United States Tax Court

T.C. Memo. 2022-29

SHAWN STEPHEN SALTER,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 10776-20. Filed April 5, 2022.

Shawn Stephen Salter, pro se.

Nchekube U. Onyima, *Trent D. Usitalo*, *Brian A. Pfeifer*, and *Michael Skeen*, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

LAUBER, *Judge*: The Internal Revenue Service (IRS or respondent) issued petitioner a notice of deficiency for 2013 after he failed to file a Federal income tax return for that year. Petitioner does not dispute the items of gross income shown in the notice of deficiency. The issues remaining for decision are his entitlement to itemized deductions, computation of a section 72(t) additional tax for an early distribution from a retirement plan, and his liability for a failure-to-file addition to tax under section 6651(a)(1).[1] We resolve these issues in respondent's favor.

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

Served 04/05/22

[*2] FINDINGS OF FACT

The following facts are derived from the pleadings, the trial testimony, and documents admitted into evidence at trial. Petitioner resided in California when his Petition was timely filed.

During the first half of 2013 petitioner resided in Arizona and was employed by Home Depot as a district loss prevention manager. He supervised ten stores, mostly in the Phoenix metropolitan area. His tasks included training employees in loss prevention techniques and policies, auditing inventory, and conducting investigations of shoplifting and other thefts.

Petitioner worked from home but traveled regularly by car to the stores under his supervision. Home Depot offered reimbursement for his travel expenses at a mileage rate, but he declined to seek reimbursement because he believed that claiming such costs on his tax return "would give [him] a bigger refund." He produced no evidence (such as logs or odometer readings) to substantiate his work-related travel.

Petitioner was laid off in mid-2013. To tide himself over during his period of unemployment, he requested from Northern Trust and received during 2013 a distribution of $37,647 from his retirement plan. He had not reached the age of 59½ by that time.

Having received no return from petitioner for 2013, the IRS prepared a substitute for return on the basis of third-party reporting. *See* § 6020(b). On March 23, 2020, the IRS issued him a notice of deficiency determining that he had received the following amounts of income during 2013:

Item	*Amount*
Wages	$31,784
Unemployment compensation	5,040
Dividends	272
Taxable state refund	131
Capital gains	3,406
Taxable retirement distribution	37,647
Other income	787
Total	**$79,067**

[*3] Allowing petitioner the standard deduction ($6,100) and one personal exemption ($3,900), the IRS determined taxable income of $69,067 and computed a tax of $13,195. It also determined an additional tax of $3,765, calculated as 10% of the early distribution from his retirement plan. *See* § 72(t). This produced total tax of $16,960, against which the IRS offset $10,851 of tax withheld by his payors, producing an outstanding liability of $6,109. The notice of deficiency also determined additions to tax under section 6651(a)(1) and (2) for failure to timely file and pay, respectively.

After receiving the notice of deficiency, petitioner informed the IRS of his belief that he had filed a return for 2013 using H&R Block software. But IRS records showed that no return had been submitted, and petitioner was unable to produce, from H&R Block or his own files, a copy of a return or evidence of its filing. Petitioner then prepared, in April 2021, a Form 1040, U.S. Individual Income Tax Return, for 2013, reporting all items of income as shown on the notice of deficiency, but claiming itemized deductions for the following expenses:

Item	*Amount*
State and local taxes	$1,652
Home mortgage interest	10,652
Mortgage insurance premiums	1,091
Charitable contributions	2,816
Unreimbursed employee expenses, including vehicle costs	10,455
Miscellaneous other deductions	380

On this Form 1040 petitioner admitted that he had received an early distribution of $37,647 from his retirement plan. But he computed the 10% additional tax on that sum as only $3,200. He explained at trial that he had offset alleged unreimbursed medical expenses against the distribution when computing the additional tax.

The IRS received third-party reports showing that petitioner had paid $1,652 of state and local taxes, $10,652 of home mortgage interest, and $1,091 of mortgage insurance premiums during 2013. Petitioner supplied no documentation, during the IRS examination or at trial, to substantiate the other deductions he claimed, and he admitted that he had estimated these amounts. He testified that he originally had documentation for his expenses, but that he had thrown those records away when he moved to California in 2017, believing that there was no need

[*4] to keep the records for more than three years. The IRS did not accept the Form 1040 for filing.

OPINION

Petitioner concedes that he received in 2013 taxable income of $79,067. At trial respondent conceded the addition to tax for failure to pay. The issues remaining for decision are petitioner's entitlement to itemized deductions, computation of the section 72(t) additional tax for the early distribution from his retirement plan, and the addition to tax for failure to file.

A. *Itemized Deductions*

Deductions are a matter of legislative grace, and taxpayers bear the burden of proving their entitlement to any deduction claimed. Rule 142(a); *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992). A taxpayer must show that he or she has met all requirements for each deduction and keep books or records that substantiate the expenses underlying it. § 6001; *Roberts v. Commissioner*, 62 T.C. 834, 836 (1974). Failure to keep and present such records counts heavily against a taxpayer's attempted proof. *Rogers v. Commissioner*, T.C. Memo. 2014-141, 108 T.C.M. (CCH) 39, 43.

Section 274(d)(4) sets forth heightened substantiation requirements with respect to "listed property." As in effect during 2013, "listed property" included "any passenger automobile." § 280F(d)(4)(A)(i); Treas. Reg. § 1.280F-6(b)(1)(i). No deduction is allowed for vehicle expenses unless the taxpayer substantiates, by adequate records or sufficient evidence corroborating his own statements, the amount, time and place, and business purpose for each expenditure. *See* § 274(d); Temp. Treas. Reg. § 1.274-5T(c).

All of the deductions petitioner claims are itemized deductions. Section 63(e)(1) provides that, "[u]nless an individual makes an election under this subsection for the taxable year, no itemized deduction shall be allowed for the taxable year." Section 63(e)(2), captioned "Time and Manner of Election," provides that "[a]ny election under this subsection shall be made on the taxpayer's return." In certain circumstances a taxpayer may make "a change of election with respect to itemized deductions," but only when a return was previously filed. *See* § 63(e)(3).

The statutory direction that an election to itemize deductions "shall be made on the taxpayer's return" is mandatory. *See Jahn v.*

[*5] *Commissioner*, 392 F. App'x 949, 950 (3d Cir. 2010) (quoting § 63(e)(2)), *aff'g per curiam* T.C. Memo. 2008-141. "Thus, if an individual fails to file a return, he has made no election to itemize his deductions." *George v. Commissioner*, T.C. Memo. 2019-128, 118 T.C.M. (CCH) 294, 296, *aff'd per curiam*, 821 F. App'x 76 (3d Cir. 2020). If no return is filed and, "as a result, the Commissioner prepares a substitute return, then the individual has made no election and may not claim itemized deductions." *Ibid.*; *see Zaklama v. Commissioner,* T.C. Memo. 2012-346, 104 T.C.M. (CCH) 760, 777 ("Having failed to file returns and thereby having failed to elect to claim itemized deductions on their returns, [the taxpayers] are not entitled to do so in these proceedings."); *Murray v. Commissioner*, T.C. Memo. 2012-213, 104 T.C.M. (CCH) 112, 114; *Salati v. Commissioner*, T.C. Memo. 1989-192, 57 T.C.M. (CCH) 246, 248.

Petitioner insists that he did timely file a return for 2013, but he has offered no evidence of any kind to support that assertion. Although he allegedly used H&R Block software to prepare the return, he has not produced a copy of any return, from H&R Block or from his own files. He has produced no evidence that a return was filed, either by mail or electronically. He asserts that the return he allegedly filed claimed a refund, but he has produced no financial records to substantiate his receipt of a refund. The certified IRS transcript of his 2013 account shows that, in December 2014, the IRS made an "inquiry for non-filing of tax return"; that the IRS sent him in March 2020 a "final notice before tax is determined by IRS"; and that a "substitute tax return [was] prepared by IRS." We find that petitioner did not file a return for 2013, that he made no election to itemize deductions as required by section 63(e), and that he accordingly is not allowed any itemized deductions. He remains entitled to the standard deduction as calculated on the notice of deficiency.

B. *Additional Tax*

Petitioner concedes that he received a taxable distribution of $37,647 from his retirement plan in 2013 and that this was an "early distribution" because he was younger than 59½ at the time. *See* § 72(t)(2)(A)(i). In such circumstances section 72(t)(1) imposes an additional tax equal to 10% of the distribution. However, the additional tax does not apply "to the extent such distributions do not exceed the amount allowable as a deduction under section 213" for medical expenses. § 72(t)(2)(B). This exception is available "without regard to whether the [taxpayer] itemizes deductions for such taxable year." *Ibid.*

[*6] In computing the additional tax petitioner reduced the distribution by $5,647 on account of alleged unreimbursed medical expenses, then calculated an additional tax of $3,200 on the balance. Although petitioner testified that he had consulted doctors during 2013 and paid medical insurance premiums after he lost his job, he submitted no documentary evidence of any kind to support that assertion.

In any event, this exception is available only for medical expenses "allowable as a deduction under section 213." During 2013, medical expenses were deductible under section 213 only to the extent they exceeded 10% of the taxpayer's adjusted gross income. *See* § 213(a). Petitioner conceded at trial that his medical expenses, even if substantiated, did not exceed this 10% floor, explaining that he had claimed no deduction for medical expenses on his pro forma Form 1040 for that reason. Because petitioner failed to substantiate his medical expenses, and because they do not exceed the 10% floor, he cannot qualify for this exception. We thus hold that respondent correctly determined an additional tax of $3,765 under section 72(t)(1).

C. *Addition to Tax*

Section 6651(a)(1) provides for an addition to tax of 5% of the tax required to be shown on the return for each month or fraction thereof for which there is a failure to file the return, not to exceed 25% in toto. Respondent determined an addition to tax under this provision. Respondent has met his burden of production, *see* § 7491(c), because we have found that petitioner failed to file a return for 2013.

The addition to tax for failure to file does not apply if "it is shown that such failure is due to reasonable cause and not due to willful neglect." § 6651(a)(1). The taxpayer bears the burden of proof on this point. *Higbee v. Commissioner*, 116 T.C. 438, 447 (2001). Petitioner did not allege or prove that he had reasonable cause for failure to file a return for 2013. To the contrary, he asserted that he did file a return, but we did not find that testimony credible. We will therefore sustain the addition to tax under section 6651(a)(1).[2]

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[2] The notice of deficiency also determined a late-payment addition to tax of $1,527.25—25% of the deficiency—under section 6651(a)(2). By virtue of section 6651(c)(1), the failure-to-file addition to tax shown in that notice was therefore reduced to $1,374.52. Since respondent has conceded the addition to tax for late payment, section 6651(c)(1) does not apply, and the failure-to-file addition to tax will be larger than determined in the notice of deficiency.

[*7] To implement the foregoing, and to account for respondent's concession,

Decision will be entered under Rule 155.