

copy forwarded to CA-7 STJ Armen

UNITED STATES TAX COURT

WASHINGTON, DC 20217

ALEXANDER HYATT,)
)
 Petitioner)
)
 v.)
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

Docket No. 26157-08.

ADA.	
RECORDED	
<i>ke</i>	
SERVICES	
<i>ke</i>	
CAL.	
STAT.	
S. T. JUDGE	
<i>Armen</i>	
FILES	

ORDER

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioner and to respondent a copy of the pages of the transcript of the hearing of the above case before Special Trial Judge Robert N. Armen, Jr. at New York, New York, on February 26, 2009, containing Judge Armen's oral findings of fact and opinion rendered at the conclusion of the hearing.

In accordance with the oral findings of fact and opinion, an Order of Dismissal and Decision will be entered for respondent.

**(Signed) Robert N. Armen, Jr.
Special Trial Judge**

Dated: Washington, D.C.
April 16, 2009

SERVED Apr 17 2009

1 Bench Opinion by Special Trial Judge Robert N. Armen, Jr.
2 Hyatt v. Commissioner Docket No. 26157-08
3 February 26, 2009

4 I.

5 THE COURT: The Court has decided to render
6 oral findings of fact and opinion in this case, and the
7 following represents the Court's oral findings of fact
8 and opinion. The oral findings of fact and opinion
9 shall not be relied upon as precedent in any other case.

10 II.

11 This proceeding was heard as a regular case
12 pursuant to the provisions of section 7443A(b)(3) of the
13 Internal Revenue Code of 1986, as amended, and Rules
14 180, 181, and 182 of the Tax Court Rules of Practice and
15 Procedure.

16 III.

17 This bench opinion is made pursuant to the
18 authority granted by section 7459(b) of the Internal
19 Revenue Code of 1986, as amended, and Rule 152 of the
20 Tax Court Rules of Practice and Procedure.

21 Hereinafter in this bench opinion, all
22 section numbers refer to the Internal Revenue Code, as
23 amended and in effect for 2003, the taxable year in
24 issue, and all Rule numbers refer to the Tax Court Rules
25 of Practice Procedure.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IV.

Michelle L. Maniscalco appeared on behalf of respondent. There was no appearance by or on behalf of petitioner.

V.

This case is before the Court on respondent's Motion To Dismiss For Failure to State A Claim Upon Which Relief Can Be Granted And To Impose a Penalty Under I.R.C. § 6673, filed December 19, 2008, pursuant to Rule 40 and section 6673, and supplemented February 23, 2009.

Petitioner resided in the State of New York at the time that the petition was filed with the Court.

VI.

The Notice of Deficiency

By notice dated July 23, 2008, respondent determined a deficiency in petitioner's Federal income tax for 2003 of \$10,354. In the notice, respondent also determined an addition to tax under section 6651(a)(1) for failure to file, an addition to tax under section 6651(a)(2) for failure to pay, and an addition to tax under section 6654(a) for failure to pay estimated tax.

The deficiency in income tax is based on respondent's determination that for 2003, petitioner

Heritage Reporting Corporation
(202) 628-4888

1 failed to report, on a Federal income tax return,
2 wages received from New York City/MTA of \$60,082, a
3 capital gain of \$1,842 in respect of an investment in
4 Met Life, Inc., and taxable interest of \$32 received
5 from Fleet Bank.

6 The additions to tax under sections 6651(a)(1)
7 and 6651(a)(2) are based on respondent's determinations
8 that petitioner failed to file a return and failed to
9 pay tax for 2003. Finally, the addition to tax under
10 section 6654(a) is based on respondent's determination
11 that petitioner failed to pay estimated tax for 2003.

12 Petitioner's Petition

13 Petitioner timely filed a petition for
14 redetermination with this Court, appealing from the
15 July 23, 2008 notice of deficiency. See secs. 6213(a),
16 7502(a).

17 In the petition, petitioner alleges in a
18 conclusory fashion that the notice of deficiency was
19 "not a proper Notice of Deficiency under the
20 requirements of the law" and that "I was denied Due
21 Process." Remarkably, petitioner admits that "I never
22 filed for 2003." Finally, petitioner alleges that
23 "The IRS is in default with respect to my requests for
24 information and Due Process."

25 Significantly, in the petition, petitioner

Heritage Reporting Corporation
(202) 628-4888

1 does not assign error nor allege facts specifically in
2 respect of the income determinations made by respondent
3 in the notice of deficiency. In particular, petitioner
4 does not deny receiving wages, capital gain, or interest
5 income, nor does petitioner allege receiving wages,
6 capital gain, or interest income in any amount less than
7 that determined by respondent in the notice of
8 deficiency. See Parker v. Commissioner, 117 F.3d 785
9 (5th Cir. 1997); White v. Commissioner, T.C. Memo.
10 1997-459.

11 Similarly, petitioner does not deny in the
12 petition that he failed to file an income tax return
13 for 2003; indeed, as previously stated, petitioner
14 admits that he failed to file a return for 2003.
15 However, petitioner does not allege that such failure
16 was due to what would constitute reasonable cause and
17 not willful neglect.

18 Further, petitioner does not deny in the
19 petition that he failed to pay estimated tax for 2003,
20 nor does he allege that such failure was excused by
21 any legitimate statutory exception.

22 Respondent's Rule 40 Motion

23 On December 19, 2008, respondent filed his
24 Motion To Dismiss For Failure To State A Claim Upon
25 Which Relief Can Be Granted and To Impose A Penalty

Heritage Reporting Corporation
(202) 628-4888

1 Under I.R.C. § 6673. The heart of respondent's motion
2 lies in paragraphs 6, 7, and 8, the most relevant
3 portions of which are as follows:

4 "6. Petitioner makes no factual claims of
5 error in the petition but argues only law and legal
6 conclusions therein.

7 7. No justiciable error has been alleged in
8 the petition with respect to the Commissioner's
9 determination set forth in the notice of deficiency
10 and no facts in support of any such error are apparent
11 therein. * * *

12 8. The document filed as the petition is
13 not a proper petition, but rather a statement making
14 frivolous arguments with no factual basis. * * * "

15 Court's January 7, 2009 Order

16 By Order dated January 7, 2009, the Court
17 directed petitioner to file a proper amended petition,
18 consistent with Rule 34(b)(4) and (5), containing clear
19 and concise assignments of each and every error that
20 petitioner alleges was committed by respondent in the
21 determination of the deficiency and the additions to
22 tax in dispute and clear and concise statements of the
23 facts on which petitioner bases the assignments of
24 error. The Court also directed petitioner to file an
25 objection, if any, to respondent's motion.

Heritage Reporting Corporation
(202) 628-4888

1 Petitioner's Response to Court's Order

2 On February 3, 2009, petitioner filed an
3 Amended Petition. The tenor of this pleading appears in
4 the last numbered paragraph of the attachment thereto:

5 "Commissioner has failed to provide any
6 rebuttal to the issues of law used and/or relied upon
7 by Petitioner in my explanation as to why I am not
8 required to file a tax return for the year in question."

9 Significantly, in the amended petition, as
10 in the petition, petitioner does not assign error nor
11 allege facts specifically in respect of the income
12 determinations made by respondent in the notice of
13 deficiency. As before, petitioner does not deny
14 receiving wages, capital gain, or interest income, nor
15 does petitioner allege receiving wages, capital gain,
16 or interest income in any amount less than that
17 determined by respondent in the notice of deficiency.
18 See Parker v. Commissioner, supra; White v.
19 Commissioner, supra.

20 Also on February 3, 2009, petitioner filed
21 an Opposition to respondent's motion. Petitioner
22 attached to his Opposition a Memorandum of Law in
23 support thereof. In a nutshell, petitioner alleges that
24 "the law does not require me to file a tax return"
25 because (1) income, for Federal income tax purposes, is

1 only "the product of corporate activities" and (2) the
2 employer, and not the employee, is "the party made
3 liable for payment of the tax on wages."

4 Hearing on Respondent's Motion

5 Pursuant to notice, respondent's motion was
6 called for hearing in New York, New York, on
7 February 23, 2009. At the hearing, there was no
8 appearance by or on behalf of petitioner. In contrast,
9 counsel for respondent appeared and presented argument;
10 counsel also conceded, on technical grounds, the
11 addition to tax under section 6651(a)(2). See sec.
12 6651(g)(2); Cabirac v. Commissioner, 120 T.C. 163
13 (2003).

14 VII.

15 Dismissal for Failure to State a Claim

16 Rule 40 provides that a party may file a
17 motion to dismiss for failure to state a claim upon
18 which relief can be granted. We may grant such a
19 motion when it appears beyond doubt that the party's
20 adversary can prove no set of facts in support of a
21 claim that would entitle him or her to relief. Conley
22 v. Gibson, 355 U.S. 41, 45-56 (1957); Price v. Moody,
23 677 F.2d 675, 677 (8th Cir. 1982).

24 Rule 34(b)(4) requires that a petition filed
25 in this Court contain clear and concise assignments of

1 each and every error that the taxpayer alleges to have
2 been committed by the Commissioner in the determination
3 of the deficiency and the additions to tax in dispute.
4 See Gordon v. Commissioner, 73 T.C. 736, 739 (1980).
5 Rule 34(b)(5) further requires that the petition contain
6 clear and concise lettered statements of the facts on
7 which the taxpayer bases the assignments of error. See
8 Jarvis v. Commissioner, 78 T.C. 646, 658 (1982).

9 Any issue not raised in the assignments of
10 error is deemed to be conceded. Rule 34(b)(4); Jarvis
11 v. Commissioner, supra at 658 n.19; Gordon v.
12 Commissioner, supra. (Parenthetically, we note that
13 the rule of concession found in Rule 34(b)(4) extends
14 to additions to tax, notwithstanding that, pursuant to
15 sec. 7491(c), the Commissioner ordinarily bears the
16 burden of production in any court proceeding with
17 respect to such additions. Swain v. Commissioner, 118
18 T.C. 358, 363 (2002).) Further, the failure of a party
19 to plead or otherwise proceed as provided in the Court's
20 Rules may be grounds for the Court to hold such party in
21 default, either on the motion of another party or on the
22 initiative of the Court. Rule 123(a). Similarly, the
23 failure of a petition to conform to the requirements set
24 forth in Rule 34 may be grounds for dismissal. Rules
25 34(a)(1), 123(b).

1 The petition filed in this case does not
2 satisfy the requirements of Rule 34(b)(4) and (5).
3 The same may be said of the amended petition. In
4 short, there is neither assignment of error nor
5 allegation of fact in support of any justiciable claim
6 in issue.

7 The Court's order dated January 7, 2009,
8 provided petitioner with an opportunity to assign error
9 and allege specific facts concerning his tax liability
10 for the year in issue. Petitioner failed to file a
11 proper amended petition.

12 We see no need to painstakingly address the
13 matters pleaded by petitioner in his pleadings. As the
14 Court of Appeals for the Fifth Circuit has remarked:
15 "We perceive no need to refute these arguments with
16 somber reasoning and copious citation of precedent; to
17 do so might suggest that these arguments have some
18 colorable merit." Crain v. Commissioner, 737 F.2d 1417,
19 1417 (5th Cir. 1984). Suffice it to say that petitioner
20 is a taxpayer subject to the Federal income tax who is
21 obliged to file a Federal income tax return and pay
22 Federal income tax on his income, specifically including
23 wages, capital gain, and interest. See secs. 1,
24 61(a)(1), (3) and (4), 6012(a)(1), 7701(a)(1) and (14).
25 See also United States v. Romero, 640 F.2d 1014, 1016

1 (9th Cir. 1981) ("Compensation for labor or services,
2 paid in the form of wages or salary, has been
3 universally held by the courts of this republic to be
4 income, subject to the income tax laws currently
5 applicable."); Monaco v. Commissioner, T.C. Memo.
6 1998-284, categorically rejecting the argument that the
7 Commissioner may not determine a deficiency without
8 first making an assessment, and affirming the principle
9 that a taxpayer's failure to report tax on a return does
10 not prevent the Commissioner from determining a
11 deficiency in that taxpayer's income tax.

12 Because petitioner's pleadings fail to state
13 a claim upon which relief can be granted, we will grant
14 that part of respondent's motion, as supplemented,
15 seeking the dismissal of this case, subject only to
16 respondent's concession regarding the addition to tax
17 under section 6651(a)(2). See Scherping v.
18 Commissioner, 747 F.2d 478 (8th Cir. 1984); Rules
19 34(a)(1), 123(b).

20 VIII.

21 Imposition of Penalty Under Section 6673(a)

22 We turn now to that part of respondent's
23 motion, as supplemented, seeking the imposition of a
24 penalty against petitioner under section 6673(a).

25 As relevant herein, section 6673(a)(1)

1 authorizes the Tax Court to require a taxpayer to pay
2 to the United States a penalty not in excess of
3 \$25,000 whenever it appears that proceedings have been
4 instituted or maintained by the taxpayer primarily for
5 delay or that the taxpayer's position in such proceeding
6 is frivolous or groundless.

7 The record in this case convinces us that
8 petitioner was not interested in disputing the merits
9 of the deficiency in income tax determined by
10 respondent in the notice of deficiency. See Coleman
11 v. Commissioner, 791 F.2d 68, 71 (7th Cir. 1986).
12 Rather, the record demonstrates that petitioner regards
13 this case as a vehicle to protest the tax laws of this
14 country and espouse his own misguided views.

15 A petition to the Tax Court is frivolous "if
16 it is contrary to established law and unsupported by a
17 reasoned, colorable argument for change in the law."
18 Coleman v. Commissioner, supra. Petitioner's position,
19 as set forth in his pleadings and in his Opposition to
20 respondent's motion, consists of tax protestor rhetoric.
21 Based on well-established law, petitioner's position is
22 frivolous and groundless. E.g., Johnston v.
23 Commissioner, T.C. Memo. 2004-107 (holding frivolous the
24 contentions that the Commissioner cannot determine a
25 deficiency for a year for which a return was not filed

1 and that a taxpayer's failure to file a return shields
2 the taxpayer from tax liability).

3 We are also convinced that petitioner
4 instituted and maintained this proceeding primarily,
5 if not exclusively, for purposes of delay. Having to
6 deal with this matter wasted the Court's time, as well
7 as respondent's. Moreover, taxpayers with genuine
8 controversies may have been delayed.

9 Many years ago, Supreme Court Justice Oliver
10 Wendell Holmes said: "Taxes are what we pay for
11 civilized society." Petitioner undoubtedly feels
12 himself to be entitled to every benefit that civilized
13 society has to offer; unfortunately, he feels no
14 obligation to pay his fair share.

15 Finally, we note that petitioner has been
16 before this Court previously in a case in which the
17 Court imposed a \$5,000 penalty on him pursuant to
18 section 6673(a)(1). Petitioner remains undeterred.

19 In view of the foregoing, we will require
20 petitioner to pay a penalty to the United States in
21 the amount of \$7,500 pursuant to the provisions of
22 section 6673(a)(1). See Coleman v. Commissioner,
23 supra at 71-72; Crain v. Commissioner, supra at 1417-
24 1418.

25

IX.

