UNITED STATES TAX COURT
WASHINGTON, DC 20217

WALLACE HAROLD PRIVETTE, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 13339-14.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This case involves deficiencies, penalties, and additions to tax that the Internal Revenue Service determined against petitioner Dr. Wallace Harold Privette, Jr., for the four years 2009 through 2012. Now before the Court are the Commissioner's motion to dismiss for lack of prosecution (ECF 42) and his motion for entry of decision (ECF 49). We will order Dr. Privette to file a response to the Commissioner's motions.

Background

Some of the pertinent background of this case is set out in our orders dated March 16 (ECF 36), April 12 (ECF 40), and April 16, 2018 (ECF 43).

The latest year at issue is 2012, for which Dr. Privette's return was due in October 2013 (pursuant to an extension) and was filed in February 2014--more than four years ago. The IRS issued to Dr. Privette notices of deficiency for those four years on March 6, 2014, and he timely mailed his petition (ECF 1) to this Court on June 4, 2014--i.e., four years ago.

This case was originally scheduled for trial at a session beginning November 2, 2015 (ECF 10), but at Dr. Privette's request, the case was continued (ECF 24).

SERVED Jun 05 2018

Dr. Privette then filed a petition in bankruptcy court (see ECF 25), and this case was therefore stayed (see ECF 26). His bankruptcy case was dismissed because of various failures on his part to participate in the proceedings (see ECF 41, Exs. A, B); and the stay of these Tax Court proceedings was lifted in May 2017 (ECF 32). By notice served December 4, 2017 (ECF 33), this case was set for trial on April 30, 2018, and a reminder of that trial date (ECF 37) was served March 23, 2018. We note that the trial date of April 30, 2018, was almost a year after the bankruptcy stay was lifted, and was about 2-1/2 years after the trial date originally set for this case.

Dr. Privette mailed on April 5, 2018, a request for a continuance of the trial scheduled for April 30, 2018. By order of April 16, 2018 (ECF 43), we denied that motion:

> Rule 133 provides, "A motion for continuance, filed 30 days or less prior to the date to which it is directed ... ordinarily will be deemed dilatory and will be denied unless the ground therefor arose during that period or there was good reason for not making the motion sooner." Dr. Privette's request, mailed 25 days before trial, is thus presumptively dilatory.
>
> Moreover, Dr. Privette obtained one continuance by motion, and obtained a year-long stay by filing a bankruptcy petition that he failed to pursue. In view of this past dilatory behavior, we give heightened scrutiny to his new request for a continuance. He alleges medical circumstances (which he does not allege arose within those 30 days [before trial]), but he submitted no documentation to substantiate his allegations. We are not persuaded that the continuance is warranted nor that granting it would actually promote the fair adjudication of this case.

On April 16, 2018, two weeks before the trial date, the Commissioner filed a motion to dismiss for lack of prosecution (ECF 44); and by order issued the next day, April 17, 2018 (ECF 45), we directed that "the Court will hear argument from the parties on the Commissioner's motion to dismiss for lack of prosecution, at or soon after the calendar call at 10:00 a.m., in Columbia, South Carolina, on Monday, April 30, 2018. If the motion is denied, the case will proceed to trial."

Also on April 17, 2018, Dr. Privette mailed a letter to the Court that appears to be in the nature of a pretrial memorandum (ECF 46). It explains why he

believes the IRS's case against him has no merit. We do not see in the document any renewed request for a continuance of the trial.

Despite our notices and orders referred to above, Dr. Privette did not appear at the "calendar call" at the beginning of the trial session on April 30, 2018. However, we took the Commissioner's motion to dismiss under advisement (rather than granting it) because the Commissioner presented at the calendar call a copy of a stipulated decision document (ECF 48). As is typical, that document consists of a proposed "Decision" in a form ready to be signed and entered by the Court, to which is appended a stipulation of the parties indicating their agreement that the Court may enter that decision. The document presented on April 30 bears a copy of Dr. Privette's signature, indicating that the document had been signed by him and that he transmitted a copy to the Commissioner by telefacsimile or some other electronic means. His signature was dated April 25, 2018 (five days before the trial session began), and he wrote nothing else on the document. The document reflects agreed deficiencies of tax in the amounts determined in the IRS's notice of deficiency (attached to the petition (ECF 1)) and penalties in lesser amounts.

Where a petitioner has thus indicated his agreement to a resolution of his case, his non-appearance at the trial session is excused and the case is not called. Rather, when a copy of a stipulated decision document bearing only facsimile signatures is presented at the calendar call, this Court "lodges" the copy and treats it as (1) reflecting the parties' report of their agreed disposition of the case and (2) indicating that the parties will promptly submit a signed original, which the Court can then sign and enter as the decision in the case. The Court directed that the original stipulated decision document be filed by May 30, 2018 (see ECF 47).

We have not received the signed original of the stipulated decision document. Instead, on May 29, 2018, the Commissioner filed a motion for entry of decision. The motion alleges that (and includes documents showing that) Dr. Privette did not return the original that he had signed on April 25, 2018, but instead sent the Commissioner a copy that he signed on May 21, 2018, on which his signature is accompanied by the notation "Signed with inclusion of Concession Qualification dated Monday May 21, 2018 only." Attached to it was a document entitled "Concession Qualification" that states (with underlining added here):

> 1. By signing this concession I agree <u>I was not permitted ample time by court order to prepare my case</u>. This was due to health restrictions on my part due to a severe blood clot and family member brain injury due to diabetic Ketoacidosis.

2. As personally discussed with the IRS, I was too tired to move forward with this case and forced travel and stress would simply cause further injury and potential death to myself. A family with a brain injury and diabetic ketoacidosis was already consuming all my time anyway. A Judicial medical order forced these elements to be ignored even though medically valid for my case. Since I became aware of my case being sent to trial only weeks in advance, these actions favored one obvious side. My concession is only given for my recognition of these factor prior to the court date which was reduced from a trial to a pretrial hearing with maybe a trial. In essence, the writing was already on the wall.

3. By signing this concession, I do not agree the audit was validly conducted, or the results of that audit were accurate. The auditor went to the end of the valid time permitted for the audit to continue and I did not sign any valid extension. This was clearly demonstrated right from the beginning of the first filing to the tax court but continually ignored. Even though this agreement has to be made without a valid signed and witness extension agreement authenticating IRS actions, I do not agree to or accept further action based on these findings.

4. I deny and do not accept any statements not individually admitted to in writing by me, or any conclusion made by these findings. I agreed to a concession only because of inadequate preparation time given and a predetermined conclusion in place.

The IRS's motion asks us to enter decision consistent with the stipulated decision document that Dr. Privette evidently signed.

Discussion

The Court must conclude this case, and there are three means by which we might do so:

1. Trial on the merits, for which Dr. Privette declined his opportunity

The first means for concluding this case would have been to resolve the case on its merits after conducting a trial. Intending to do so, we ordered the trial to

take place at our Columbia session beginning April 30, 2018--nearly four years after Dr. Privette filed his petition commencing this case. He did not obtain a continuance of this trial date, but he did not appear for trial. This means of resolving the case is therefore not available to us.

2. Settlement, which has apparently occurred

The second means of concluding this case would be for the Court to enter decision consistent with an agreement of the parties. Tax litigants, like other litigants, may settle their cases by agreement. "In a tax case, it 'is not necessary that the parties execute a closing agreement under section 7121 in order to settle a case pending before this Court, but, rather, a settlement agreement may be reached through offer and acceptance made by letter, or even in the absence of a writing.'" Dorchester Indus., Inc. v. Commissioner, 108 T.C. 320, 330 (1997) (quoting Lamborn v. Commissioner, T.C. Memo. 1994-515, aff'd without published opinion, 208 F.3d 205 (3d Cir. 2000)). It appears that here there is an agreement that we should enforce, because Dr. Privette evidently signed a stipulated decision document embodying such an agreement. It appears that Dr. Privette did agree with the Commissioner for the entry of a decision, by transmitting to the Commissioner an unqualified signature on a stipulated decision document, which induced the Commissioner to advise the Court that the case would not be tried and induced the Court to treat the case as settled.

Dr. Privette thereby apparently led us to expect the delivery in due course of a signed original, but that original has never been submitted. If he has subsequently attempted to back out of the agreement, that attempt would not succeed, and we would enforce the parties' agreement. Unless Dr. Privette shows that he did not thus communicate agreement by his signing and transmitting the stipulated decision document on April 25, 2018, we would expect to grant the IRS's motion for entry of decision on the grounds that the parties had settled the case.

(Apparently, the only original decision document that Dr. Privette has provided to the Commissioner is one that he signed after adding a purported "qualification" by which he apparently intended to reserve a supposed right to dispute in the future the outcome to which he had agreed. However, a Tax Court decision in a deficiency case must resolve and does resolve its merits, with finality. See 26 U.S.C. sec. 7481(a). We cannot dismiss a deficiency case without prejudice. See sec. 7459(d). After having received a notice of deficiency, Dr. Privette could not challenge the merits of his liability in a collection case

before this Court, see sec. 6330(c)(1)(B); and after having timely filed his deficiency case in the Tax Court, Dr. Privette could not dispute his liability in a refund suit before the district court or the Court of Federal Claims, see sec. 6512(a).)

3. Dismissal for failure properly to prosecute, which would apparently be appropriate here in the absence of a settlement

If Dr. Privette did not intend to agree to resolve finally his case by the stipulated decision document that he transmitted to the Commissioner on April 25, 2018, then his still-unresolved case was set for trial on April 30, 2018, and he was obliged to appear and put on his evidence. He did not do so. His "Concession Qualification" states that he "became aware of my case being sent to trial only weeks in advance", but we do not understand what he means by so saying. We served on Dr. Privette a notice of trial (ECF 33) and our standing pretrial order (ECF 34) on December 4, 2017--five months before trial. The Commissioner alleges in his motion to dismiss filed April 16, 2018 (ECF 42 at 2), "By letters dated December 14, 2017 [more than four months before trial] and January 22, 2018 [more than three months before trial], the Commissioner notified petitioner that his case had been set for trial"; and Dr. Privette has not disputed that allegation. The Commissioner restated the trial date on page one of a motion (ECF 35) for an order to show cause filed March 15, 2018; and by order dated March 16 (served March 19), 2018, we repeated, "Pursuant to notice served December 4, 2017, this case is scheduled to be tried at the Court's session in Columbia, South Carolina, beginning April 30, 2018 (i.e., 6 weeks away)."

Dr. Privette has had an ample opportunity, over a course of years, to prepare his case for trial. He was not entitled to grant himself another continuance by failing to appear.

It is

ORDERED that, no later than July 2, 2018, Dr. Privette shall file a response to the Commissioner's motion to dismiss for lack of prosecution filed April 16, 2018 (ECF 42) and his motion for entry of decision filed May 29, 2018 (ECF 49). If Dr. Privette discerns any error or material omission in the foregoing discussion in this order, then he should address that error or omission in his response. If he decides to accept the Commissioner's proposed stipulated decision document without "qualifications", then he should immediately deliver the signed original to the Commissioner. If a decision document without "qualifications" is filed on or

before July 2, 2018, then Dr. Privette need not file a response to the Commissioner's motions.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
June 5, 2018