with Court orders and failed to appear for trial); Zubasic v. Commissioner, 671 F. App’x 31 (Mem), 32 (3d Cir. 2016) (affirming dismissal for failure to prosecute where taxpayers failed to cooperate with the Commissioner, failed to submit a pretrial memorandum, and failed to appear for trial); Roulett v. Commissioner, 534 F. App’x 915, 916 (11th Cir. 2013) (affirming dismissal for failure to prosecute where taxpayers failed to appear for trial and failed to file a pretrial memorandum); De Haas v. Commissioner, 418 F. App’x 637 (9th Cir. 2011) (affirming dismissal for failure to prosecute where taxpayer failed to appear for trial), aff’g T.C. Memo. 2009-25; Klootwyk v. Commissioner, 418 F. App’x 635 (9th Cir. 2011) (same), aff’g T.C. Memo. 2008-214; Fisher v. Commissioner, 375 F. App’x 603, 603-604 (7th Cir. 2010) (same); Taylor v. Commissioner, 271 F. App’x 414, 416 (5th Cir. 2008) (same); Taylor v. Commissioner, 29 F. App’x 19, 21-22 (2d Cir. 2001) (affirming dismissal for failure to prosecute where taxpayer failed to cooperate with the Commissioner, failed to respond to numerous inquiries from the Court, and failed to appear for trial); Duran v. Commissioner, 12 F. App’x 588, 589 (9th Cir. 2001) (affirming dismissal for failure to prosecute where taxpayers failed to appear for trial).

In the notice of deficiency,³ respondent determined a deficiency of \$3,777 in petitioner's 2016 Federal income tax. Respondent therein determined, inter alia, that petitioner had unreported income for 2016 by virtue of his failure to include in his taxable income \$977 of additional wage income shown on one or more Form(s) W-2 that respondent received for the year at issue. The notice of deficiency indicates that petitioner reported \$30,037 of wage income for 2016; however, it adjusts the foregoing amount to \$31,034. Petitioner does not deny in his Petition that he received the additional wage income in question. Rather, his contentions in the Petition are limited to his entitlement to claim head of household filing status and certain deductions and credits as a result of his purported support of a dependent during the year at issue.

In a case involving unreported income, as in the instant matter, the Court of Appeals for the Fourth Circuit, where appeal in this case lies absent a stipulation to the contrary, has held that the presumption of correctness applies once the Commissioner makes a "minimal evidentiary showing" to support a link between the taxpayer and an income-producing activity. See Williams v. Commissioner, 999 F.2d 760, 766 (4th Cir. 1993), aff'g T.C. Memo. 1992-153. If the Commissioner produces evidence linking the taxpayer with an income-producing activity, the burden of proof shifts back to the taxpayer to prove by a preponderance of the evidence that the Commissioner's determinations are arbitrary or erroneous. Helvering v. Taylor, 293 U.S. 507, 515 (1935); Tokarski v. Commissioner, 87 T.C. 74, 76-77 (1986).⁴

We find that respondent has made a sufficient evidentiary showing for his unreported income determination in this case. As noted, the notice of deficiency indicates that the factual basis for the determination is one or more Form(s) W-2 that respondent received for 2016. Respondent has attached as Exhibit A to his

³A copy of the notice of deficiency is attached as Exhibit A to respondent's Answer.

⁴If an information return is the basis for the Commissioner's determination of a deficiency--as it is here--sec. 6201(d) may apply to shift the burden of production to the Commissioner if in any court proceeding the taxpayer asserts a reasonable dispute with respect to the income reported on the information return and the taxpayer has fully cooperated with the Commissioner. See McQuatters v. Commissioner, T.C. Memo. 1998-88. Petitioner has neither asserted a reasonable dispute nor fully cooperated with respondent. Accordingly, sec. 6201(d) does not apply in this case.

Motion to Dismiss a copy of a Branerton letter⁵ to petitioner, dated December 12, 2019, which states, inter alia: “IRS records indicate that you omitted \$998^[6] in wages and \$72 in withholding credits from your return. If this is inaccurate, please submit a letter on official letter from Pope David Tire and Service Center stating that you did not work for them in 2016”. The foregoing suggests that the issuer of the Form W-2 in question was “Pope David Tire and Service Center”. Additionally, the notice of deficiency indicates that petitioner reported over \$30,000 of wage income for 2016; in our view, petitioner’s reported wage income for 2016--particularly coupled with his failure to dispute respondent’s unreported income determination or produce the letter requested by respondent--is an implicit acknowledgment that he engaged in some income-producing activity during the taxable year. Thus, we find that the presumption of correctness attaches to the notice of deficiency in this case. See Banister v. Commissioner, T.C. Memo. 2008-201, slip op. at 5-6 (finding that a notice of deficiency indicating third-party payers paid the taxpayer the specific amounts in question satisfied the minimal evidentiary burden, even though direct evidence was not in the record, where the taxpayer implicitly acknowledged that he received at least some income during the year at issue), aff’d, 418 F. App’x 637 (9th Cir. 2011).

All of the material allegations set forth in the Petition in support of the assignments of error have been denied in respondent’s Answer. Petitioner has not claimed or shown entitlement to any shift in the burden of proof under section 7491(a). See sec. 7491(a)(2)(B). Accordingly, the burden of proof rests with petitioner concerning any error in the deficiency determination. As petitioner adduced no evidence in support of the assignments of error in the Petition, he has failed to satisfy his burden of proof. We thus sustain the deficiency in full.

The foregoing considered, it is

ORDERED that respondent’s Motion to Dismiss for Failure to Properly Prosecute, filed February 5, 2020, is granted, and this case is hereby dismissed for failure to properly prosecute. It is further

⁵See Branerton v. Commissioner, 61 T.C. 691 (1974).

⁶While respondent does not appear to have explained the discrepancy between the amount of unreported income determined in the notice of deficiency (\$997) and the amount stated in the foregoing letter, we presume it is attributable to rounding or an administrative error. In any event, the difference is de minimis.

ORDERED and DECIDED that there is a deficiency in petitioner's 2016 Federal income tax due in the amount of \$3,777.

**(Signed) Joseph H. Gale
Judge**

ENTERED: **MAR 12 2020**