

Rule 162 does not provide a standard by which a motion to vacate should be evaluated. In the absence of specific Tax Court rules, this Court looks to the Federal Rules of Civil Procedure (“FRCP”) for a suitable standard, as urged by Rule 1(b), which provides:

(b) Scope of Rules: These Rules govern the practice and procedure in all cases and proceedings before the Court. Where in any instance there is no applicable rule of procedure, the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand;

3. Rule 60(b) of the FRCP provides:

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief;

4. FRCP 60(b) is, per Rule 1(b), “suitably adaptable to govern the matter at hand,” so those rules should be applied in evaluating this motion. Potentially applicable grounds upon which the Order can be set aside include “mistake” under FRCP 60(b)(1) and “any other reason that justifies relief” under FRCP 60(b)(6);

5. The U.S. Supreme Court recently issued a ruling in Boechler, P.C. v Commissioner, No. 20-1472, slip. op. (U.S. April 21, 2022), ___ U.S. ___ (2022), which articulates an analysis that should be employed in determining whether certain statutory deadlines are jurisdictional or procedural. That mandatory analysis was not applied in the Order.

6. To correct its prior “mistake,” per Rule 162 and FRCP 60(b)(1), the Tax Court issued an Order on April 26, 2022, in the matter of Sherman v. Commissioner, No. 11951-20, which applied Boechler and stated that,

...on April 8, 2022, we issued an ‘Order of Dismissal for Lack of Jurisdiction.’ However, on April 21, 2022, the U.S. Supreme Court issued its opinion in Boechler, P.C. v. Commissioner, No 20-1472, holding that the 30-day deadline in section 6330(d)(1) is not jurisdictional but rather is subject to equitable tolling. It is ORDERED that our order of April 8, 2022, is hereby vacated. This case remains pending before this Court....

7. As detailed in the accompanying Memorandum of Law, the Tax Court in this case should follow the action of the Tax Court in Sherman by applying the Boechler analysis and reversing the Order. If the Boechler analysis had been applied by the Tax Court in making a decision with respect to the Order, petitioner is of the view that the Order would not have been issued, and as such, the Order constitutes a “mistake” that requires it to be set aside under Rule 162 and FRCP Rule 60(b)(1);

8. Respondent’s counsel has been informed of this motion and objects to it being granted.

WHEREFORE, it is prayed that this motion be granted.

Respectfully submitted,



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