United States Tax Court
Washington, DC 20217

Austin Leroy Bayne,	)	
	)	
Petitioner	)	
	)	
v.	)	Docket No. 2680-20S.
	)	
Commissioner of Internal Revenue,	)	
	)	
Respondent	)	

ORDER OF DISMISSAL AND DECISION

This case was calendared for a remote trial at the Atlanta, Georgia trial session commencing February 1, 2021. The Petition seeks review of a notice of deficiency issued to petitioner for his 2014 taxable year in which respondent determined that petitioner is liable for a deficiency in the amount of $20,264 and additions to tax under sections 6651(a)(1)[1] and (2) and 6654 in the amounts of $3,246, $3,607, and $247, respectively. On December 30, 2020, respondent filed a Motion to Dismiss for Lack of Prosecution, along with an Affidavit of Elizabeth Mourges in support thereof (collectively, the Motion to Dismiss), wherein he requests that this case be dismissed for failure to properly prosecute and that, after accounting for respondent's concessions, a decision be entered sustaining a deficiency in the amount of $13,292 and additions to tax under sections 6651(a)(1) and (2) and 6654 in the amounts of $1,677, $1,864, and $122, respectively, for petitioner's 2014 taxable year.

By Order and Order to Show Cause served January 8, 2021, the Court (1) calendared respondent's Motion to Dismiss for hearing at the calendar call of the aforementioned trial session and (2) directed petitioner to file, on or before January 25, 2021, 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

[1] Section references are to the Internal Revenue Code of 1986, as amended and in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure. Dollar amounts have been rounded to the nearest dollar.

Entered and Served 08/30/21

to properly prosecute. The Order warned petitioner that failure to respond or failure to appear at the remote hearing on February 1, 2021, could result in dismissal of the case and entry of decision against him. The copy of the Order mailed to petitioner at the address listed in the Petition was not returned. When this case was called from the calendar on February 1, 2021, there was no appearance by or on behalf of petitioner, and, to date, he has not responded to the Order to Show Cause.

This case was first set for a remote trial at the Baltimore, Maryland trial session commencing November 2, 2020, by a Notice Setting Case for Trial (first Trial Notice) mailed on July 27, 2020, to petitioner at the address listed in the Petition. Attached thereto was a Standing Pretrial Order which, among other things, directed petitioner to communicate with respondent's counsel concerning the possibility of settling this case or, alternatively, preparing it for trial. The copies of the first Trial Notice and Standing Pretrial Order mailed to petitioner were not returned.

By Order served October 21, 2020, the Court continued this case and calendared it for a remote trial at the Atlanta, Georgia trial session commencing February 1, 2021.[2] Another Standing Pretrial Order was attached to the Court's Order. The Standing Pretrial Order directed petitioner, among other things: (1) to communicate and cooperate with respondent's counsel regarding settlement or, if the case could not be settled, the preparation of a stipulation of facts; (2) to file, jointly with respondent, a status report concerning a basis of settlement or other reason a trial would not be necessary, or separately, a pretrial memorandum or motion to dismiss, no later than January 11, 2021; (3) to file, jointly with respondent, the stipulation of facts together with all stipulated documents, and separately, all documents and materials that he expected to use at trial that were not in the stipulation of facts, no later than January 19, 2021; and (4) to be present on the trial date and prepared to try the case. The Standing Pretrial Order warned: "If you have not yet settled your case and you do not participate in conference calls and pretrial conferences, or appear at trial, the Judge may dismiss your case and enter a decision against you. The Judge may also dismiss your case and enter a decision against you if you do not follow this or other Court Orders." The copies of the Court's Order and the Standing Pretrial Order mailed to petitioner at the address listed in the Petition were not returned.

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[2] By separate Order also served October 21, 2020, the Court additionally calendared this case for a remote hearing on November 18, 2020, concerning third-party subpoenas.

A Notice of Remote Proceeding (second Trial Notice), containing comprehensive instructions for accessing the February 1, 2021, remote proceeding either by joining online via Zoomgov or by telephone, was also mailed on October 21, 2020, to petitioner at the address listed in the Petition. The second Trial Notice warned: "If you fail to appear the Court may dismiss your case for the failure to properly prosecute under Rule 149(a) of the Tax Court Rules of Practice and Procedure." The copy of the second Trial Notice mailed to petitioner was not returned.

During the period after this case was first set for trial, respondent's counsel attempted to contact petitioner by telephone, letter, and email in order to attempt to resolve this case or prepare it for trial. After this case was continued and reset for trial, respondent's counsel once again attempted to contact petitioner by telephone. However, petitioner has not responded to respondent's counsel's repeated attempts at communication.[3] Consequently, the parties have not filed a joint status report or a stipulation of facts. Nor has petitioner filed a pretrial memorandum or motion to dismiss, or any proposed trial exhibits.

The Court may dismiss a case at any time and enter a decision against the taxpayer for failure properly to prosecute his case, failure to comply with the Rules of this Court or any order of the Court, or for any cause which the Court deems sufficient. Rule 123(b); 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 February 1, 2021, despite being warned by the second Trial Notice and the Standing Pretrial Order that failure to appear could result in dismissal of the case and entry of a decision against him. Moreover, petitioner has

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[3] Respondent's specific allegations concerning petitioner's failure to cooperate are detailed in the Motion to Dismiss, which petitioner had an opportunity to dispute by filing a response to the Court's Order to Show Cause, or by appearing at the hearing on the Motion to Dismiss. Given petitioner's failure to dispute respondent's allegations, and the absence of any contrary evidence, we treat them as established for purposes of the Motion to Dismiss.

failed to cooperate with respondent's counsel to prepare for trial or otherwise resolve this case as directed in the Standing Pretrial Order. Furthermore, petitioner has failed to make any required filing under the Standing Pretrial Order. Finally, petitioner has failed to comply with the Court's Order to Show Cause directing him 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 him.

Petitioner's failure to appear for trial and failure to comply with the terms of the Standing Pretrial Order requiring adequate pretrial preparation 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 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.

We have balanced petitioner's interest in being heard, which has been diminished by his 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[4] respondent determined a deficiency of $20,264 in petitioner's 2014 Federal income tax. The notice of deficiency indicates that petitioner failed to file a Federal income tax return for 2014 and that he thus failed to report the following amounts of income: (1) wages totaling $39,937; (2) individual retirement account (IRA) distributions totaling $28,540; and (3) distributions from pensions and annuities totaling $27,891. The notice of deficiency also indicates that the foregoing unreported income determinations include the following specific amounts reported on information returns submitted to respondent by third parties: (1) wages of $38,053 from Wegmans Food Markets Inc. and $1,884 from Village Super Market of MD LLC; and (2) taxable retirement account distributions of $27,300 from National Financial Services LLC and $1,240

[4] A partial copy of the notice of deficiency is attached to the Petition.

from Fidelity Investments.[5] The notice of deficiency does not include a description of any information return from which respondent became aware of the $27,891 of pension and annuity income that he determined was unreported.

In the Petition, petitioner assigned error to respondent's determination of the total amount of income he received for the year. However, respondent contends in his Motion to Dismiss--and petitioner has not disputed--that after the notice of deficiency was issued, petitioner submitted to respondent a Form 1040A, U.S. Individual Income Tax Return,[6] in which he conceded receiving $39,938 of wages (matching, aside from a rounding difference, the amount respondent determined was petitioner's total unreported wage income) and $29,132 of IRA distributions, of which petitioner reported that the taxable portion was $1,241 (matching, aside from a rounding difference, the amount respondent determined petitioner received from Fidelity Investments), and the nontaxable portion was $27,891 (matching the amount respondent determined was petitioner's unreported pension and annuity income). Respondent now concedes that the $27,891 that petitioner reported as a nontaxable distribution was in fact a nontaxable rollover. Respondent thus contends that the only remaining disputed income item is the $27,300 of IRA distributions that the notice of deficiency indicates petitioner received from National Financial Services LLC, but which petitioner did not report in his subsequently filed Form 1040A.

The Commissioner's determinations in a notice of deficiency are generally entitled to a presumption of correctness. See Rule 142(a). In a case involving unreported income, as in the instant matter, the Court of Appeals for the Fourth Circuit, where appeal in this case would ordinarily lie,[7] has held that the

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[5] The notice of deficiency also indicates that HSA Bank reported that it distributed $17 to petitioner. It does not appear, however, that respondent included that amount in his adjustments to petitioner's income.

[6] The Affidavit of Elizabeth Mourges submitted in support of respondent's Motion to Dismiss avers that a copy of petitioner's Form 1040A from respondent's administrative file is attached thereto. The Form 1040A is signed by petitioner and dated January 23, 2020, and it includes as attachments copies of information returns corresponding to the amounts of income petitioner reported therein.

[7] Pursuant to sec. 7463(b), the decision entered in this case is not reviewable in any other court. We nevertheless generally follow the precedent of the Court of Appeals to which an appeal would otherwise lie. See Golsen v. Commissioner, 54 T.C. 742, 757 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971).

presumption of correctness applies once the Commissioner makes a "minimal evidentiary showing" to support a link between the taxpayer and an income-producing activity. See Williams v. Commissioner, 999 F.2d 760, 766 (4th Cir. 1993), aff'g T.C. Memo. 1992-153. If the Commissioner produces evidence linking the taxpayer with an income-producing activity, the burden of proof shifts back to the taxpayer to prove by a preponderance of the evidence that the Commissioner's determinations are arbitrary or erroneous. Helvering v. Taylor, 293 U.S. 507, 515 (1935); Tokarski v. Commissioner, 87 T.C. 74, 76-77 (1986).

We agree with respondent that petitioner admitted, in his Form 1040A, receiving $39,937 of total wages and a $1,240 distribution from Fidelity Investments, as determined in the notice of deficiency. Furthermore, even if petitioner had not admitted receiving those income items, the notice of deficiency itself would satisfy respondent's burden of production since it indicates that respondent determined the specific amounts of those unreported income items based on information returns filed by third-party payers. See Banister v. Commissioner, T.C. Memo. 2008-201, 2008 WL 3925877, at *2 (finding that a notice of deficiency indicating third parties paid the taxpayer the specific amounts in question satisfied the minimal evidentiary burden, even though direct evidence was not in the record, where the taxpayer implicitly acknowledged that he received at least some income during the year at issue), aff'd, 418 F. App'x 637 (9th Cir. 2011).

Respondent's burden of production is similarly satisfied with respect to his determination that petitioner received $27,300 of distributions from National Financial Services LLC, since the notice of deficiency indicates that such distributions were reported to respondent in an information return.[8] Moreover,

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[8] Although sec. 6201(d) may, in certain circumstances, shift the burden of production to the Commissioner when a disputed information return forms the basis of his deficiency determination, such circumstances are not present here. As an initial matter, sec. 6201(d) requires that "the taxpayer has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by the Secretary)". The undisputed allegations in respondent's Motion to Dismiss concerning petitioner's failure to cooperate are sufficient to demonstrate that petitioner has not satisfied that requirement. Furthermore, sec. 6201(d) applies only "if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return". Petitioner has generically disputed the total amount of income that *(continued)*

respondent has also submitted, as Exhibit B to his Motion to Dismiss, copies of documents from the records of Fidelity Management Trust Company (Fidelity) that independently satisfy his burden of production as to that unreported income. The documents are accompanied by a certificate executed by Fidelity's custodian of records that is sufficient to authenticate them as admissible business records. See Fed. R. Evid. 803(6), 902(11). Among the Fidelity documents are copies of a Form 1099-R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., issued to petitioner by National Financial Services LLC as agent for Fidelity Investments, indicating that petitioner received taxable IRA distributions of $27,300 for 2014. That amount is corroborated by copies of four cancelled checks issued to petitioner[9] by Fidelity Brokerage Services LLC, in amounts totaling $27,300, as well as by the December 2014 statement for petitioner's Fidelity Rollover IRA (account number ending in 0067), which shows year-to-date reportable distributions from the IRA of $27,300.[10] Respondent has accordingly produced sufficient evidence to link petitioner to the $27,300 of disputed IRA distributions. Consequently, respondent's unreported income determinations are entitled to the presumption of correctness.

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

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respondent determined he failed to report for 2014, but he has not identified any specific dispute concerning a particular income item or information return. He therefore has not raised a reasonable dispute with respect to any specific income item for purposes of sec. 6201(d). See Carlson v. Commissioner, T.C. Memo. 2012-76, 2012 WL 947161, at *3, aff'd, 604 F. App'x 628 (9th Cir. 2015).

[9] Three of the four checks were endorsed by petitioner. The fourth check appears to have been endorsed by Tabbitha Bayne, who also co-endorsed another of the checks and is listed as petitioner's spouse on line 3 of his Form 1040A, where he elected married filing separately as his filing status.

[10] The Fidelity documents also include a Form 5498, IRA Contribution Information, for 2014 which was issued to petitioner by National Financial Services LLC as agent for Fidelity Management Trust Company. The Form 5498 reports rollover contributions to an account with an account number ending in 0067 in the amount of $27,891--i.e., the amount that respondent now concedes was a nontaxable rollover. It thus appears that, during 2014, petitioner rolled over $27,891 into his Fidelity IRA account and subsequently received taxable distributions from that account totaling $27,300.

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, he has failed to satisfy his burden of proof. We thus sustain the reduced deficiency of $13,292 that respondent seeks in his Motion to Dismiss.

In the notice of deficiency respondent also determined that petitioner is liable for additions to tax under sections 6651(a)(1) and (2) and 6654. Section 6651(a)(1) imposes an addition to tax for failure to file a timely return, unless the taxpayer proves that such failure is due to reasonable cause and is not due to willful neglect. Section 6651(a)(2) imposes an addition to tax for failure to pay the amount of tax shown on a return, unless the taxpayer proves that such failure is due to reasonable cause and is not due to willful neglect. Section 6654 imposes an addition to tax on an individual taxpayer who underpays his estimated tax.

The Commissioner generally bears the burden of production with respect to any penalty, addition to tax, or other additional amount, where the taxpayer has contested it in his 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 penalty. 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 penalty because of reasonable cause, substantial authority, or a similar provision. Id. at 446-447; see also Wheeler v. Commissioner, 127 T.C. 200, 206 (2006), aff'd, 521 F.3d 1289 (10th Cir. 2008).

Respondent has not attempted to meet his burden of production with respect to the additions to tax determined in the notice of deficiency. He instead argues that he has no burden of production as to the additions to tax because the Petition fails to put them at issue. See Rule 34(b)(4); Funk v. Commissioner, 123 T.C. at 218; Swain v. Commissioner, 118 T.C. at 364-365. We disagree. As we have previously explained, "[a]ll claims in a petition should be broadly construed so as to do substantial justice, and a petition filed by a pro se litigant should be liberally construed." Gray v. Commissioner, 138 T.C. 295, 298 (2012). The assignments of error in the Petition, which petitioner filed pro se, include the statement, "I don't think it's fair to wait 5 years then slap someone with all these charges and penal[]ties." That statement, construed liberally, is sufficient to put respondent on notice that petitioner disagrees with respondent's determination that he is liable for "charges and penalties", i.e., additions to tax, for the year at issue. We accordingly

must determine whether respondent has satisfied his burden of production with respect to each of the additions to tax determined in the notice of deficiency.

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% 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%. 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 and by the amount of any credit that the taxpayer may claim on the return. See sec. 6651(b)(1). To carry his burden of production with respect to the section 6651(a)(1) addition to tax, the Commissioner must introduce evidence showing that a return was filed after the due date. See Wheeler v. Commissioner, 127 T.C. at 207-208; Higbee v. Commissioner, 116 T.C. at 447. Petitioner's 2014 income tax return was due in April 2015, and any extension for filing the return would have expired in October 2015. See secs. 6072(a), 6081(a). Respondent has produced a copy of petitioner's 2014 return, dated January 23, 2020, which bears a stamp indicating that the Internal Revenue Service received it on February 5, 2020. The return is also accompanied by a copy of an envelope listing petitioner's return address and bearing a postmark which begins "01 FEB" and appears, consistent with the other dates appearing on the return, to end in "2020" (although the year of the postmark is not entirely legible). Respondent has accordingly produced sufficient evidence to indicate that petitioner filed his 2014 return more than 5 months after the latest date on which it could have been timely filed, and that the maximum section 6651(a)(1) addition to tax therefore applies. See Higbee v. Commissioner, 116 T.C. at 447 & n.7 (burden of production satisfied where parties stipulated the return filing date and the return for the year at issue itself reflected that it was not timely filed); Amelsberg v. Commissioner, T.C. Memo. 2018-94, at *21 (burden of production satisfied where there was evidence of the dates on which the taxpayers mailed their returns and the dates the Commissioner received them).

Where a taxpayer fails to pay the amount of tax shown on a return by the date prescribed for payment, section 6651(a)(2) imposes an addition to tax equal to 0.5% of the tax shown for each month (or portion thereof) that the tax remains unpaid, up to a maximum of 25%. To satisfy his burden of production with respect to an addition to tax under section 6651(a)(2), the Commissioner must produce evidence that a return was filed showing the tax liability for the year at issue. See Wheeler v. Commissioner, 127 T.C. at 210. In cases where a taxpayer has not filed a return, the Commissioner must produce evidence that he made a substitute for return (SFR) on the taxpayer's behalf pursuant to section 6020(b). See id.; Gardner v. Commissioner, T.C. Memo. 2013-67, at *23-*25 (explaining that

documents such as account transcripts indicating that respondent prepared a substitute for return are insufficient to satisfy the burden of production). In this case, the notice of deficiency indicates that petitioner failed to file a return for 2014, but it makes no reference to an SFR. Respondent's Motion to Dismiss refers to an SFR only in a brief notation in an exhibit,[11] and respondent has not submitted to the Court a copy of any SFR prepared for 2014. Respondent has accordingly failed to satisfy his burden of production, and we will not sustain the addition to tax under section 6651(a)(2).[12]

The section 6654 addition to tax applies where a taxpayer underpays his estimated tax. Sec. 6654(a); Wheeler v. Commissioner, 127 T.C. at 210. A

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[11] The notation "SFR" appears in Exhibit A to respondent's Motion to Dismiss. Exhibit A is a Form 5278, Statement - Income Tax Changes, which reflects respondent's concessions. The "SFR" notation appears on line 9, reflecting taxable income shown in the return as filed, which is listed as zero. Exhibit A provides no other information about the SFR.

[12] Respondent does not contend that petitioner's Form 1040A could satisfy his burden of production as to the section 6651(a)(2) addition to tax. In that regard, we note that petitioner claimed to have paid the tax shown as due in his Form 1040A, in that he reported withholding credits in excess of the tax shown and claimed that he was due a refund. Respondent evidently concedes that petitioner properly claimed the withholding credits since an identical amount, aside from a rounding difference, appears as a positive adjustment to petitioner's prepayment credits in the Form 5278 attached as Exhibit A to respondent's Motion to Dismiss. Petitioner's Form 1040A, standing alone, therefore would not satisfy respondent's burden of producing evidence that petitioner failed to pay the tax shown as due therein. See sec. 6651(b)(2) (providing that, for purposes of calculating an addition to tax under sec. 6651(a)(2), the amount of tax shown on a return is reduced "by the amount of any part of the tax which is paid on or before the beginning of * * * [any] month and by the amount of any credit against the tax which may be claimed on the return"); Spurlock v. Commissioner, T.C. Memo. 2003-124, 2003 WL 1987156, at *10 ("[A] failure to file Federal income tax returns and a failure to pay the correct amount of tax are insufficient alone to justify the imposition of additions to tax under section 6651(a)(2)."); Burr v. Commissioner, T.C. Memo. 2002-69, 2002 WL 459233, at *6 & n.4, *7 & n.5 (declining to sustain sec. 6651(a)(2) additions to tax where the taxpayer did not file returns before issuance of notices of deficiency and the Commissioner did not argue that subsequently filed delinquent returns constituted the taxpayer's returns for purposes of sec. 6651(a)(2)), aff'd, 56 F. App'x 150 (4th Cir. 2003).

taxpayer is only obligated to pay estimated tax if he has a "required annual payment". See Wheeler v. Commissioner, 127 T.C. at 211-212. The Commissioner's burden of production therefore requires him, "at a minimum, to produce evidence that a taxpayer had a required annual payment under section 6654(d)." Id. at 212. Under section 6654(d)(1)(B), the required annual payment is equal to the lesser of (1) 90% of the tax shown on the taxpayer's return for the taxable year (or, if no return was filed, 90% of his tax for the year), or (2) 100% (or, in the circumstances described in section 6654(d)(1)(C), 110%) of the tax shown on the taxpayer's return for the previous taxable year, if such a return was filed. The Commissioner accordingly must produce evidence showing whether the taxpayer filed a return for the taxable year preceding the year at issue, and if so, the amount of tax shown thereon. See Wheeler v. Commissioner, 127 T.C. at 211-212. Respondent has not done so here. He therefore has not satisfied his burden of production, and we do not sustain the section 6654 addition to tax.

In sum, respondent has produced sufficient evidence to satisfy his burden of production with respect to the section 6651(a)(1) addition to tax, but not as to the other additions to tax determined in the notice of deficiency. Petitioner thus bears the burden of proof with respect to any exculpatory factors for the section 6651(a)(1) addition to tax. See Wheeler v. Commissioner, 127 T.C. at 206; Higbee v. Commissioner, 116 T.C. at 446-447. As petitioner has adduced no evidence in support of any exculpatory factors, we will sustain an addition to tax under section 6651(a)(1). In his calculations in the notice of deficiency and in Exhibit A to his Motion to Dismiss, respondent applied section 6651(c)(1), which provides that the section 6651(a)(1) addition to tax must be reduced by the amount of the section 6651(a)(2) addition to tax for months as to which both additions apply. Because we do not sustain the section 6651(a)(2) addition to tax, section 6651(c)(1) does not apply in this case. See Burr v. Commissioner, 2002 WL 459233, at *8. Petitioner is accordingly liable for an addition to tax under section 6651(a)(1) equal to 25% of the $7,455 net amount due after accounting for prepayment credits.[13] See secs. 31(a), 6651(a)(1), (b)(1).

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[13] The net amount due is shown on line 23 of Exhibit A to respondent's Motion to Dismiss. In the Motion to Dismiss, respondent seeks a sec. 6651(a)(1) addition to tax of $1,677, which is 22.5% of the $7,455 net amount due. Respondent's calculation thus reflects that, under sec. 6651(c)(1), the sec. 6651(a)(1) addition to tax would have applied for 5 months at a reduced rate of 4.5% per month, totaling 22.5% (instead of the usual rate of 5% per month, totaling 25%) if we had sustained the sec. 6651(a)(2) addition to tax (which would have applied at a rate of 0.5% per month, totaling 2.5%, over the course of the same 5-month period).

The foregoing considered, it is

ORDERED that the Court's Order to Show Cause served January 8, 2021, is hereby made absolute. It is further

ORDERED that respondent's Motion to Dismiss for Lack of Prosecution, filed December 30, 2020, is granted, in that this case is hereby dismissed for failure to properly prosecute. It is further

ORDERED and DECIDED that there is a deficiency in petitioner's 2014 Federal income tax due in the amount of $13,292 and an addition to tax due under I.R.C. section 6651(a)(1) in the amount of $1,863.75; and

That there are no additions to tax due from petitioner for the taxable year 2014 under the provisions of I.R.C. sections 6651(a)(2) and 6654.

(Signed) Joseph H. Gale
Judge