

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

YOLANDA W. BENTLEY & OMAR A. )  
JONES, )  
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Petitioners, )  
 )  
v. ) Docket No. 20337-16S.  
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COMMISSIONER OF INTERNAL REVENUE, )  
 )  
Respondent )

**ORDER OF DISMISSAL FOR LACK OF JURISDICTION**

Petitioners filed the petition to commence this case on September 15, 2016. In the petition, petitioners indicate that they seek review with respect to their 2012 tax year and, among other things, state: “\* \* \* the Service has commenced collection action before issuing any deficiency notice to the last known address and we have not received a notice of deficiency from the Service.” Attached to the petition is a copy of IRS Notice CP22E, “Changes to your 2012 Form 1040A”, dated August 1, 2016, which notice states in part as follows: “As a result of your recent audit, we changed your 2012 Form 1040A. \* \* \* As a result, you owe \$7,933.43.”

Presently pending before the Court are (1) respondent’s Motion To Dismiss For Lack Of Jurisdiction, filed November 3, 2016; (2) respondent’s First Supplement to his motion, filed November 29, 2016; (3) petitioners’ Response to respondent’s motion, as supplemented, filed January 4, 2017; and (4) petitioners’ First Supplement to their Response, filed May 9, 2017. Most recently, by Order of the Chief Judge dated August 10, 2017, this case was assigned to the undersigned for the purpose of addressing the pending matter.

In his November 3, 2016 motion respondent moves to dismiss this case 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.”

The Tax Court is a court of limited jurisdiction and may therefore exercise jurisdiction only to the extent expressly provided by statute. Breman v. Commissioner, 66 T.C. 61, 66 (1976). In addition, jurisdiction must be proven affirmatively, and a taxpayer invoking our jurisdiction bears the burden of proving that the Court has jurisdiction over the taxpayer's case. See Fehrs v. Commissioner, 65 T.C. 346, 348 (1975); Wheeler's Peachtree Pharmacy, Inc. v. Commissioner, 35 T.C. 177, 180 (1960).

In a case seeking redetermination of a deficiency, the jurisdiction of the Court depends, in part, on the timely filing of a petition by the taxpayer. Rule 13(c), Tax Court Rules of Practice of Procedure; Normac, Inc. v. Commissioner, 90 T.C. 142, 147 (1988). In this regard, and as relevant, Internal Revenue Code (I.R.C.) section 6213(a) provides that the petition must be filed with the Court within 90 days after a notice of deficiency is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day). See also I.R.C. sec. 7503. The notice of deficiency is sufficient if mailed to the taxpayer by certified or registered mail at the taxpayer's last known address. I.R.C. sec. 6212(b). If a petition is timely mailed and properly addressed to the Tax Court in Washington, D.C., it will be considered timely filed. See I.R.C. sec. 7502(a)(1). In order for the timely mailing/timely filing provision to apply, however, the envelope containing the petition must bear a postmark with a date that is on or before the last date for timely filing a petition. See I.R.C. sec. 7502(a)(2). If a notice of deficiency is mailed to the taxpayer by certified or registered mail at the taxpayer's last known address, the law does not require that respondent prove delivery or actual receipt of the notice by the taxpayer. E.g., Monge v. Commissioner, 93 T.C. 22, 33 (1989).

The record in this case reflects that duplicate copies of a notice of deficiency for 2012 were sent by certified mail to petitioners on March 8, 2016. As substantiation of the mailing of the duplicate copies of the notice, respondent provided: (1) a complete copy of the notice of deficiency for 2012, dated March 8, 2016; (2) a certified mail list, PS Form 3877, dated March 8, 2016 (although erroneously postmark stamped March 8, 2015) indicating that items of mail related to tax year 2012 with certified mail tracking numbers of "7015 0920 0001 4374 5758" and "7015 0920 0001 4374 5772" were sent to petitioners; (3) tracking information from the U.S. Postal Service website ("USPS Tracking") indicating that items of mail with the just-referenced tracking numbers were mailed on March 8, 2016, delivery was attempted and "Notice Left (No authorized Recipient Available)" on March 10, 2016, and eventually (on or about March 30, 2016) the items of mail were returned to sender because "Unclaimed/Max Hold Time

Expired”. Based on the March 8, 2016 mailing date of the duplicate copies of the deficiency notice, the last date that petitioners could timely file a petition with the Court was June 6, 2016. However, the petition was dated September 11, 2016, the Court received and filed it on September 15, 2016, and the envelope in which the petition was mailed to the Court bears a postmark date of September 12, 2016.

Petitioners oppose respondent’s motion, as supplemented, on various grounds. First, petitioners suggest that the notice of deficiency is not valid because it reflected incorrect information as to the tax return involved, e.g., the notice referred to a Form 1040A, rather than the Form 1040 that petitioners claim they filed for 2012. However, this fact, if true, does not render the notice invalid. The notice “is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough.... [M]istakes in the notice which do not frustrate its purpose, are negligible.” O’Rourke v. United States, 587 F.3d 537 (2<sup>nd</sup> Cir. 2009), quoting Olsen v. Helvering, 88 F.2d 650, 651 (2d Cir. 1937).

Second, petitioners assert that the notice was not mailed in accordance with procedures outlined in the Internal Revenue Manual applicable to the issuance of a notice of deficiency. In support of this position, petitioners cite Knudsen v. Commissioner, T.C. Memo. 2015-69 (2015), in which, in the context of a motion for summary judgment filed by the Commissioner, this Court held that certified mail lists that were defective in several ways called into question whether the notices of deficiency in that case were properly mailed. That case, however, is factually distinguishable from this case. In Knudsen, one or both of the certified mail lists did not indicate how many pieces of mail that the USPS had received from respondent, lacked the manual signature of a USPS employee, did not identify the listed items as notices of deficiency, and did not indicate the tax year to which the listed items were related. Here, the certified mail list provided by respondent is less than ideal in certain ways: The list does not state how many items of mail that the USPS received from respondent (although the “Total Number of Pieces Listed by Sender” is confirmed and initialed), does not indicate that the items of mail were notices of deficiency, and the year postmarked on the list (2015) does not match the date printed on the list (2016). However, the list does bear a USPS postmark and indicates the tax year to which the items of mail were related. Furthermore, respondent has provided USPS certified mail tracking information (“USPS Tracking”) that indicates items of mail with the same tracking numbers as those appearing on the certified mail list corresponding to petitioners’ names and addresses and the tax year 2012 entered the mail system on March 8, 2016, which date matches the printed date on the certified mail list. See Boulton

v. Commissioner, T.C. Memo. 2011-11 (“The U.S. Postal Service [tracking information] provides reliable data from a neutral third-party source that is not susceptible to manipulation by the parties.”). Accordingly, even if respondent failed to comply with certain provisions of the Internal Revenue Manual as petitioners suggest, the defects asserted by petitioners are not so substantial as to render PS Form 3877 unreliable. See O’Rourke v. United States, 587 F.3d 537, 541-542 (2<sup>nd</sup> Cir. 2009); Garrett v. Commissioner, T.C. Memo. 2015-228. Accordingly, upon review of the totality of the documentation in the record, the Court is satisfied that the irregularities in the certified mail list do not preclude a conclusion of proper mailing of the duplicate copies of the notice of deficiency.

Third, petitioners allege that neither they nor their representative (who had been designated as their power of attorney by the submission of Forms 2848, Power of Attorney And Declaration of Representative, to respondent on December 17, 2015) received the notice of deficiency. However, as noted above, the law does not require that respondent show delivery or actual receipt of a notice of deficiency (if mailed to a taxpayer at the taxpayer’s last known address) to prove that the notice was properly mailed. See Monge v. Commissioner, 93 T.C. 22, 33 (1989). Moreover, in the context of deficiency cases such as this one, the Court has held that the sending of a copy of a notice to a representative pursuant to a request in a power of attorney is a matter of courtesy and in no way affects the mailing requirements of I.R.C. section 6212. See McDonald v. Commissioner, 76 T.C. 750, 752-754 (1981).

Notably, at no time have petitioners alleged that the address to which the duplicate copies of the notice of deficiency were mailed is not petitioners’ last known address.<sup>1</sup> In addition, nothing appears in the record to suggest that petitioners provided the IRS with “clear and concise notification” of any different address prior to the March 8, 2016 mailing. See sec. 301.6212-2(a), Proced. & Admin. Regs.

The record in this case establishes that the petition was not timely filed. Although the Court may be sympathetic to petitioners’ circumstances, it has no authority to extend the period for the timely filing of a petition. Axe v. Commissioner, 58 T.C. 256, 259 (1972); Joannou v. Commissioner, 33 T.C. 868,

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<sup>1</sup> Petitioners’ address of record in the present case appears to be that of their representative. However, the record includes a copy of the power of attorney form (Form 2848) that each petitioner executed on December 17, 2015, in favor of their representative. Each such Form 2848 lists as petitioners’ address the same address to which the duplicate copies of the notice of deficiency were mailed.

869 (1960). However, although petitioners cannot prosecute the present case, they may not be without a judicial remedy in the form of a refund action in the appropriate Federal district court or the United States Court of Federal Claims. See McCormick v. Commissioner, 55 T.C. 138, 142 n.5 (1970); see also Weber v. Commissioner, 138 T.C. 348, 366-367 (2012). It is also possible that petitioners might have an administrative remedy in the form of a request for audit reconsideration. However, those two remedies are beyond the scope of this Court's jurisdiction, and petitioners may care to seek advice from a competent tax professional.

Finally, although the petition alleges "collection action" by respondent, there is nothing in the record to suggest that the Court might have collection review jurisdiction pursuant to I.R.C. section 6330(d)(1). See Sarrell v. Commissioner, 117 T.C. 122, 125 (2001); Moorhous v. Commissioner, 116 T.C. 263, 269 (2001); Offiler v. Commissioner, 114 T.C. 492, 498 (2000). Thus, in a collection review action this Court's jurisdiction depends, in part, on the issuance of a notice of determination by respondent's Office of Appeals after the taxpayer has requested an administrative hearing following the issuance by respondent's collection division of either a final notice of intent to levy, see I.R.C. sec. 6330(a), or a notice of filing of Federal tax lien, see I.R.C. sec. 6320(a). Generally speaking, in a collection review case the taxpayer may challenge the existence or amount of the underlying liability if the taxpayer did not receive a notice of deficiency for such liability or did not otherwise have an opportunity to dispute such liability. See I.R.C. sec. 6330(c)(2)(B).

Upon due consideration, it is

ORDERED that respondent's Motion To Dismiss For Lack Of Jurisdiction, filed November 3, 2016, and supplemented November 29, 2017, is granted, and this case is dismissed for lack of jurisdiction for want of a timely-filed petition.

**(Signed) Robert N. Armen**  
**Special Trial Judge**

ENTERED: **AUG 15 2017**