

UNITED STATES TAX COURT
WASHINGTON, DC 20217

RAJIV KHANNA & VIVIAN CHENG-)	
KHANNA,)	
)	
Petitioners,)	
)	
v.)	Docket No. 5469-16L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case was calendared for trial at the New York, NY trial session commencing November 13, 2017. By Order dated November 9, 2017, this case was continued sua sponte and stricken from the Court's New York, NY trial session commencing November 13, 2017, with jurisdiction retained by the undersigned. The petition in this case was filed in response to a decision letter issued to petitioners with respect to a levy to collect a Federal income tax liability for taxable year 2012. In their petition, petitioners challenge respondent's determination that their Form 12153, Request for a Collection Due Process or Equivalent Hearing (CDP hearing request), was untimely.

Pending before the Court in this case is respondent's Motion to Dismiss for Lack of Jurisdiction, filed August 22, 2017, wherein respondent moves that this case be dismissed upon the ground that he did not issue a notice of determination to petitioners or make any other determination with respect to the taxable period at issue sufficient to confer jurisdiction on this Court.

At issue is whether petitioners timely requested a collection due process hearing (CDP hearing) with respect to a levy on their State tax refund to collect the aforementioned 2012 liability. Petitioners received a Notice CP 92, Seizure of your state tax refund and notice of your right to a hearing (CDP notice), dated June 29, 2015, which specified that their CDP hearing request should be sent to respondent's office in Philadelphia, PA by July 29, 2015. Petitioners instead mailed the CDP hearing request to respondent's Kansas City, MO office, where it

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was stamped as received on July 27, 2015, and thereafter forwarded to the Philadelphia office. The Philadelphia office stamped the CDP hearing request three times: once on August 17, 2015, and twice on August 19, 2015. Respondent treated the earlier date, August 17, 2015, as the date of receipt in determining whether the CDP hearing request was timely. As this date was more than 30 days after the June 29, 2015, date on the CDP notice, respondent determined petitioners' CDP hearing request was untimely.

On the basis of its position that petitioners' CDP hearing request was untimely, respondent's Office of Appeals held an equivalent hearing with them and issued a decision letter dated December 1, 2015, sustaining the levy. On February 29, 2016, petitioners mailed a petition to the Court, which the Court received and filed on March 7, 2016, 90 and 97 days, respectively, after the date on the decision letter. Consequently, the record strongly suggests that the petition was untimely under section 6330(d)(1).¹ If the petition was untimely under section 6330(d)(1), then we would lack jurisdiction regardless of whether the CDP hearing request were found to be timely and the decision letter consequently treated as a notice of determination. See Craig v. Commissioner, 119 T.C. 252, 259 (2002). However, the record does not establish the mailing date of the decision letter. That mailing date, if later than the date on the decision letter, would commence the 30-day period for filing a petition. See Bongam v. Commissioner, 146 T.C. 52, 58 (2016). We will first direct respondent to identify any evidence with respect to the date the decision letter was mailed.

Depending upon the evidence identified concerning the decision letter's mailing date, we may still need to decide the more difficult issue of the timeliness of petitioners' CDP hearing request. In that event, we may further direct respondent to address three additional issues bearing upon the timeliness of petitioners' CDP hearing request: (1) the statutory basis for respondent's position in section 301.6330-1(b)(1), Proced. & Admin. Regs., that a taxpayer must file a CDP hearing request within 30 days of the issuance of a post-levy CDP notice (under section 6330(f)); (2) the impact of recent U.S. Supreme Court and Third Circuit Court of Appeals cases concerning equitable tolling upon respondent's position that the requirement that a CDP hearing request be filed within 30 days of the CDP notice is jurisdictional, see United States v. Kwai Fun Wong, 575 U.S. ___, 135 S. Ct. 1625 (2015); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145

¹Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended.

(2013); Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) (cautioning courts not to lightly attach the drastic consequences of labeling a deadline enacted by Congress as “jurisdictional” in an effort to bring some discipline to the term’s use); Kontrick v. Ryan, 540 U.S. 443 (2004); United States v. Brockamp, 519 U.S. 347 (1997); Irwin v. Dept. of Veterans Affairs, 498 U.S. 89 (1990); Rubel v. Commissioner, 856 F.3d 301, 304 (3d Cir. 2017) (cautioning courts to avoid “drive-by jurisdictional rulings” due to the drastic consequences of a “jurisdictional” label); and (3) the circumstances surrounding the Kansas City office’s forwarding of petitioners’ CDP hearing request to the Philadelphia office and the possibility that such forwarding would render the CDP hearing request timely under section 7502.

The foregoing considered, it is

ORDERED that, on or before March 15, 2018, respondent shall file a First Supplement to his Motion to Dismiss for Lack of Jurisdiction identifying any evidence of the mailing date of the decision letter issued to petitioners. It is further

ORDERED that petitioners shall have until April 5, 2018, in which to file any response they wish to make to respondent’s First Supplement to his Motion to Dismiss for Lack of Jurisdiction.

(Signed) Joseph H. Gale
Judge

Dated: Washington, D.C.
February 13, 2018