

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

ESTATE OF DANIEL J. SAGER, DECEASED,	)	
STEVEN SAGER, EXECUTOR,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 3057-16 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

This case is before the Court on respondent’s Motion to Dismiss for Lack of Jurisdiction filed on March 1, 2016. Respondent contends that the Court lacks jurisdiction because no notice of determination was issued under section 6320 or section 6330 to the estate of Daniel J. Sager for the 1997 tax year.<sup>1</sup> Stephen Sager, executor of the estate of Daniel J. Sager, objects to this motion.

A. Background

This case concerns the 1997 tax year for Daniel J. Sager (decedent), who died in March 2011. Decedent’s son Steven Sager (Mr. Sager) is the executor of the estate of Daniel J. Sager (the estate). Mr. Sager resided in New Jersey when he filed the petition.

1. Notices and Equivalent Hearing

Decedent timely filed a 1997 Form 1040, U.S. Individual Income Tax Return, on July 27, 1998, pursuant to an extension. In a notice of deficiency dated November 10, 2011, the Internal Revenue Service (IRS or respondent) determined a deficiency in income tax of \$108,130 for decedent for tax year 1997. A timely petition was not filed in response to the notice of deficiency.<sup>2</sup> On March 29, 2012, respondent assessed additional tax and interest based on the

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

<sup>2</sup>On March 31, 2014, a petition was filed in response to the notice of deficiency. By order dated September 8, 2014, the Court dismissed the petition for lack of jurisdiction because it was not filed within the prescribed 90-day period. See sec. 6213(a).

defaulted notice of deficiency. On April 15, 2012, decedent's overpayment of \$1,390 from his 2002 Form 1040 was credited toward the outstanding balance for tax year 1997.

In May 2012, the unpaid assessed balance due for decedent's 1997 tax year was assigned to Revenue Officer (RO) Scherzer. RO Scherzer asserts that on August 29, 2012, she personally delivered to Mr. Sager a Final Notice - Notice of Intent to Levy and Notice of Your Right to Request a Hearing (levy notice), dated August 29, 2012. A certified copy of the 1997 account transcript for decedent reflects that the levy notice was issued and a return receipt was signed. Respondent asserts that he has been unable to obtain a copy of this notice.

Respondent issued a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320 (lien notice), dated September 11, 2012.<sup>3</sup> In response to the lien notice, Mr. Sager sent a Form 12153, Request for Due Process or Equivalent Hearing, dated October 24, 2012. Respondent received Mr. Sager's Form 12153 on October 25, 2012. Mr. Sager's Form 12153 listed the lien notice as the basis for the hearing request and checked the box requesting an equivalent hearing. Mr. Sager asserted "I Cannot Pay Balance" and "Other" as the reasons for disagreeing with the lien, asserting that the "taxes, fees, etc. are not correct. The balance owed should be zero (0). All 1997 taxes were paid/settled." Mr. Sager attached to his Form 12153 a letter asserting that he had not timely received the lien notice because it was delivered to an invalid address and also asserting that he was disputing the underlying tax liability for 1997.

RO Scherzer concluded that because Mr. Sager's Form 12153 was not timely filed, the request would be considered a request for an equivalent hearing. The case was transferred to the IRS Office of Appeals (Appeals Office). After some delay in scheduling, two meetings were held with Mr. Sager, his certified public accountant John Unterreiner, and Settlement Officer (SO) Voysest, on October 8, 2014, and October 23, 2015. During these meetings, which served as an equivalent hearing, Mr. Sager challenged decedent's underlying liability for 1997 and also requested interest abatement under section 6406(e)(1).

On December 16, 2014, Mr. Sager made a \$50,000 payment which was applied to the 1997 balance due. On October 19, 2015, respondent assessed a penalty of \$1,528 for late payment of tax.

Respondent issued a Letter 3210, Decision Letter on Equivalent Hearing Under Internal Revenue Code Sections 6320 and/or 6330 (decision letter), dated January 6, 2016, determining that the lien was proper and could proceed. The decision letter stated that SO Voysest had "determined that an adjustment to the assessed tax and interest was warranted which resulted in a decrease in the deficiencies, while the remaining deficiency was satisfied by a previously established credit. The remaining failure to pay penalty was abated." The decision letter also denied Mr. Sager's abatement of interest request pursuant to section 6404(e)(1) asserting "[t]here

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<sup>3</sup>Respondent mailed the lien notice via certified mail to decedent's prior address in Hawthorne, New Jersey (Hawthorne address). In 2011 the estate's last known address had been updated to an address in Ridgewood, New Jersey, and thus this notice was not mailed to the last known address. Decedent's partner, Ms. Osborne, was living at the Hawthorne address and she hand-delivered the lien notice to petitioner on October 10, 2012.

is no reasonable cause for abatement of interest \* \* \* IRC 6404(e)(1) provides for abatement of interest \* \* \* assessed as a result of unreasonable errors or delays in the performance of a ministerial act or managerial act by the Service. This request was denied as it was determined that the assessed interest was not the result of unreasonable errors or delays in the performance of a ministerial or managerial act by the service.”

2. Petition and Motion to Dismiss for Lack of Jurisdiction

On February 2, 2016, Mr. Sager mailed a petition in response to the decision letter, which was filed on February 8, 2016. In his petition, Mr. Sager asserted “IRS claims we did not file due process hearing in time” and also disputed respondent’s “calculations on interest and penalties”. Mr. Sager attached the decision letter dated January 6, 2016, and also a letter dated January 11, 2016, written by Mr. Unterreiner and addressed to the Appeals Office. In this letter Mr. Unterreiner repeated the prior request for abatement of interest under section 6404(e)(1) citing “numerous delays due to managerial acts and Hurricane Sandy” and “numerous instances of our client trying to get this case resolved, but not being given the proper advice or turnaround which affect the timing of getting this case settled on time.” Attached to this letter was a statement titled “Daniel J Sager IRS Timeline” asserting that numerous conversations were held with the Appeals Office and other IRS employees and citing a number of delays by the IRS.

On February 22, 2016, Mr. Sager reached an agreement with respondent to abate the remainder of the outstanding tax liability, and most of the interest and penalties, and release the federal tax lien.<sup>4</sup> This abatement, coupled with the \$1,390 credit and the \$50,000 payment

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<sup>4</sup>Total amounts abated on February 22, 2016:

	Balance due <u>2/22/2016</u>	Amount <u>reduced/abated</u>	Balance due <u>2/23/2016</u>
Tax	\$118,308	\$98,614	\$19,694
Interest	158,826	128,708	30,118
Penalty	1,528	1,521	7
Fees charged			<u>50</u>
Total			49,869

(\$51,390 in total payments), reduced the 1997 balance due to zero. Of these payments, \$30,065 was applied to interest while the remainder was applied to tax and penalties.<sup>5</sup>

On March 1, 2016, respondent filed the motion to dismiss for lack of jurisdiction. By order dated March 21, 2016, Mr. Sager was directed to file an opposition to respondent's motion. On April 5, 2016, counsel Sandy Freund from the Rutgers Law School Federal Tax Clinic entered an appearance on behalf of Mr. Sager. On April 8, 2016, Mr. Sager filed an opposition to respondent's motion. On May 17, 2016, respondent filed a reply to Mr. Sager's opposition.

By order dated July 5, 2015, the Court directed Mr. Sager to file a Ratification of Petition in his capacity as executor of decedent's estate. On July 25, 2016, Mr. Sager filed a ratification of the petition in his role as the executor of the Estate of Daniel J. Sager, Deceased.

By order dated July 22, 2016, the Court set the pending motion for hearing in New York, New York for October 31, 2016. By order dated October 14, 2016, the parties were directed to file legal memoranda supporting or opposing jurisdiction by October 25, 2016. On October 24, 2016, respondent filed his Memorandum of Law in Support of Respondent's Motion to Dismiss for Lack of Jurisdiction. On October 26, 2016, Mr. Sager filed his Memorandum of Law in Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction.

The hearing was held as scheduled on October 31, 2016. Counsel for respondent and Ms. Freund and her student attorney, Charlie Rioux, appeared and presented arguments. Mr. Sager's counsel asserted, among other things, that the Court had jurisdiction to hear the interest abatement claim, seeking a refund of the interest paid. Respondent asserted that the Court does not have jurisdiction under section 6320 or section 6330, but conceded that the Court may have jurisdiction to review Mr. Sager's request for interest abatement under section 6404(h).

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<sup>5</sup>Mr. Sager also received a refund of \$1,574 and an interest credit of \$53. Before applying the \$1,390 credit and the \$50,000 payment, the interest due was computed as follows:

<u>Date</u>	<u>Interest</u>	<u>Amount</u>
11/14/2011	Interest charged for late payment	\$13,429
3/29/2012	Interest charged for late payment	145,397
10/19/2015	Interest abated	(128,708)
2/22/2016	Interest credited	<u>(53)</u>
	Total before payments applied	30,065

B. Discussion

The Tax Court is a court of limited jurisdiction and may exercise that jurisdiction only to the extent authorized by Congress. Naftel v. Commissioner, 85 T.C. 527, 529 (1985). In addition, jurisdiction must be proven affirmatively, and a party invoking our jurisdiction bears the burden of proving that we have 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).

The Court's jurisdiction under sections 6320 and 6330 depends upon the issuance of a valid notice of determination and the filing of a timely petition for review. Secs. 6320(c), 6330(d)(1); Rule 330(b); Offiler v. Commissioner, 114 T.C. 492, 498 (2000). A condition precedent to the issuance of a notice of determination is the requirement that a taxpayer requests a hearing before the IRS Office of Appeals within the 30-day period specified in section 6320(a) or 6330(a). A late or untimely request for a hearing nonetheless made within a one-year period calculated with reference to one of the types of notice of intent to levy or final notice of lien will result only in an equivalent hearing and corresponding decision letter. Kennedy v. Commissioner, 116 T.C. 255, 262-263 (2001); sec. 301.6330-1(i)(1) and Q&A-16, *Proced. & Admin. Regs.* Such a decision letter is not a notice of determination sufficient to invoke the Court's jurisdiction under section 6320 or section 6330. Kennedy v. Commissioner, 116 T.C. at 262-263.

Mr. Sager received a decision letter, which is not sufficient to invoke the Court's jurisdiction under section 6330 or 6320.<sup>6</sup> See secs. 6320(c), 6330(d)(1); Rule 330(b); Kennedy v. Commissioner, 116 T.C. at 262-263; Offiler v. Commissioner, 114 T.C. at 498; sec. 301.6330-1(i)(1) and Q&A-16, *Proced. & Admin. Regs.*

Mr. Sager further asserts, and respondent concedes, that the Court may have jurisdiction to consider his interest abatement claim. Section 6404(e)(1) provides, in pertinent part, that the Secretary may abate the assessment of interest on any payment of tax to the extent that any unreasonable error or delay in payment is attributable to an officer or employee of the IRS being erroneous or dilatory in performing a ministerial or managerial act. For purposes of section 6404(e)(1) "an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved."

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<sup>6</sup>Mr. Sager requests that the decision letter be treated as a determination letter for purposes of conferring jurisdiction under section 6320 and section 6330. Mr. Sager concedes that he cannot cite existing precedent for this unique set of facts (where the lien notice was not sent to the last known address, where the request for the CDP hearing was not timely, and where the lien has already been discharged). Thus, he has not met the burden of proving that we have jurisdiction under section 6320 or section 6330. 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 involving an abatement of interest request under section 6404(e), under the law in effect at the time the petition in this case was filed, the Court has jurisdiction if the petition is filed “at any time the earlier of” (1) the date the Secretary mails a final determination not to abate interest or (2) 180 days after the taxpayer files a claim for abatement of interest with the Secretary. Secs. 6040(h)(1)(A)(i) and (ii). The petition cannot be filed later than 180 days after the Secretary mails the final determination not to abate interest.<sup>7</sup> Id. subpara. (B). The Court has jurisdiction to determine overpayments pursuant to section 6404(h). See Goettee v. Commissioner, T.C. Memo. 2003-43, 2003 WL 464862, at \*19.

“A notice of final determination not to abate interest is a prerequisite to the Court’s jurisdiction and serves as a taxpayer’s ‘ticket’ to the Tax Court”. Bourekis v. Commissioner, 110 T.C. 20, 26 (1998). A final determination by the Secretary to not abate interest under section 6040(h)(1) gives the Court jurisdiction to hear an interest abatement claim, independent of whether the Court has jurisdiction under section 6320 or section 6330. See Gray v. Commissioner, 138 T.C. 295, 304-305 (2012), aff’d, 732 F.3d 790 (7th Cir. 2013).

In Gray v. Commissioner, the IRS issued a notice of determination that included a denial of the taxpayer’s request for interest abatement, stating ‘[a] review of your request for abatement shows that there is no basis for interest abatement, based on the criteria shown in IRC section 6404(e)’ and ‘it was determined that the conditions for IRC section 6404 with regard to interest abatement were not met.’ Id. at 304. The notice of determination satisfied the Court that the taxpayer made a request for interest abatement under section 6404(e) during her CDP hearing and that the Appeals Office made a determination to deny this request. Id. The Court held that the notice of determination was the final “written and embodied determination” that the taxpayer was not entitled to interest abatement under section 6404(e) because the notice fairly indicated that the settlement officer considered whether interest abatement was appropriate, and further respondent did not suggest nor provide evidence that the determination was not intended to be a final resolution of the taxpayer’s request. Id. at 304-305. The form in which the final determination was made was not controlling because ‘the name or label of a document does not control whether the document constitutes a determination \* \* \* our jurisdiction is established when the Commissioner issues a written notice that embodies a determination.’ Id. at 304 (citing Cooper v. Commissioner, 135 T.C. 70, 75 (2010)).

The decision letter dated January 6, 2016, was a written embodiment that SO Voysest had considered Mr. Sager’s interest abatement request made during the equivalent hearing and then decided to deny the request. Respondent has not asserted nor proven that the decision letter was not meant to be a final determination on Mr. Sager’s interest abatement request. Thus, the decision letter serves as a final determination by respondent to not abate such interest. See sec. 6040(h)(1)(A)(i); Gray v. Commissioner, 138 T.C. at 304-305. The petition filed February 8, 2016, was filed well within the prescribed period of 180 days after the final determination was mailed. See sec. 6040(h)(1).

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<sup>7</sup>Section 6404(h)(1) also states that the taxpayer must “meet the requirements referred to in section 7430(c)(4)(A)(ii).” The Court has held that only the net worth requirement of sec. 7430(c) is incorporated into section 6404(h). Corbalis v. Commissioner, 142 T.C. 46, 57-58 (2014).

Therefore, we find the Court has jurisdiction to hear Mr. Sager's request for abatement of interest under section 6404(h)(1).

Premises considered, it is

ORDERED that respondent's Motion To Dismiss for Lack of Jurisdiction, filed March 1, 2016, is granted in part, to the extent that the Court does not have jurisdiction under section 6320 or section 6330. It is further

ORDERED that respondent's Motion To Dismiss for Lack of Jurisdiction, filed March 1, 2016, is denied in part, to the extent that the Court has jurisdiction to review Mr. Sager's request for abatement of interest under section 6404(h)(1). It is further

ORDERED that the parties shall, on or before May 17, 2017, file (either joint or separate) written status report(s) advising of the then current status of this matter.

**(Signed) Peter J. Panuthos**  
**Special Trial Judge**

Dated: Washington, D.C.  
February 17, 2017