

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PA

OMAR ROHTTIS,)
)
Petitioner(s),)
)
v.) Docket No. 6382-14S.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)
)

ORDER AND ORDER OF DISMISSAL FOR LACK OF JURISDICTION

Introduction

On May 20, 2014, respondent filed a Motion to Dismiss for Lack of Jurisdiction. Respondent's motion states that: (1) the notice of deficiency was mailed to petitioner on May 20, 2013; (2) the 90-day period for timely filing a petition with this Court ended on August 19, 2013; and (3) petitioner filed the petition in this case on March 20, 2014. Respondent, therefore, asserts that the petition was not filed with the Court within the time prescribed by section 6213(a) or section 7502.¹

On June 11, 2014, petitioner filed a notice of objection to respondent's motion. In this notice, petitioner states that: (1) petitioner did not receive the notice of deficiency; (2) petitioner's 2012 tax return was filed on February 25, 2013 with a designation of "2 Floor"; and (3) respondent sent the notice of deficiency to petitioner's address without the "2 Floor" designation. Petitioner concludes that the notice of deficiency was not sent to petitioner's last known address.

Findings of Fact

Respondent's motion was set for an evidentiary hearing on September 9, 2014. The following represents the Court's findings based on the submissions of the parties and the testimony of witnesses at the evidentiary hearing.

¹All section references are to the Internal Revenue Code, as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

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Petitioner has resided in an apartment in a two story building in Ozone Park, New York for five or more years. The building is comprised of a commercial storefront on the first level and two apartments on the second level. There are two doors to the building, each of which have the same address, 10112 Liberty Avenue, Ozone Park, New York 11417-1725. Facing the building, on the sidewalk level, there is a white door to the right, which leads to the two residential apartments (one of which is leased by petitioner) and a bronze door to the left, which leads to the storefront business. There is a slot in the white door through which mail can be delivered. In May of 2013, there was an outside mailbox attached to the wall next to the business entrance. At some later date, and at the time of the hearing, there was no outside mailbox next to the business entrance, but rather there were two holes in the wall where the mailbox was previously attached to the wall.

On his Federal Income Tax Returns for the taxable years 2009, 2010 and 2011, petitioner listed his address as 10112 Liberty Avenue, Ozone Park, New York 11417-1725. At some point in 2011 petitioner began experiencing a problem in not receiving his mail. He believed that some of his mail was placed in the storefront mailbox, some of which he did not receive. As a result of this problem, petitioner added the words "2 Floor" to his address. On his 2012 and 2013 Federal Income Tax Returns petitioner used the "2 Floor" as part of his address. The storefront business was vacant at the time of the evidentiary hearing.

On May 20, 2013, after the filing of the 2012 return, respondent mailed, by certified mail, a notice of deficiency to petitioner addressed to the Liberty Avenue Address, without including the "2 Floor". When delivery was attempted by USPS, no one responded to sign for the certified mail. A notice of attempted delivery was left for petitioner. It is not clear from this record whether the notice was placed in the slot or in the outside mailbox, however we are satisfied that petitioner did not receive the notice of attempted delivery. After fifteen days, USPS returned the notice of deficiency to respondent since petitioner did not respond to the notice of attempted delivery.

Well after the 90 days expired from the initial mailing of the notice of deficiency on May 20, 2013, petitioner received a copy of the notice of deficiency. Soon thereafter petitioner filed the petition herein.

Discussion

The jurisdiction of this Court is limited by statute and attaches only upon the issuance of a valid notice of deficiency and the timely filing of a petition. This case must be dismissed for lack of jurisdiction because a petition was not filed within the time prescribed by the statute. We have jurisdiction to decide if we have jurisdiction. Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999, 1002 (1978). Where jurisdiction is lacking because of the Commissioner's failure to issue a valid notice of deficiency, we will dismiss on that ground, rather than on the ground that the taxpayer failed to file a timely petition. Shelton v. Commissioner, 63 T.C. 193, 198 (1974); Pietanza v. Commissioner, 92 T.C. 729, 735-736 (1989).

A notice of deficiency is valid if it is mailed to the taxpayer's last known address, whether or not the taxpayer receives the notice. Frieling v. Commissioner, 81 T.C. 42, 52 (1983). At the evidentiary hearing, respondent's position was that the notice of deficiency was mailed to petitioner's last known address because either (1) the address reflected in the 2012 return did not constitute a change of address or (2) in the alternative, if there was a change of address, respondent's omission of "2 Floor" was an inconsequential error. An inconsequential error in the address will not preclude a finding that the notice of deficiency was valid. Violette v. Commissioner, T.C. Memo. 1994-173. We have generally found an error to be inconsequential in one or both of the following situations: (1) the error was so minor that it would not have prevented delivery; or (2) the error did not result in actual prejudice to the taxpayer-addressee. Id.

Neither situation is present in this case. Petitioner testified credibly that the reason that he changed his address to add "2 Floor" was because he was having problems receiving his mail. The notice of deficiency was not mailed to the exact address reflected on the 2012 return. Respondent does not suggest, and in fact concedes that he had sufficient time to input petitioner's full address as set forth in the 2012 return prior to the mailing of the notice of deficiency on May 20, 2013. See Abeles v. Commissioner, 91 T.C. 1019, 1036 (1988); Yusko v. Commissioner, 89 T.C. 806, 809 (1987).

Under these circumstances, we conclude that petitioner provided respondent notice of a change of address as indicated in the filing of the 2012 Federal Income Tax Return. Respondent did not mail the notice of deficiency to the precise address set forth in the 2012 return. Petitioner did not receive the notice of deficiency in time to file a timely petition. We conclude that respondent's error prevented petitioner from receiving the notice of deficiency. Thus, respondent's omission of the "2 Floor" designation in the address on the notice of deficiency was not an inconsequential error. We conclude that the notice of deficiency was not sent to petitioner's last known address, was not received by petitioner in time to file a timely petition, and was thus invalid. Upon due consideration, it is

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction is denied. It is further

ORDERED that, on the Court's own motion, this case is dismissed for lack of jurisdiction on the ground that the notice of deficiency was not mailed to petitioner's last known address and is therefore invalid.

(Signed) Peter J. Panuthos
Special Trial Judge

ENTERED: **NOV 21 2014**