

161 T.C. 1-9

UNITED STATES TAX COURT

REPORTS

Vol. 161

Nos. 1 and 2



July 1, 2023, to
August 31, 2023

UNITED STATES TAX COURT
WASHINGTON, D.C.

JUDGES OF THE UNITED STATES TAX COURT

Chief Judge

KATHLEEN KERRIGAN

Judges

MAURICE B. FOLEY

JOSEPH H. GALE¹

ELIZABETH CREWSON PARIS²

RICHARD T. MORRISON³

RONALD L. BUCH

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CARY DOUGLAS PUGH

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Senior Judges recalled to perform judicial duties under the provisions of section 7447 of the Internal Revenue Code:

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MICHAEL B. THORNTON

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Special Trial Judges

LEWIS R. CARLUZZO, *Chief Special Trial Judge*

PETER J. PANUTHOS

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ADAM B. LANDY

EUNKYONG CHOI⁴

STEPHANIE A. SERVOSS, *Clerk*

SHEILA A. MURPHY, *Reporter of Decisions*

¹ Judge Gale assumed Senior status on August 26, 2023.

² Judge Paris retired on July 29, 2023, and was recalled July 30, 2023.

³ Judge Morrison retired August 28, 2023, and was recalled August 29, 2023.

⁴ Special Trial Judge Choi resigned August 11, 2023.

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REPORTS
OF THE
UNITED STATES TAX COURT

JOSEPH E. ABE, DDS, INC., PETITIONER *v.* COMMISSIONER
OF INTERNAL REVENUE, RESPONDENT

Docket No. 20378-22R.

Filed August 3, 2023.

P established a retirement plan for its employees. R selected P's retirement plan for audit. R issued a determination letter revoking the plan's qualification. P petitioned the Court pursuant to I.R.C. § 7476 seeking a declaratory judgment. R timely filed an Answer. P moved to dismiss the case. R did not object to the Motion to Dismiss. *Held:* The Court has discretion to grant motions for voluntary dismissal in nondeficiency cases filed pursuant to I.R.C. § 7476. *Held, further,* the Court will dismiss the case.

Daniel W. Layton, for petitioner.

Edward T. Mitte, for respondent.

OPINION

FOLEY, *Judge:* The sole issue for decision is whether the Court, on petitioner's Motion, may dismiss a petition for declaratory judgment filed pursuant to section 7476.¹

¹Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C. (Code), in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

Background

Petitioner, Joseph E. Abe, DDS, Inc., is a California corporation. Petitioner created the Joseph E. Abe, DDS, Inc., Retirement Plan (plan) which became effective on July 1, 1982. On September 9, 1987, the Internal Revenue Service sent petitioner a favorable determination letter that informed petitioner that the plan met the requirements of section 401(a). On August 7, 2019, petitioner terminated the plan, effective January 1, 2019.

In a letter dated November 25, 2020, respondent notified petitioner that the plan was selected for audit. The audit initially covered 2018 and 2019 but was later extended to include 2012 through 2017. On October 27, 2021, respondent sent petitioner a Revenue Agent Report with the results of the audit and revoked the plan's qualification relating to 2012 through 2019. In a final revocation letter dated June 21, 2022, respondent informed petitioner that the plan did not meet the requirements of section 401(a).

On September 16, 2022, petitioner timely filed a Petition with the Court seeking a declaratory judgment pursuant to section 7476 that from 2012 through 2019 the plan was a qualified retirement plan. The Court, on November 17, 2022, filed respondent's timely Answer. On January 14, 2023, petitioner moved to dismiss the Petition. Respondent did not object to the Motion.

Discussion

The Tax Court is a court of limited jurisdiction and may exercise jurisdiction only to the extent authorized by Congress. *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). The Court primarily hears cases involving petitions to redetermine deficiencies. *See* § 6213; *Mainstay Bus. Sols. v. Commissioner*, 156 T.C. 98, 99 (2021). The Court also hears certain nondeficiency cases, including collection actions pursuant to sections 6320 and 6330, innocent spouse determinations pursuant to section 6015, whistleblower award determinations pursuant to section 7623(b)(4), and interest abatement actions pursuant to section 6404(h). *Mainstay*, 156 T.C. at 99. In addition the Court's jurisdiction extends to reviewing the Commissioner's

decisions regarding the initial or continuing qualification of a retirement plan. § 7476(a).

When the Court grants a motion to dismiss, unless the dismissal is for lack of jurisdiction, section 7459 requires the Court to sustain the Commissioner's determination set forth in the notice of deficiency. § 7459(d). This Court has held that taxpayers may not move to withdraw a petition in deficiency redetermination cases. *See Estate of Ming v. Commissioner*, 62 T.C. 519, 522–23 (1974) (holding section 7459(d) applies in cases filed pursuant to section 6213 and mandates an entry of decision in the Commissioner's favor).

In nondeficiency cases filed pursuant to Code sections other than section 6213, this Court has previously granted taxpayers' motions to dismiss or withdraw petitions. *See generally Stein v. Commissioner*, 156 T.C. 167 (2021) (administrative costs pursuant to section 7430(f)(2)); *Mainstay*, 156 T.C. at 100 (failure to abate interest pursuant to section 6404(h)); *Jacobson v. Commissioner*, 148 T.C. 68 (2017) (whistleblower awards pursuant to section 7623(b)(4)); *Davidson v. Commissioner*, 144 T.C. 273 (2015) (innocent spouse determinations pursuant to section 6015(e)); *Wagner v. Commissioner*, 118 T.C. 330 (2002) (collection actions pursuant to sections 6320(c) and 6330(d)). Section 6213 was not applicable to these nondeficiency cases and therefore section 7459(d) did not mandate entry of decisions in the Commissioner's favor upon the dismissals. *See, e.g., Stein*, 156 T.C. at 169.

Because there is no Tax Court Rule on motions for voluntary dismissal, the Court may look to the Federal Rules of Civil Procedure (FRCP). *See* Rule 1(b). FRCP 41 permits plaintiffs to voluntarily dismiss a civil action without a court order by filing either (1) a notice of dismissal before the opposing party serves an answer or a motion for summary judgment or (2) a stipulation of dismissal signed by all parties who have appeared. FRCP 41(a)(1)(A). In all other circumstances, a court may dismiss a case "at the plaintiff's request only by court order, on terms that the court considers proper." FRCP 41(a)(2). The granting of a motion pursuant to FRCP 41(a)(2) is without prejudice, unless the Court orders otherwise. *Davidson*, 144 T.C. at 276; *Settles v. Commissioner*, 138 T.C. 372, 375 (2012). Accordingly, a voluntary dismissal is generally treated as if the action had never been filed. *See*

Humphreys v. United States, 272 F.2d 411, 412 (9th Cir. 1959); *Wagner*, 118 T.C. at 333–34.

FRCP 41(a)(2) permits voluntary dismissal at a court’s discretion, and the caselaw interpreting the provision provides that a court should grant such dismissal “unless the defendant will suffer clear legal prejudice.” *Wagner*, 118 T.C. at 333 (quoting *McCants v. Ford Motor Co.*, 781 F.2d 855, 856–57 (11th Cir. 1986)). In considering whether the nonmoving party would be prejudiced by the granting of a motion to voluntarily dismiss, the Court must “weigh the relevant equities and do justice between the parties in each case.” *Id.* (quoting *McCants*, 781 F.2d at 857). Where the Commissioner does not object to the granting of a taxpayer’s motion to dismiss, the Court has concluded that he will not be prejudiced. *See, e.g., Stein*, 156 T.C. at 170; *Wagner*, 118 T.C. at 331, 333–34. The Court also considers whether the statutory period for filing a petition has expired and has granted motions to voluntarily dismiss where the period for filing had expired. *E.g., Jacobson*, 148 T.C. at 70–71; *Wagner*, 118 T.C. at 333–34.

Consistent with our holdings in *Stein*, *Mainstay*, *Jacobson*, *Davidson*, and *Wagner*, we hold it is within the Court’s discretion to grant motions for voluntary dismissal in nondeficiency cases filed pursuant to section 7476. Respondent does not object to the granting of petitioner’s Motion, the statutory period for refiling a petition has expired, and we conclude he would not be prejudiced by the dismissal. Accordingly, we will grant the Motion and dismiss the case without prejudice.

An order granting petitioner’s Motion to Dismiss will be entered.

ZOLA JANE PUGH, PETITIONER *v.* COMMISSIONER
OF INTERNAL REVENUE, RESPONDENT

Docket No. 17992-19P.

Filed August 14, 2023.

R certified P to the Secretary of State under I.R.C. § 7345 as an individual with a “seriously delinquent tax debt.” The State Department accordingly refused to renew P’s U.S. passport. P petitioned the Court for review of R’s certification pursuant to I.R.C. § 7345(e). R filed two successive Motions for

Summary Judgment, one of which was pending when P filed a Motion to Dismiss her case. R initially indicated that he would object to dismissal but later stated that he had no objection. *Held*: The Court has discretion to grant P’s unilateral Motion for the Court to dismiss without prejudice her case contesting a certification under I.R.C. § 7345. *Held, further*, absent evidence of clear legal prejudice to R, we will grant P’s Motion to Dismiss. *Held, further*, R’s Motion for Summary Judgment will be denied as moot.

Zola Jane Pugh, pro se.

Susan K. Bollman and *John S. Hitt*, for respondent.

OPINION

COPELAND, *Judge*: Petitioner, Zola Jane Pugh, has filed a Motion to Dismiss her case, which she initially brought to contest a certification by the Commissioner of Internal Revenue (Commissioner) that she has a “seriously delinquent tax debt” as defined in section 7345.¹ Whether we may grant a taxpayer’s motion to dismiss without prejudice in a case contesting a section 7345 certification is a question of first impression for this Court.

Background

On July 23, 2018, Ms. Pugh was notified by the Commissioner that he had certified her to the U.S. Department of State (State Department) under section 7345 as an individual having a seriously delinquent tax debt.² After Ms. Pugh applied for renewal of her passport, the State Department is-

¹Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C. (I.R.C.), in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

²Section 7345(b)(1) generally defines a “seriously delinquent tax debt” as an unpaid, legally enforceable Federal tax liability of an individual—

- (A) which has been assessed,
- (B) which is greater than \$50,000, and
- (C) with respect to which—
 - (i) a notice of lien has been filed pursuant to section 6323 and the administrative rights under section 6320 with respect to such filing have been exhausted or have lapsed, or
 - (ii) a levy is made pursuant to section 6331.

The threshold amount described in subparagraph (B) is modified to account for inflation. I.R.C. § 7345(f).

sued a letter on April 15, 2019, notifying her that she was ineligible for passport services because of the Commissioner's certification. *See* 22 U.S.C. § 2714a(e) (generally forbidding the State Department from issuing or renewing a passport for a taxpayer certified under section 7345 and authorizing the State Department to revoke a passport previously issued to that taxpayer).

On the basis of that letter Ms. Pugh petitioned this Court contending that the Commissioner's section 7345 certification was erroneous,³ and the nonissuance of a passport is unconstitutional.⁴ The Commissioner filed a Motion for Summary Judgment on January 19, 2021, contending that he did not err in certifying Ms. Pugh to the State Department as having a seriously delinquent tax debt, and denial of a passport resulting from a certification under section 7345 is not a violation of the Constitution. We denied that Motion without prejudice because the Commissioner failed to support it with copies of the relevant notices of deficiency, notices of intent to levy, and/or Internal Revenue Service (IRS) transcripts relating to Ms. Pugh's alleged tax deficiencies. The Commissioner included some of these documents in a renewed Motion for Summary Judgment, filed on November 23, 2022. Ms. Pugh did not respond to either Motion for Summary Judgment, despite two separate orders for her to do so.

On January 23, 2023, Ms. Pugh filed a Motion to Dismiss her case in light of her alleged recent discovery that "she, as an alien foreign national, is exempt from taxation and

³Section 7345(e)(1) provides as follows:

After the Commissioner notifies an individual [of a certification to the Secretary of State] under subsection (d), the taxpayer may bring a civil action against the United States in a district court of the United States, or against the Commissioner in the Tax Court, to determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification. For purposes of the preceding sentence, the court first acquiring jurisdiction over such an action shall have sole jurisdiction.

⁴In her Petition, Ms. Pugh checked the box indicating that she had received a Notice of Determination Concerning Collection Action. We dismissed that claim for lack of jurisdiction under sections 6320 and 6330 because the Commissioner confirmed that Ms. Pugh had not received such a notice. However, we retained the case because we have jurisdiction to hear the section 7345(e) claim that Ms. Pugh conveyed in the remaining portions of the Petition.

has been all her life.” (Ms. Pugh provided no documentation or other supporting evidence for this claim.) The Commissioner initially indicated that he would object to the Motion to Dismiss but later, upon being ordered to file a formal objection, stated that he did not object. The Notice of No Objection states, in part: “[The Commissioner] will suffer no clear legal prejudice from the dismissal of petitioner’s petition to contest her certification as an individual owing a seriously delinquent tax debt under section 7345.”

Discussion

Ms. Pugh’s Motion to Dismiss does not specify whether she is requesting dismissal with prejudice or without prejudice to refile a suit on the same claim in the future. Because Ms. Pugh is self-represented and because a dismissal with prejudice has more severe implications for her rights, we will construe her Motion as a motion to dismiss without prejudice. *See Gray v. Commissioner*, 138 T.C. 295, 298 (2012) (“All 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.” (first citing Rule 31(d); then citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972); then citing *Lukovsky v. Commissioner*, T.C. Memo. 2010-117; then citing *Med. Prac. Sols., LLC v. Commissioner*, T.C. Memo. 2009-214, supplemented by T.C. Memo. 2010-98; and then citing *Swope v. Commissioner*, T.C. Memo. 1990-82)).

This Court has long held that when taxpayers bring cases under section 6213 asking us to redetermine a tax deficiency, we cannot grant motions to dismiss without prejudice because we are mandated by section 7459(d) to enter a decision sustaining the Commissioner’s deficiency determination.⁵ *See Estate of Ming v. Commissioner*, 62 T.C. 519, 521 (1974). This holding is based on the statutory framework governing our and other courts’ jurisdiction in the handling of deficiency cases, *id.* at 521–22, as well as a deficiency petition’s inherent prejudice to the Commissioner, who is precluded by section 6213(a) from assessing or collecting the tax in dispute during the pendency of the case, *Estate of Ming*, 62 T.C. at 524.

⁵Section 7459(d) provides that in deficiency cases, “a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary [of the Treasury].”

However, over the years Congress has expanded our jurisdiction to include controversies that do not require us to redetermine deficiencies. And in many of those new areas of jurisdiction, we have granted motions to dismiss without prejudice absent objection from the Commissioner. For example, in *Wagner v. Commissioner*, 118 T.C. 330 (2002), we granted the taxpayers' unopposed motion to dismiss a case brought under section 6320(c) for review of the Commissioner's determination to file a notice of federal tax lien. In *Davidson v. Commissioner*, 144 T.C. 273 (2015), we granted a taxpayer's unopposed motion to withdraw her petition and dismiss her case brought under section 6015(e) for stand-alone review of the Commissioner's denial of "innocent spouse" relief from joint and several liability. In *Jacobson v. Commissioner*, 148 T.C. 68 (2017), we granted a whistleblower's unopposed motion to dismiss her case brought under section 7623(b)(4) for review of the IRS Whistleblower Office's award determination. In *Mainstay Business Solutions v. Commissioner*, 156 T.C. 98 (2021), we granted a taxpayer's unopposed motion to withdraw its petition and dismiss its case brought under section 6404(h) for review of the Commissioner's failure to abate interest. In *Stein v. Commissioner*, 156 T.C. 167 (2021), we granted the taxpayers' unopposed motion to dismiss their petition brought under section 7430(f)(2) for review of the Commissioner's denial of their claim for recovery of reasonable administrative costs incurred in connection with a proceeding before the IRS. In *Joseph E. Abe, DDS, Inc. v. Commissioner*, 161 T.C. 1 (2023), we granted a taxpayer's unopposed motion to dismiss its petition brought under section 7476 to review the Commissioner's revocation of a retirement plan's qualification under section 401(a).

In each of those cases we explained that in the absence of a controlling Tax Court Rule, we look to the Federal Rules of Civil Procedure (FRCP) for guidance. See Rule 1(b); *Mainstay Bus. Sols.*, 156 T.C. at 100. In particular we look to FRCP 41(a)(1), which provides rules for the voluntary dismissal of a civil "action." FRCP 41(a)(1) states that in the federal district courts, a plaintiff may dismiss an action without court order by filing either (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment or (ii) a stipulation signed by all parties who have

appeared. FRCP 41(a)(2) states that except in those two circumstances, a plaintiff's motion to dismiss is effective "only by court order, on terms that the court considers proper." The U.S. Court of Appeals for the District of Columbia Circuit, to which an appeal of this case (and other cases brought under section 7345(e)) normally would lie, *see* I.R.C. § 7482(b)(1) (flush language), has indicated that dismissals generally should be granted under FRCP 41(a)(2) unless dismissal would inflict "clear legal prejudice" on the defendant, other than the prospect of a second round of litigation. *Conafay v. Wyeth Lab'ys*, 841 F.2d 417, 419 (D.C. Cir. 1988); *see also Wagner*, 118 T.C. at 333.

The Commissioner has stated that he no longer objects to dismissal of Ms. Pugh's case. Despite Ms. Pugh's excessive delay in filing her Motion to Dismiss—at which time the Commissioner had already filed two Motions for Summary Judgment—and her unsubstantiated reason for seeking dismissal (*viz.*, that she is an "alien foreign national"), we do not see sufficient grounds to second-guess the Commissioner's assertion that he will not be prejudiced by dismissal. In fact, upon dismissal the Commissioner's certification of Ms. Pugh as an individual with a "seriously delinquent tax debt" will remain in place. We conclude that the Commissioner will not suffer clear legal prejudice if we grant Ms. Pugh's Motion, in effect treating this case as if it had never been commenced.

We therefore will grant Ms. Pugh's Motion to Dismiss, deny the Commissioner's pending Motion for Summary Judgment as moot, and dismiss the case without prejudice.

To reflect the foregoing,

An appropriate order will be entered.

