

UNITED STATES TAX COURT
 WASHINGTON, DC 20217

TARIG GABR,)	
)	
Petitioner,)	
)	
v.)	Docket No. 24991-15 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case is scheduled to be tried at the Court’s session beginning October 16, 2017, in Washington, D.C. This case is before the Court on the Commissioner’s motion to dismiss for lack of jurisdiction on the ground that no statutory notice of determination or other determination was issued by the Internal Revenue Service (“IRS”) to petitioner that would confer jurisdiction to this Court (because petitioner did not timely request an agency-level collection due process (“CDP”) hearing). We will take the motion under advisement, and at the October 16 session we will conduct a hearing on the issue of jurisdiction.

Background

This case involves the IRS’s proposed collection of petitioner Tarig Gabr’s return-preparer penalties assessed under section 6694(b) for tax returns filed for the years 2009 and 2010.

When Mr. Gabr did not pay these assessed liabilities, the IRS mailed a Notice of Federal Tax Lien (“NFTL”) to him on January 28, 2014. The NFTL stated that the correct office to which he should mail a Form 12153, “Request for Collection Due Process or Equivalent Hearing” was the Philadelphia ACS office (apparently the “Automated Collection System” office). The NFTL also stated the deadline was March 6, 2014, by which Mr. Gabr had to mail Form 12153 to the

IRS for it to be considered timely. The NFTL had a header that included the name of a “Contact Person” and that gave a “Contact Telephone Number”.

Mr. Gabr’s attorney alleges (and for purposes of the Commissioner’s motion we assume) that on February 26, 2014, he called and spoke with an IRS agent who provided a telefacsimile (“fax”) number to which Mr. Gabr’s attorney faxed the Form 12153 that same day.

On February 26, 2014, the IRS did receive Mr. Gabr’s Form 12153 by fax at its Kansas City Service Center location. Sometime after this date, the Kansas City Service Center forwarded Mr. Gabr’s Form 12153, to the IRS’s Philadelphia, PA, Service Center, where it was received on March 10, 2014. The Philadelphia Service Center forwarded Mr. Gabr’s Form 12153 to the IRS’s Philadelphia ACS office, where it was received on March 11, 2014, five days after the March 6 deadline.

Because Mr. Gabr’s Form 12153 was not received by the Philadelphia ACS office by the March 6, 2014 deadline, the IRS’s Appeals Office denied Mr. Gabr’s CDP hearing request. However, Appeals granted Mr. Gabr an “equivalent hearing”. On September 1, 2015, the IRS issued to Mr. Gabr a “Decision Letter on Equivalent Hearing Under Section 6320 and/or 6330 of the Internal Revenue Code” (“Decision Letter”). The Decision Letter stated, “We determined you didn’t file your request for a due process hearing request within the legal timeframe”, and stated that he had been provided an equivalent hearing without the right of subsequent judicial review. On October 1, 2015 (30 days after the date of the Decision Letter), Mr. Gabr filed his petition in this Court.

Discussion

The Commissioner argues that we lack jurisdiction over the petition. The Commissioner argues that Mr. Gabr did not timely submit his CDP hearing request with the Philadelphia ACS Office by March 6, 2014, and that consequently no agency-level CDP hearing was conducted, no notice of determination was issued to him, and his petition in this Court was therefore not filed in response to a valid notice of determination). Offiler v. Commissioner, 114 T.C. 492, 498 (2000).

Mr. Gabr argues that his CDP hearing request was timely submitted by being faxed before March 6, 2014, to the Kansas City Service Center pursuant to instructions given for that purpose when his attorney phoned the number appearing on his NFTL, so that the “Decision Letter” sent to him by Appeals, though not

titled a “notice of determination”, was in fact a notice of determination for purposes of section 6330(d)(1). Graham v. Commissioner, T.C. Memo. 2008-129, slip op. at 14-15.

We must determine whether Mr. Gabr timely submitted his request for a CDP hearing by faxing it to the Kansas City Service Center. The regulations provide: “The written request for a CDP hearing must be sent, or hand delivered (if permitted), to the IRS office and address as directed on the CDP Notice.” 26 C.F.R. sec. 301.6320-1(c)(2), para. A-C6. However, the Commissioner acknowledges in his motion,

Admittedly, “if it is determined that the taxpayer received erroneous instructions from an IRS employee resulting in the request being sent to the wrong office,” the postmark date for when the request was sent to the incorrect office is used to determine timeliness. I.R.M. 5.19.8.4.2(8).

The Commissioner argues that Mr. Gabr failed to submit Form 12153 to the office listed on the CDP notice and that his attorney did not receive erroneous instructions from an IRS employee.

Mr. Gabr argues that on February 26, 2014, his attorney received an erroneous fax number from an IRS Agent. Mr. Gabr asserts that Form 12153 was sent to the wrong office due to the incorrect information provided by the IRS agent and otherwise it would have been timely submitted.

There is evidently no dispute that Mr. Gabr’s request for a CDP hearing was submitted by fax on February 26, 2014, to the Kansas City Service Center. But the record reflects a factual dispute as to whether Mr. Gabr’s Form 12153 was sent to that office due to information provided by the IRS to his attorney.

We will therefore hold a hearing to resolve this factual dispute. Mr. Gabr, as the party invoking our jurisdiction, will have the burden of establishing that this Court has jurisdiction over his case. See Savoy v. Commissioner, T.C. Memo. 2014-162, *15, aff’d, 589 Fed. Appx. 187 (4th Cir. 2015). In this case, that requires a showing that Mr. Gabr submitted the Form 12153 within 30 days of the NFTL. See Kennedy v. Commissioner, 116 T.C. 255, 261 (2001); Offiler v. Commissioner, 114 T.C. 492, 498 (2000).

It is

ORDERED that the Commissioner's motion to dismiss is taken under advisement. It is further

ORDERED that at or soon after the calendar call at 10:00 a.m., on Monday, October 16, 2017, in Washington, D.C., the Court will hold an evidentiary hearing on the Commissioner's motion to dismiss for lack of jurisdiction, at which time parties shall present evidence in support of their respective positions. It is further

ORDERED that no later than October 2, 2017, the parties shall telephone the Chambers Administrator of the undersigned judge (at 202-521-0850) to schedule a telephone conference call. During this conference call the parties and the Court will discuss Mr. Gabr's attorney's role during the hearing, in view of Rule 3.7 of the American Bar Association's Model Rules of Professional Conduct.

**(Signed) David Gustafson
Judge**

Dated: Washington, D.C.
September 25, 2017