UNITED STATES TAX COURT
WASHINGTON, DC 20217

ROCK BORDELON,	)	
	)	
Petitioner,	)	**CT**
	)	
v.	)	Docket No. 11905-14.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

We decided this case (and two other cases consolidated with it) by T.C. Memo. 2020-26 (Feb. 20, 2020), in which we directed that decision would be entered pursuant to Rule 155. The parties filed a joint agreed computation for entry of decision (Doc. 59), and on April 10, 2020, we entered decision (Doc. 61) in accordance with their joint filing. Now pending before the Court is respondent's motion (Doc. 62) filed August 13, 2020--not 30 days after we entered decision, cf. Tax Court Rule 163, nor 90 days, cf. I.R.C. sec. 7483, but 125 days--requesting leave to file a motion for an order correcting the decision (see Fed. R. Civ. P. 60(a)) or vacating the decision (see Fed. R. Civ. P. 60(b)). The corresponding motion (Doc. 63) to vacate or correct decision has been lodged with the Court. Petitioner filed an opposition (Doc. 65) to respondent's motion for leave and generally opposes any action by the Court to either correct or vacate its decision, because it has become final pursuant to I.R.C. sec. 7481. We will grant respondent's motion for leave; we will deny in part his motion to vacate or correct the decision (as to his request for an order to vacate our decision); and we will grant his motion in part in that pursuant to Rule 162 we will "revise" our decision.

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Background

Resolution of the issues

This case is one of three consolidated cases for which we issued an opinion (Doc. 57) on February 20, 2020, resolving the disputed issues and stating that "[d]ecisions will be entered under Rule 155." Under that Tax Court rule, the parties would, if possible, agree on deficiency amounts to be entered by the Court, taking into account the parties' resolution of certain issues (reflected in stipulations of settled issues (Docs. 47, 50)) and the Court's resolution of the remaining issues. As is common, the Commissioner undertook to prepare a proposed computation, which petitioners would then confirm or correct.

Respondent's Rule 155 proposal

For 2011 (the year now in dispute), the Commissioner's computation for this case (on a Form 5278, "Statement - Income Tax Changes") reflected a deficiency amount of "$675,934.00". Page 27 shows the "Increase (Decrease) in Assessment" for 2011 as $675,934.00 (calculated from the "Revised Liability" of $682,972.00--consistent with our opinion of February 20, 2020--reduced by the previous assessment of $7,038.00). Petitioner does not dispute that $675,934.00 is the deficiency amount actually yielded by the parties' stipulations and the Court's opinion. Consequently, there was no mathematical or other error in the computation per se.

However, that correct number does not appear on the summary "Computation Statement" that serves as a face sheet for the Form 5278 or on the proposed stipulated decision. Rather, the IRS Tax Computation Specialist who prepared those documents used, as templates, equivalent documents from a previous case in which the deficiency amount had been much smaller--i.e., $24,770.00. She did not insert the actual correct number for this case but instead, by mistake, left that much smaller number on the documents. Respondent's counsel transmitted the documents to petitioners, thereby proposing a joint filing for the parties to make.

Petitioner's response

Petitioner's counsel explains that "the time constraints imposed by the Court on a response to the motion [sic] were such that Petitioner was not able to verify the accuracy of the new calculation made by Respondent and definitely not able to

agree to it." To our reading, this statement about the "calculation", which is silent about the amount stated in the proposed decision document, is ambiguous. Of course, "verify[ing] the accuracy" of the proposed decision amount would have been downright impossible, since we now know it was wildly inaccurate; and counsel might have been "not able to agree to it" for the reason that it bore a gross and obvious error. Petitioner's counsel did not request additional time to prepare an alternative calculation or to otherwise determine whether he agreed to respondent's proposed stipulated decision. That might mean that (in view of the magnitude of the error) he perceived an apparent petitioner-favorable error in the too-good-to-be-true proposed decision and decided to sign it without doing his own computation, which could only be disadvantageous to his client. For purposes of this order, however, we assume that petitioner's counsel perceived no error but simply thought it appropriate to rely on his opponent.

Petitioner's counsel therefore signed the proposed stipulated decision (bearing for 2011 the incorrect amount of $24,770.00) and returned it to respondent's counsel for filing. That is, petitioner accepted respondent's Rule 155 proposal and agreed to join respondent in proposing it to the Court.

The entry of decision

Respondent's counsel signed the document and filed it with the Court on April 1, 2020, bearing the signatures of counsel for both parties. We therefore view the proposed stipulated decision as a joint proposal of the parties, and any error in it, though originated by respondent, is a joint error by both parties.

On April 10, 2020, the Court--unaware of the error--entered the decision (Doc. 61), relying on the parties' stipulation. The decision stated that: for 2010 petitioner owed a deficiency amount of $538,545 and $26,927.25 in additions to tax under section 6651(a)(1); and for 2011 petitioner owed a deficiency amount of $24,770 (not $675,934.00) and no amount for penalties or additions to tax.

Post-decision deadlines

Rule 162 (discussed below) provides a 30-day period for "[a]ny motion to vacate or revise a decision, * * * unless the Court shall otherwise permit." That 30-day period ended Monday, May 11, 2020. Section 7481(a)(1) (discussed below) provides that "the decision of the Tax Court shall become final * * * [u]pon the expiration of the time allowed for filing a notice of appeal", which, under

section 7483 is "90 days after the decision of the Tax Court is entered"--in this case, expiring July 9, 2020. Neither party made any filings during these periods.

Respondent's discovery of the error

On April 17, 2020 (seven days after the entry of decision), respondent's counsel sent the case files to the IRS Appeals Office for assessment and closing. But as counsel explains, time elapsed:

> Normally Appeals will process a case for assessment and closing within 45 days after receiving it, but due to the National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, declared March 1, 2020, there was a significant delay in the processing.
>
> 16. On July 14, 2020, the Appeals Office contacted respondent's counsel; they were processing the cases for assessment and closing, and noted the discrepancy between the 2011 deficiency stated in the Decision and the 2011 deficiency indicated by the Form 5278 computations.
>
> 17. On July 22, 2020, respondent's counsel received confirmation from Technical Support that the 2011 deficiency stated on the Computation Statement face sheet was not correct, and that the Form 5278 attached to the Computation Statement indicated the correct deficiency.

Respondent's motions

On August 13, 2020 (i.e., 125 days after decision had been entered on April 10, 2020), respondent filed his motion requesting leave (Doc. 62) to file out of time a motion (Doc. 63) for an order correcting or vacating the decision on account of a mistake in the decision. In his motions, the respondent shows that the proposed stipulated decision document and the summary "Computation Statement" on which the Court relied in entering the decision had erroneous entries for the 2011 deficiency amount, and that because of the error made by the Tax Computation Specialist and left uncorrected by respondent's counsel and petitioner's counsel, those documents did not reflect the 2011 deficiency amount as shown and computed on the relevant pages of the computation statement.

Respondent contends that the decision can be either "corrected" or "vacated". He argues that the discrepancy is a clerical mistake of the sort that the Court can "correct" despite the decision having become final under section 7481. See Snow v. Commissioner, 142 T.C. 413, 420 (2014); Michaels v. Commissioner, 144 F.3d 495 (7th Cir. 1998), aff'g T.C. Memo. 1995–294). Alternatively, respondent contends that because neither of the parties noticed the erroneous entry before the decision was entered, the decision is based on the type of "mutual mistake" that would permit the Court to "vacate" the decision and issue a new decision to correct the error. See La Floridienne J. Buttgenbach & Co. v. Commissioner, 63 F.2d 630 (5th Cir. 1933); Woods v. Commissioner, 92 T.C. 776 (1989).

Petitioners' response

On August 18, 2020, we issued an order (Doc. 64) for petitioner to file a response to respondent's motions and "[i]n addition to any other arguments that petitioner wishes to make, that response shall advise the Court of the deficiency amount for 2011 that is consistent with the Court's opinion. If that amount is $24,770 (or any other amount other than $675,934), then that response shall include a computation justifying that amount."

On September 4, 2020, petitioner filed his opposition (Doc. 65) to the respondent's motion for leave to file motion to vacate decision or correct decision, in which he contends that under Michaels, the Court is limited to correcting "clerical errors" made by the Court itself, not mistakes committed by one of the parties in the calculations under a Rule 155 agreement. Petitioner thus contends that this case does not involve the sort of "clerical error" that the Court has the authority to correct, because "[t]he Court made no error" but merely relied on documents prepared by respondent, which petitioner admits included a calculation error committed by respondent.

With regard to vacating the decision, petitioner acknowledges that the Court has authority to vacate decisions when there has been fraud on the Court (citing Taub v. Commissioner, 64 T.C. 741, 751 (1975), aff 'd without published opinion, 538 F.2d 314 (2d Cir. 1976)), or when the Court never acquired jurisdiction over the petitioner (citing Abeles v. Commissioner, 90 T.C. 103 (1988)) However, petitioner contends that the Court does not have jurisdiction to vacate a decision to correct a clerical mistake committed by one of the parties, and that: "If a party can have a final decision vacated because of a mathematical error in a Rule 155

agreement, then no Tax Court Decision under Tax Court Rule 155 will ever be final."

With regard to the deficiency amount, petitioner does not contend that the correct amount was $24,770 (as stated in the decision), and he did not provide any calculation to indicate the correct deficiency amount was anything other than $675,934. We therefore consider petitioner to have conceded that the correct deficiency amount for 2011 was $675,934.

Discussion

I. General principles

Tax Court Rule 162 states: "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." If no such motion is filed within the 30 days, the decision generally becomes final under section 7481 "[u]pon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time", i.e., 90 days after the decision is entered, pursuant to I.R.C. sec. 7483.

There is no Tax Court rule that prescribes when the Court may "otherwise permit" a motion to vacate or revise a final decision, i.e., a decision that has not been appealed and as to which more than 90 days have passed. Rule 1(b) states: "Where in any instance there is no applicable rule of procedure, the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand."

Rule 60 of the Federal Rules of Civil Procedure provides the following circumstances in which a Federal district court may vacate or alter a judgment, order, or other part of the record:

> (a) Corrections Based on Clerical Mistakes; Oversights and Ommissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

However, because Tax Court decisions become final by an express statute (I.R.C. sec. 7481), the Tax Court's authority to vacate a decision under Tax Court Rule 162 is more limited than a district Court's authority to grant relief from a judgment under Fed. R. Civ. P. 60(b), and in an appeal from a Tax Court decision the power of the Court of Appeals is similarly constrained. See Wapnick v. Commissioner, 365 F.3d 131, 132 (2d Cir. 2004) ("In considering the predecessor to section 7481, the Supreme Court ruled that after an order of the Tax Court has become final the 'statute deprives us of jurisdiction over the case.' R. Simpson & Co. v. Commissioner, 321 U.S. 225, 230 (1944); see also Lasky v. Commissioner, 235 F.2d 97, 99 (9th Cir. 1956). The Court recognized that 'the usual rules of law applicable in court procedure must be changed' to achieve the finality needed in the realm of tax decisions. See Simpson, 321 U.S. at 228").

II. Circumstances for vacating a final decision

In Snow v. Commissioner, supra, we noted that when a decision becomes final under section 7481, our authority to vacate the decision is limited as a result of that finality provision:

> As a general rule, the finality of a decision is absolute. See Abatti v. Commissioner, 86 T.C. [1319 (1986)] at 1323[, aff'd 859 F.2d 115, 117-118 (9th Cir. 1988)]. There are very few exceptions. Cinema '84 v. Commissioner, 122 T.C. 264 (2004), aff'd, 412 F.3d 366 (2d Cir. 2005). One exception is where there was a fraud on the Court. * * * We have also vacated an otherwise final decision in a situation where the Court had never acquired jurisdiction to make a decision. * * * [Citations omitted.]

142 T.C. at 419. Neither fraud on the Court nor lack of jurisdiction has been alleged in the instant case.

Respondent contends that, in addition to fraud or lack of jurisdiction, mutual mistake of the parties can also justify the vacating of a final decision. See La Floridienne J. Buttgenbach & Co. v. Commissioner, 63 F.2d 630, 630 (5th Cir. 1933) ("the first stipulation was made under a mutual mistake and misunderstanding carried into the Board's order"); cf. Woods v. Commissioner, 92 T.C. 776 (1989) (in a different context, "mutual mistake" included the naming of a wrong entity on Form 872-A). Petitioner has denied that there was "mutual mistake" but rather has contended the mistake was solely the respondent's. But we hold that the circumstances respondent describes here, as supplemented by petitioner, did constitute mutual mistake.

However, "vacating" a decision seems to be the remedy most appropriate where a decision must truly be undone because the supposed basis for it was invalid (such as a purported agreement that is not enforceable, or a circumstance in which a new trial should be held, or a purported exercise of jurisdiction that was in fact lacking). But here that is not the case. We do not need to set aside an agreement; we do not need a new trial; we do not need to retract a wrongful purported exercise of jurisdiction. Rather, we see on the computation the parties' concurrence about the amount of the decision, and there is no dispute that the computation is correct. That is, contrary to petitioner's characterization, there was no "mathematical error" by one of the parties in the computation. Rather, by an error (of an employee of one of the parties' counsel) left uncorrected by both parties, the wrong number--a number other than the agreed-upon and correct

number--was printed on the stipulated decision document. That is, we know quite precisely the error on the decision, how it was made, and how to fix it.

III. Correcting clerical errors in a final decision

Where a clerical error has been discovered after a Tax Court decision becomes final, we may issue an order correcting the clerical error (rather than vacating the decision). See Snow v. Commissioner, 142 T.C. at 420 (citing Michaels v. Commissioner, 144 F.3d 495 (7th Cir. 1998)); Seven W. Enters, Inc. and Subs. v. Commissioner, 723 F.3d 861, 862 (7th Cir. 2013) ("the Tax Court did not have the authority to vacate those decisions. Instead, * * * the Tax Court should have corrected the initial decisions without vacating them").

As noted in part I of this order, our authority to correct clerical errors in otherwise final decisions derives from Tax Court Rule 1(b), which allows us to adapt Federal Rules of Civil Procedure when no Tax Court rule applies, and from Fed. R. Civ. P. 60(a), which allows a court to correct clerical errors at any time. See Snow v. Commissioner, 142 T.C. at 420 ("We may also 'correct' a final decision where a clerical error in the decision is discovered after the decision has become final"). In that connection, "[c]lerical mistakes need not be made by the clerk, but they must be in the nature of recitation of amanuensis mistakes that a clerk might make." Jones v. Anderson-Tully Co., 722 F.2d 211, 212 (5th Cir. 1984). In other words, a clerical mistake, i.e., a mistake that we can correct without vacating our decision, can include failing to update an entry on the face page of a computation statement and on a proposed decision document, where the actual agreed computation was correct. And though the petitioner contends that this mistake was not the Court's mistake, and thus would not be something we have power to correct, we disagree. The mistake was originated by respondent, concurred in by petitioner, proposed by the parties jointly, and adopted by the Court--and it was a clerical mistake.

IV. Conclusion

We need not vacate our decision of April 10, 2020, to correct what was unquestionably a clerical error with respect to the stated deficiency amount for 2011. Our decision relied on information provided in an agreed computation statement that had a mistaken entry on the first page; the erroneous entry was clearly contradicted by the relevant computations throughout the document, e.g., page 27, and thus we will correct our error.

To give effect to the foregoing, it is

ORDERED that, respondent's motion for leave to file a motion to vacate the decision and to correct the decision (Doc. 62) is granted, and the Clerk of the Court is directed to file, as of the date of this order, respondent's motion to vacate decision or correct decision (Doc. 63) lodged August 13, 2020. It is further

ORDERED that respondent's motion to vacate decision or correct decision (Doc. 63) is denied in part in that the Court will not vacate its decision entered April 10, 2020. It is further

ORDERED that respondent's motion to vacate decision or correct decision (Doc. 63) is granted in part in that the petitioner's deficiency for 2011 as stated in the Court's decision entered April 10, 2020, will be corrected from $24,770 to $675,934 as set forth in the parties' agreed computation for entry of decision (Doc. 59) which is consistent with our opinion of February 20, 2020, and that the ORDERED AND DECIDED paragraph in the Court's decision entered April 10, 2020, is corrected to read as follows:

> ORDERED AND DECIDED: That there is due from petitioner as follows:

Year	Deficiency	IRC § 6651(a) (1)	IRC § 6662(a)
2010	$538,545.00	$26,027.25	$0
2011	$675,934.00	--	$0

It is further

ORDERED that in all other respects the Court's decision entered April 10, 2020, remains in full force and effect.

(Signed) David Gustafson
Judge

Dated: October 14, 2020
Washington, D.C.