

UNITED STATES TAX COURT
WASHINGTON, DC 20217

RIVKA FAECHER,)	
)	SYM
Petitioner,)	
)	
v.)	Docket No. 16049-12.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER AND DECISION

This case was called from the calendar for the New York, New York trial session on September 30, 2013. There was no appearance by or on behalf of petitioner. Respondent’s counsel appeared and lodged with the Court a facsimile of a stipulated decision signed by both parties. A stipulated decision with original signatures of petitioner (dated September 2, 2013) and respondent’s counsel (dated October 17, 2013) was received by the Court on October 21, 2013.

The stipulated decision provides that there are deficiencies in income tax due from petitioner for the taxable years 2005, 2006, 2007, and 2008 in the amounts of \$1,000.00, \$1,000.00, \$2,000.00, and \$2,000.00, respectively. The stipulated decision further provides that there are penalties due from petitioner for taxable years 2006, 2007, and 2008, under the provisions of section 6662(a).¹ Those penalties are premised on underpayments of tax entirely attributable to a disallowance and recapture of the refundable Additional Child Tax Credit.²

¹Section references are to the Internal Revenue Code of 1986, as in effect for the years in issue.

²The parties agreed that the deficiencies in this case “represent a recapture of the Additional Child Tax Credit” for each of the years in issue. The refunds arising from the claimed credit were issued for taxable years 2006, 2007, and 2008, but the refund arising from the claimed credit for 2005 was frozen.

In the deficiency agreed to in the stipulated decision, these refunded credits did not offset an amount shown as tax by petitioner on the return; they only served to reduce that amount below zero. In these circumstances, under the Court's holding in Rand v. Commissioner, 141 T.C. ___, ___ (slip op. at 33) (Nov. 18, 2013), petitioner has no underpayment for 2006, 2007, or 2008 for purposes of section 6664(a). Consequently, the Court, by Order To Show Cause dated November 21, 2013, directed respondent to file a response either conceding the section 6662(a) penalties or showing cause why he has satisfied his burden of production under section 7491(c) that the imposition of penalties in this case is appropriate.

On January 2, 2014, respondent filed a Response to the Order To Show Cause in which he concedes that, if the holding in Rand v. Commissioner, supra, controls the computation of underpayments in this case, he cannot satisfy his burden of production under section 7491(c) for the imposition of penalties under section 6662(a) for 2006, 2007, and 2008. Respondent further requests that the Court treat the stipulated decision received on October 21, 2013, as a stipulation of settled issues with respect to the remaining issues in the case.

The Commissioner generally bears the burden of production with respect to the liability of any individual for any penalty or addition to tax. Sec. 7491(c). However, we have held that where the taxpayer fails to state a claim with respect to a penalty or addition to tax, the Commissioner incurs no obligation to produce evidence in support of the individual's liability pursuant to section 7491(c), see Funk v. Commissioner, 123 T.C. 213, 216-218 (2004); Swain v. Commissioner, 118 T.C. 358, 364-365 (2002), at least where nothing in the record suggests the addition or penalty has been incorrectly computed. Where, as here, the record demonstrates that the penalty sought by respondent is erroneously calculated, we conclude that it should not be sustained, without regard to whether petitioner has stated a claim in the petition concerning the penalty.

In accordance with Rand v. Commissioner, supra, and for the reasons stated therein, we hold that petitioner has no underpayment of tax for 2006, 2007, and 2008 within the meaning of sections 6662(a) and 6664(a), and is therefore not liable for any penalty under section 6662(a) for those years. In the stipulated decision, respondent concedes that there is no section 6662(a) penalty due from petitioner for 2005 and that there are no additions to tax due from petitioner under the provisions of section 6651(a)(1) for 2005, 2006, 2007, and 2008.

In consideration of the foregoing, it is

ORDERED that the Court's November 21, 2013 Order To Show Cause is hereby made absolute. It is further

ORDERED that the Clerk of the Court shall file the stipulated decision received by the Court on October 21, 2013, as a stipulation of settled issues as of the date of this Order. It is further

ORDERED AND DECIDED that, pursuant to the agreement of the parties, there are deficiencies in income tax due from petitioner for the taxable years 2005, 2006, 2007, and 2008 in the amounts of \$1,000.00, \$1,000.00, \$2,000.00, and \$2,000.00, respectively. It is further

ORDERED AND DECIDED, pursuant to the agreement of the parties, that there are no additions to tax due from petitioner for the taxable years 2005, 2006, 2007, and 2008, under the provisions of section 6651(a)(1). It is further

ORDERED AND DECIDED, pursuant to the agreement of the parties, that there is no penalty due from petitioner for taxable year 2005 under the provisions of section 6662(a). It is further

ORDERED AND DECIDED that there are no penalties due from petitioner for the taxable years 2006, 2007, and 2008, under the provisions of section 6662(a).

(Signed) Joseph H. Gale
Judge

ENTERED: **APR 15 2014**