

UNITED STATES TAX COURT
WASHINGTON, DC 20217

SANDRA ADAMS GRIFFIN,)
)
Petitioner,) **BD**
)
v.) Docket No. 25051-17S.
)
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 12, 2020, respondent filed a Motion to Dismiss for Failure to Properly Prosecute, 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 2015 taxable year as determined in the notice of deficiency. The Court thereafter on February 13, 2020, issued an Order to Show Cause directing petitioner to file, on or before February 28, 2020, a response in writing, showing cause why respondent’s Motion to Dismiss should not be granted and this case should not be dismissed for failure to properly prosecute. The Order to Show Cause warned petitioner that failure to respond could result in dismissal of the case and entry of a decision against her. The Order to Show Cause was electronically served on petitioner on February 13, 2020.¹ To date, petitioner has not responded to the Order to Show Cause.

A Notice Setting Case for Trial (Trial Notice), setting a trial date in this case for March 2, 2020, was electronically served on petitioner on October 7, 2019. The Trial Notice warned: “Your failure to appear may result in dismissal of the case and entry of decision against you.”

A Standing Pretrial Notice was attached to the Trial Notice. The Standing Pretrial Notice advised petitioner, among other things: (1) to meet with respondent’s counsel regarding settlement or, if the case could not be settled, to communicate and cooperate with respondent’s counsel in the preparation of a stipulation of facts; (2) in

¹Because petitioner consented to electronic service, all Court documents are served on petitioner electronically. To date, the Court has received no notification that any electronic service has not been delivered.

the event a trial is likely, to submit to the Court and respondent's counsel no later than seven days before the date of the trial session, a completed copy of the pretrial memorandum form attached to the Standing Pretrial Notice; and (3) to be present on the trial date and prepared to try the case. The Standing Pretrial Notice warned: "Failure to appear may result in a dismissal of the case and a decision against the nonappearing party."

A Notice of Change of Trial Judge and Date of Session (Change Notice), was electronically served on petitioner on December 11, 2019. The Change Notice changed the trial date in this case to March 9, 2020, and advised that the Standing Pretrial Notice for the trial session remained in full force and effect, and the location of the place of trial remained the same.

A third Notice (Reminder Notice), electronically served on January 24, 2020, reminded petitioner that her case had been set for trial on March 9, 2020, and warned that failure to appear could result in its dismissal. As noted supra n.1, the Court has received no notification that any electronic service has been rejected and/or not delivered.

During the period after this case was set for trial, respondent's counsel sent petitioner several letters seeking her 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.² Additionally, petitioner has not filed a pretrial memorandum in this case.

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

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

²Respondent'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 responding to the Order to Show Cause or by appearing when this case was called from the trial calendar. 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);³ 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 Notice, Reminder Notice, and the Court's Order dated February 13, 2020, that failure to appear could result in dismissal of the case and entry of a decision against her. Furthermore, petitioner has failed to file a pretrial memorandum as directed by the Standing Pretrial Notice. Finally, petitioner has failed to comply with the Court's Order to Show Cause directing her 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 her.

Petitioner's failures 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 Order to Show Cause 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) (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.

³All 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.

We have balanced petitioner's interest in being heard, which has been diminished by her 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) (affirming dismissal for failure to prosecute where taxpayer failed to comply with Court orders and failed to appear for trial); Taylor v. Commissioner, 271 F. App'x 414, 416 (5th Cir. 2008) (affirming dismissal for failure to prosecute where taxpayers failed to appear for trial); 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, respondent determined a \$7,075 deficiency in petitioner's 2015 Federal income tax. 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, she has failed to satisfy her burden of proof. We thus sustain the deficiency in full.

In the notice of deficiency, respondent also determined that petitioner is liable for an addition to tax of \$1,360.40 under section 6651(a)(1) for 2015.⁴ Section 6651(a)(1) imposes an addition to tax for any failure to file a return by its due date. The addition is equal to 5 percent of the amount required to be shown as tax on the return for each month or portion thereof that the return is late, up to a maximum of 25 percent. See id. The addition is imposed on the net amount due, calculated by reducing the amount required to be shown as tax on the return by any part of the tax which is paid on or before its due date. See sec. 6651(b)(1).

The Commissioner generally bears the burden of production with respect to an addition to tax where the taxpayer has contested it in her petition. See sec. 7491(c); Funk v. Commissioner, 123 T.C. 213, 216-218 (2004); Swain v. Commissioner, 118 T.C. 358, 363-365 (2002). To satisfy the burden, the Commissioner must offer sufficient evidence to indicate that it is appropriate to impose the addition to tax.⁵ Higbee v. Commissioner, 116 T.C. 438, 446 (2001). If the Commissioner satisfies his burden of production, the taxpayer bears the burden of proving it is inappropriate to impose the addition to tax because of reasonable cause, substantial authority, or a similar provision. Id. at 446-447; see also secs. 6651(a)(1), 6664(c); Wheeler v. Commissioner, 127 T.C. 200, 206 (2006), aff'd, 521 F.3d 1289 (10th Cir. 2008).

Petitioner has not alleged any specific error in respondent's determination of the section 6651 addition to tax. Where a petition fails to state a claim with respect to penalties, the Commissioner incurs no obligation to produce evidence in support of such determinations pursuant to section 7491(c). See Funk v. Commissioner, 123

⁴Respondent additionally determined in the notice of deficiency that a section 6662(a) accuracy related penalty should be imposed against petitioner, but he has conceded that penalty in his Motion to Dismiss.

⁵Generally, this burden also includes showing compliance with the supervisory approval requirement of section 6751(b). See Graev v. Commissioner, 149 T.C. 485, 492-493 (2017), supplementing and overruling in part 147 T.C. 460 (2016); see also Chai v. Commissioner, 851 F.3d 190, 221 (2d Cir. 2017), aff'g in part, rev'g in part T.C. Memo. 2015-42. However, additions to tax under section 6651 are not subject to the supervisory approval requirement. See sec. 6751(b)(2)(A); Dynamo Holdings Ltd. P'ship v. Commissioner, 150 T.C. 224, 231 (2018).

T.C. at 218; Swain v. Commissioner, 118 T.C. at 364-365. Petitioner has failed to put the addition to tax at issue, and respondent accordingly bears no burden of production with respect to it.⁶

Petitioner bears the burden of proof with respect to any exculpatory factors for penalties. See Higbee v. Commissioner, 116 T.C. at 446-447; Wheeler v. Commissioner, 127 T.C. at 206. As petitioner has adduced no evidence in support of any exculpatory factors, we sustain respondent's determination of the addition to tax pursuant to section 6651.

The foregoing considered, it is

ORDERED that respondent's Motion to Dismiss for Failure to Properly Prosecute, filed February 12, 2020, is granted, and this case is hereby dismissed for failure to properly prosecute. It is further

ORDERED and DECIDED that there is a deficiency in petitioner's 2015 Federal income tax due in the amount of \$7,075 and an addition to tax under section 6651(a)(1) due of \$1,360.40.

(Signed) Joseph H. Gale
Judge

ENTERED: **MAR 12 2020**

⁶Attached as Exhibit A to respondent's Motion to Dismiss is a copy of an uncertified income tax account transcript for petitioner's 2015 taxable year. We note that an uncertified account transcript would have been insufficient to satisfy respondent's burden of production if petitioner had assigned error in her Petition to respondent's determination of the section 6651 addition to tax.