

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

JOHN GARCIA,)	
)	
Petitioner,)	
)	
v.)	Docket No. 23490-16.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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ORDER OF DISMISSAL FOR LACK OF JURISDICTION

Pending before the Court is respondent’s Motion To Dismiss For Lack Of Jurisdiction, filed February 17, 2017. Petitioner filed a Response to respondent’s motion on March 9, 2017, objecting to its granting. Thereafter respondent filed a Response on April 3, 2017, and petitioner filed a Reply on April 25, 2017. Most recently, respondent filed a Reply on June 12, 2017, responding in part to questions posed by the Court in an Order dated May 22, 2017. Although the parties appear to disagree on one factual matter, which is mentioned hereinafter, the uncontested portion of the record before the Court, consisting of both facts and exhibits to the parties’ various filings, obviates the need for an evidentiary hearing and permits the Court to act on respondent’s motion at this time.

Introduction

The parties agree that this case must be dismissed for lack of jurisdiction. Respondent contends that dismissal should be based on an untimely filed petition, whereas petitioner contends that dismissal should be based on an invalid notice of deficiency. Regarding the latter rationale for dismissal, the parties agree that the validity, or the invalidity, of the notice of deficiency turns on whether the notice

was sent to petitioner at his last known address. The discussion that follows should therefore be understood as a quest to resolve that central issue. An important part of that quest requires focusing on several different addresses.

Background

Petitioner resided in the State of Texas at the time that the petition was filed with the Court.

1. Petitioner's Petition and Respondent's Motion

On October 31, 2016, petitioner (through counsel) filed a Petition with the Court.¹ Paragraph 1 of the Petition states that petitioner disputes both an IRS notice of deficiency (see I.R.C. sec. 6212) and an IRS notice of determination concerning collection action (see I.R.C. sec. 6330); paragraph 3 of the Petition identifies the relevant taxable year as 2014. However, neither a notice of deficiency nor a notice of determination is attached to the Petition as an exhibit. Rather, attached as exhibits are three documents, two of which are referenced in paragraph 2 of the Petition; those two are an examination-related Letter 1912 dated November 10, 2015, and a collection-related notice dated October 17, 2016, both for the taxable year 2014. Notably, examination-related Letter 1912 is addressed to petitioner at Brownfield Drive in El Paso, Texas (hereinafter the Brownfield Drive address), and the collection-related notice is addressed to petitioner in care of his counsel at his counsel's office address in Albuquerque, New Mexico.² Because of the importance of these addresses (particularly the former) to the disposition of respondent's pending motion, they will hereinafter be referred to as petitioner's Brownfield Drive address and counsel's Albuquerque address. Finally as immediately relevant, the Petition alleges in an Addendum to paragraphs 5 and 6 that "The IRS has failed to properly serve taxpayer with a Notice of Deficiency" and that "Taxpayer nor his attorney were provided with a Notice of Deficiency."³

¹ The Petition was sent to the Court by certified mail; the envelope in which it was mailed bears a USPS postmark date of October 27, 2016.

² For privacy reasons street numbers and ZIP codes are not used in this Order Of Dismissal For Lack Of Jurisdiction.

³ In the context of the Petition (and the entire case) the Court understands the latter allegation to mean to say that neither the taxpayer nor his attorney received a notice of deficiency.

After this case was at issue, see Tax Court Rule 38, respondent filed his Motion To Dismiss For Lack Of Jurisdiction on February 17, 2017. The preamble to respondent's motion states as follows:

RESPONDENT MOVES, that this case, insofar as it relates to tax year 2014, be dismissed for lack of jurisdiction upon the ground that the Petition was not filed within the time prescribed by I.R.C. § 6213(a) or § 7502.

RESPONDENT FURTHER MOVES that pursuant to Tax Court Rule 53, that this case be dismissed for lack of jurisdiction upon the grounds that no notice of determination under I.R.C. §§ 6320 or 6330 was sent to Petitioner for tax year 2014.^[4]

As recounted in the opening paragraph of this Order Of Dismissal For Lack Of Jurisdiction, the parties filed various responses and replies after respondent filed his motion to dismiss. Those filings demonstrate that the Court's action granting or denying respondent's motion turns on whether a notice of deficiency that respondent sent to petitioner was mailed to him at his last known address.⁵ See I.R.C. sec. 6212(b)(1) . Accordingly, the Court turns to the facts that inform its decision in that regard.

2. Petitioner's Income Tax Returns and the Notice of Deficiency

Petitioner electronically filed his Federal income tax return (Form 1040) for 2014 on February 25, 2015. On the return petitioner listed his address as Twin Leaf Drive in El Paso, Texas (hereinafter the Twin Leaf Drive address). See supra note 2,.

⁴ Although the verbiage of the first paragraph of the preamble of respondent's motion suggests that more than one taxable year at issue in this case, that is not true; rather, only the taxable year 2014 is at issue.

⁵ Petitioner ultimately concedes in his various filings that respondent did not send him a notice of determination concerning collection action for 2014. Insofar as collection review is concerned, it is clear that the Court's jurisdiction under I.R.C. section 6330(d) requires the issuance by the Commissioner of a notice of determination. E.g., Sarrell v. Commissioner, 117 T.C. 122, 125 (2001); Moorhous v. Commissioner, 116 T.C. 263, 269 (2001). Accordingly, the part of respondent's motion that moves that "this case be dismissed for lack of jurisdiction upon the grounds that no notice of determination under I.R.C. §§ 6320 or 6330 was sent to Petitioner for tax year 2014" will be granted without further discussion.

Respondent presumably began an examination of petitioner's 2014 return in 2015 because, on October 30, 2015, petitioner's counsel filed a power of attorney (Form 2848, "Power of Attorney and Declaration of Representative"), authorizing him to represent petitioner in respect of respondent's examination of returns and amended returns for (inter alia) the taxable year 2014. The power of attorney listed petitioner's address as the Twin Leaf Drive address and counsel's address as the Albuquerque address. The power of attorney did not direct respondent to send the original of documents to petitioner's counsel.

On November 10, 2015, respondent sent to petitioner at his Brownfield Drive address, and to petitioner's counsel at counsel's Albuquerque address, the aforementioned examination-related Letter 1912 regarding petitioner's 2014 return and options available if petitioner wished to concede or to pursue respondent's preliminary deficiency and penalty determinations. Petitioner and/or his counsel received Letter 1912, as demonstrated by the fact that it was attached to the Petition as an exhibit.⁶

The reason that respondent sent Letter 1912 to petitioner at his Brownfield Drive address is explained by the fact that respondent updated petitioner's address from the Twin Leaf Drive Address (as reflected on petitioner's 2014 return) to the Brownfield Drive address during late September or early October 2015. The record suggests that respondent did so because petitioner filed an amended return for 2011 in April 2015 that listed the Brownfield Drive address. Respondent argues that he was not obliged to subsequently change petitioner's address back to the Twin Leaf Drive address by virtue of the October 30, 2015 power of attorney because of respondent's policy not to regard the filing of a power of attorney as constituting clear and concise notification of a change of address. See Rev. Proc. 2010-16, sec. 5.01(4), 2010 WL 1509667. For reasons to be discussed, the Court need not decide whether this policy is well-founded or legally sound in order to act on respondent's pending motion.

On February 12, 2016, petitioner filed his 2015 Federal income tax return (Form 1040). On it he listed the Brownfield Drive address as his address.

On March 8, 2016, respondent issued a notice of deficiency, determining a deficiency in, and an accuracy-related penalty on, petitioner's income tax for 2014.

⁶ Respondent's cover letter transmitting Letter 1912 to petitioner's counsel is attached as an exhibit to petitioner's April 25, 2017 Reply to respondent's pending motion.

Respondent sent the notice of deficiency by certified mail addressed to petitioner at the Brownfield Drive address. USPS Tracking shows that the notice of deficiency was delivered and signed for on March 11, 2016.⁷ According to both the notice of deficiency (on Form 4089-B, “Notice of Deficiency-Waiver”) and a declaration from the person responsible for mailing notices of deficiency to taxpayers and their authorized representative, a copy of the notice of deficiency was mailed to petitioner’s counsel at his Albuquerque address on March 8, 2016. However, in the Petition and in his various filings, petitioner (through counsel) states that neither he nor counsel received the notice of deficiency (or a copy) at or about the time of its mailing. This is the disputed factual matter that was alluded to in the opening paragraph of this Order Of Dismissal For Lack Of Jurisdiction. As stated there, the Court need not resolve such matter in order to act on respondent’s pending motion at this time.

The 90th day following the mailing of the notice of deficiency was Monday, June 6, 2016. The Petition, however, was not mailed to the Court until October 27, 2016; it was received and filed four days later on October 31, 2016.

Discussion

In an action for redetermination, the Court’s jurisdiction depends on a valid notice of deficiency and a timely filed petition. Frieling v. Commissioner, 81 T.C. 42, 46 (1983); Tax Court Rule 13(a), (c). In the present case, the parties agree that the petition was not timely filed but they disagree whether the notice of deficiency was valid. In the context of this case validity turns on whether the notice of deficiency was sent to petitioner at his last known address. Respondent argues that it was; petitioner argues that it wasn’t. If petitioner is correct, then the Court would still dismiss this case for lack of jurisdiction, but such dismissal would mean that respondent would not be permitted to assess (nor seek to collect) the deficiency and penalty but rather would be obliged to send petitioner another notice of deficiency, thereby affording petitioner the opportunity of invoking the Court’s jurisdiction by filing a timely petition. Pietanza v. Commissioner, 92 T.C. 729, 735-736 (1989), aff’d without published opinion 935 F.2d 1282 (3d Cir. 1991). In contrast, if respondent is correct, then the deficiency and penalty may be

⁷ The record does not permit the Court to determine with any degree of certainty who signed for receipt of the notice of deficiency that was delivered to the Brownfield Drive address.

lawfully assessed and respondent would have the right to seek to collect those amounts. Id.

A notice of deficiency that is sent to a taxpayer by certified (or registered) mail at the taxpayer's last known address is sufficient, I.R.C. sec. 6212(a), (b)(1), even if it is not received by the taxpayer, King v. Commissioner, 857 F.2d 676, 679 (9th Cir. 1988), aff'g 88 T.C. 1042 (1987); Yusko v. Commissioner, 89 T.C. 806, 810 (1987). A taxpayer's "last known address" is defined by the applicable regulation as follows:

* * * a taxpayer's last known address is the address that appears on the taxpayer's most recently filed and properly processed Federal tax return, unless the Internal Revenue Service (IRS) is given clear and concise notification of a different address. Further information on what constitutes clear and concise notification of a different address and a properly processed Federal tax return can be found in Rev. Proc. 90-18 (1990-1 C.B. 491) or in procedures subsequently prescribed by the Commissioner.

Sec. 301.6212-2(a), Proced & Admin. Regs. See Abeles v. Commissioner, 91 T.C. 1019, 1034-1035 (1988).

In the present case, it is uncontested that petitioner's most recently filed return was his 2015 income tax return, which was filed on February 12, 2016, some three weeks and four days before the mailing of the notice of deficiency on March 8, 2016. It is also uncontested that petitioner listed the Brownfield Drive address on that return as his address. These uncontested facts should be the end of the matter. However, petitioner argues that his 2015 was not "properly processed" and therefore does not constitute clear and concise notification of a change of address. To support his argument, petitioner relies on Rev. Proc. 2010-16, 2010 WL 1509667, which is the successor to the revenue procedure identified in section 301.6212-2(a), Proced. & Admin. Regs., above. In particular, petitioner relies on section 5.01.02 of Rev. Proc. 2010-16, which defines the term "properly processed" in pertinent part as follows:

(1) Except as otherwise provided by the exceptions below, a return will be considered properly processed after a 45-day processing period which begins the day after the date of receipt of the return by the Internal Revenue Submission Processing Campus. If a return is received prior to the due date for the return, however, the 45-day

processing period will begin the day after the due date of the return. Returns that are not filed in a processible form may require additional processing time. If additional processing time is required, the 45-day processing period for address changes will begin the day after the error that caused the return to be unprocessable is corrected.

(2) Due to the high volume of returns received during the filing season, if a taxpayer provides new address information on a Form 1040, 1040-A, 1040-EZ, 1040 (NR), 1040 (PR), 1040-SS, or 1040-X that is received in processible form by the Service after February 14 and before June 1, the return will be considered properly processed on July 16.

In petitioner's view, his 2015 return, which was filed on February 12, 2016, was not properly processed as of the date that respondent issued the notice of deficiency (i.e., on March 8, 2016) because the 45-day processing period had not elapsed; therefore, according to petitioner, his 2015 return did not provide clear and concise notification of a change of address. Remarkably, petitioner next posits that the touchstone for decision is "what were the circumstances then known to Respondent [as of the date of issuance of the notice of deficiency on March 8, 2016] or which in the exercise of due diligence could have been known to him?" Petitioner then points to the October 30, 2015 power of attorney and argues that it provided clear and concise notification of the Twin Leaf Drive address.

The Court rejects petitioner's argument. Its fallacy is using Rev. Proc. 2010-16 as a sword and not recognizing that it represents a shield designed to give respondent reasonable time to process the tens of millions of returns that are received during filing season. Here petitioner would penalize respondent for being efficient, i.e., processing petitioner's 2015 return well before the 45-day processing period specified by the revenue procedure had elapsed. If, as petitioner posits, "the inquiry must focus to the time the notice was issued on March 8, 2016" and must then ask "what were the circumstances then known to Respondent or which in the exercise of due diligence could have been known to him?", the answer is clear: Respondent knew that petitioner had filed a 2015 return and that the address on that return was the Brownfield address. In other words, a return that is actually processed at some time within the 45-day processing period is "properly processed" at that time. To hold otherwise would be nonsensical.

The Court's view is consistent with Abeles v. Commissioner, 91 T.C. at 1035, which holds that the focus in deciding the issue of a taxpayer's last known

address should be on what “was available to respondent's agent when that agent prepared to send a notice of deficiency in connection with an examination of a previously filed return.” As the Court went on to state in that case, “we are merely reiterating our position that what is of significance is what respondent knew at the time the statutory notice was issued * * * and attributing to respondent information which respondent knows, or should know, with respect to a taxpayer's last known address, through the use of its computer system.” Id.

Finally, petitioner does not argue, and there is nothing in the record to suggest, that he provided notification (much less clear and concise notification) of any change of address between the time that he filed his 2015 return and the time that respondent issued the notice of deficiency. Because the petitioner’s last known address was established conclusively in February 2016, the power of attorney filed in October 2015 is irrelevant to this matter. Also noteworthy is the fact that someone at the Brownfield Drive address received and signed for the notice of deficiency addressed to petitioner.

Conclusion

The Brownfield address was petitioner’s last known address on March 8, 2016, when the notice of deficiency was issued. Accordingly, the Court holds that the notice of deficiency was valid. Because the petition was not timely filed, respondent’s motion must therefore be granted and this case dismissed for lack of jurisdiction.

Notwithstanding the dismissal of this case in this Court, petitioner would appear to have both administrative and judicial remedies available to him. Thus, respondent acknowledges that “petitioner may come to an agreement with the Service regarding the underlying liability through the audit reconsideration process * * * [and] has repeatedly suggested that petitioner take advantage of the audit reconsideration process.” In addition, a judicial remedy would be afforded by a refund action. See McCormick v. Commissioner, 55 T.C. 138, 142 n.5 (1970); see also Weber v. Commissioner, 138 T.C. 348, 366-367 (2012).

Premises considered, it is hereby

ORDERED that respondent’s Motion To Dismiss For Lack Of Jurisdiction, filed February 17, 2017, is granted. It is further

ORDERED that this case, insofar as it represents an action for redetermination of deficiency and penalty, is dismissed for lack of jurisdiction on the ground that the petition was not timely filed; and that this case, insofar as it represents an action for collection review, is dismissed for lack of jurisdiction on the ground that no notice of determination was sent to petitioner.

(Signed) Robert N. Armen
Special Trial Judge

Entered: **JUN 28 2017**