

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

WENDELL ADRIAN BOWMAN,)	
)	
Petitioner,)	
)	
v.)	Docket No. 16772-17S.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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)	

ORDER AND ORDER OF DISMISSAL FOR LACK OF JURISDICTION

On March 22, 2018, respondent filed a Motion To Dismiss 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.”¹ Thereafter, on April 2, 2018, petitioner filed a Notice Of Objection to the granting of respondent’s motion.

Background

On April 20, 2017, respondent sent to petitioner by certified mail a notice of deficiency that was addressed to him at 5960 River Road, Bryans Road, MD 20616 (the River Road address).² The notice determined a deficiency in income tax for 2014. The notice of deficiency was dated April 20, 2017, and the first three paragraphs thereof stated in pertinent part as follows:

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

² Bryans Road is located in Charles County, Maryland, about 25 miles from the Tax Court in Washington, D.C.

We have determined that there is a deficiency (increase) in your income tax as shown above. This letter is your NOTICE OF DEFICIENCY, as required by law. * * *

If you want to contest this determination in court before making any payment, you have until the **Last Date to Petition Tax Court** (90 days from the date of this letter or 150 days if the letter is addressed to you outside of the United States) to file a petition with the United States Tax Court for a redetermination of the amount of your tax.
* * *

The time in which you must file a petition with the court (90 or 150 days as the case may be) is fixed by law and the Court cannot consider your case if your petition is filed late. * * *

[Emphasis in the original.] “**The Last Date to Petition Tax Court**” was specified in the upper right-hand portion of the first page of the notice of deficiency as follows:

**Last Day to File a Petition With
the United States Tax Court:**
July 19, 2017

On August 7, 2017, the Court received (and filed) a petition from petitioner. Petitioner listed the River Road address as his mailing address on the petition and he wrote the date “May 4, 2017” opposite his signature. In addition to the notice of deficiency, petitioner attached to the petition as an exhibit a copy of a letter dated June 12, 2017, addressed to him from respondent’s Memphis, TN service center regarding the examination of his 2014 income tax return.³ The first paragraph of that letter references “your response dated 05/09/2017” and the on-going “review of the information you sent us”.

Petitioner utilized first-class postal mail to send his petition to the Court. The envelope in which the petition was mailed to the Court arrived without any postmark on it.

³ The Memphis service center was the Internal Revenue Service (IRS) office that had issued the April 20, 2017 notice of deficiency.

Discussion

The Tax Court is a court of limited jurisdiction. See sec. 7442. Accordingly, the Court may exercise jurisdiction only to the extent expressly authorized by statute. Breman v. Commissioner, 66 T.C. 61, 66 (1976). In addition, jurisdiction must be proven affirmatively, and a party invoking the Court's jurisdiction bears the burden of proving that the Court has jurisdiction over the party'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); National Comm. to Secure Justice, Etc. v. Commissioner, 27 T.C. 837, 839 (1957). In order to meet this burden, the party must establish affirmatively all facts giving rise to the Court's jurisdiction. See Wheeler's Peachtree Pharmacy, Inc. v. Commissioner, 35 T.C. at 180; Consolidated Co. v. Commissioner, 15 B.T.A. 645, 651 (1929).

In an action for the redetermination of a deficiency, such as the present case, the Court's jurisdiction under section 6213(a) depends on the issuance by the Commissioner of a valid notice of deficiency to the taxpayer and the timely filing of a petition by the taxpayer. Frieling v. Commissioner, 81 T.C. 42, 46 (1983); Rule 13(a). The validity of a notice of deficiency has nothing to do with the substantive merits of the Commissioner's determination of the deficiency; rather, it deals with matters such as the proper mailing of the notice, i.e., whether the Commissioner mailed the notice to the taxpayer at the taxpayer's last known address.

In the present case respondent proved that the notice of deficiency was sent by certified mail to petitioner at the River Road address on April 20, 2017. See Magazine v. Commissioner, 89 T.C. 321, 327 n.8 (1987), holding that Postal Service Form 3877 represents direct evidence of the date of mailing of the notice of deficiency. The 90th day thereafter was July 19, 2017, which was a Wednesday and not a legal holiday in the District of Columbia. However, the petition was not received (and filed) by the Court until Monday, August 7, 2017, which was 109

days after the mailing of the notice of deficiency, or 19 days after the critical 90th day.⁴

In his Notice Of Objection petitioner objects to the granting of respondent's motion and the dismissal of this case.⁵ In doing so petitioner does not raise any issue regarding his last known address. Rather, petitioner's sole jurisdictional argument is as follows:

The 90-day period did not state whether it was a 90-calendar day or a 90-working day period. This makes a difference in the calculation of timely filing. The letter should have clearly stated - file by xxx. Again I state - "The letter of April 20 was premature." Discussions were still ongoing with the IRS throughout 2017. The IRS requested a payment and accepted the payment in October.

As a matter of law, section 6213(a) contemplates computing time by reference to calendar days and not by working days. See Rule 25, regarding the computation of time; see also sec. 7503, regarding time for performance of acts where last day falls on Saturday, Sunday, or legal holiday. But more importantly, petitioner is incorrect in stating that the notice did not specify the last day to timely file. Rather, as quoted above, the notice clearly and unambiguously stated that the last day to file a petition with the Court was July 19, 2017. Because the petition was received by the Court 19 days later, it was not timely filed.⁶

It is commendable that petitioner was continuing to work with respondent's Examination Division in an effort to administratively resolve his tax dispute on a mutually agreeable basis, as demonstrated by both the June 12, 2017 Memphis service center letter and the portion of petitioner's Notice Of Objection quoted

⁴ As previously stated, the envelope in which the petition was mailed to the Court does not bear any postmark. In order to demonstrate normal mailing time, including time for the irradiation of Government mail, respondent relies on a statement from the United States Postal Service. Also, see infra note 5 regarding a specific instance of mailing time in this case.

⁵ Notably, the Notice Of Objection was dated March 26, 2018. The envelope in which it was sent to the Court by first-class postal mail was postmarked March 27, 2018, and it was received by the Court on Monday, April 2, 2018.

⁶ Nothing in the record supports even a suggestion that the provisions of sec. 7502 regarding timely mailing treated as timely filing might be implicated in the present case.

above. However, the Congress has given the Court no discretion to extend statutory deadlines within which a petition must be filed if the Court is to have jurisdiction.

Finally, although the Court lacks jurisdiction to hear petitioner's case, he is not without a judicial remedy. Specifically, petitioner may pay the tax, file a claim for refund with the IRS, and, if his claim is denied, sue for a refund in the appropriate Federal District Court or the U.S. 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).

In view of the foregoing, it is hereby

ORDERED that this case is stricken for trial from the Court's April 30, 2018 Washington, D.C. trial session. It is further

ORDERED that respondent's Motion To Dismiss For Lack Of Jurisdiction, filed March 22, 2018, is granted, and this case is dismissed on the stated ground because the petition was not timely filed.

Petitioner is advised that he need not appear in court on April 30, 2018, in Washington, D.C., because this case will not be called from the calendar at that time because of the action taken by the Court in this order dismissing this case for lack of jurisdiction.

(Signed) Robert N. Armen
Special Trial Judge

ENTERED: **APR 05 2018**