

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DRC

ERIC PROTTER, DECEASED,)
)
Petitioner,)
)
v.) Docket No. 22975-15SL.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

On November 3, 2015, respondent filed a Motion To Dismiss for Lack of Jurisdiction on the ground that the petition was not filed within the time prescribed by sec. 6330(d) or sec.7502 of the Internal Revenue Code (I.R.C.), to which petitioner objected by filing on December 7, 2015, a Response to the motion to dismiss. On February 8, 2016, respondent filed a Reply to petitioner's Response.

This Court is a court of limited jurisdiction. It may therefore exercise jurisdiction only to the extent expressly provided by statute. Breman v. Commissioner, 66 T.C. 61, 66 (1976). In a case seeking review of a determination under section 6320 or 6330, I.R.C., the jurisdiction of the Court depends, in part, upon the issuance of a valid notice of determination by the IRS Office of Appeals under section 6320 or 6330, I.R.C. Secs. 6320(c) and 6330(d)(1), I.R.C.; Rule 330(b), Tax Court Rules of Practice and Procedure; Offiler v. Commissioner. Jurisdiction also depends in part on a timely filed petition. Rule 330(b), Tax Court Rules of Practice and Procedure; Weber v. Commissioner, 122 T.C. 258 (2004); McCune v. Commissioner, 115 T.C. 114 (2000). Section 6330(d)(1), I.R.C., specifically provides that the petition must be filed with the Tax Court within 30 days of the determination. However, if the conditions of I.R.C. section 7502 are satisfied, a petition which is timely mailed is treated as having been timely filed. See secs. 7502(a)(2)(A)(i) and (B), I.R.C.; sec. 301.7502-1(c)(1), Proced. & Admin. Regs.

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Respondent attached to the motion, a copy of a USPS tracking entry indicating that he mailed a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the I.R.C. for taxable years 2011, and 2012, dated August 4, 2015, to petitioner by certified mail bearing the certified mail number 7011 0110 0001 9818 9816, on August 4, 2015. The record establishes that the petition was filed on September 10, 2015, a date 37 days after the date on the notice of determination. Attached to the petition was the above-described notice of determination bearing the certified mail number 7011 0110 0001 9818 9816. The petition arrived at the Court in an envelope bearing a U.S. postmark date of September 4, 2015, a date 31 days after the date on the notice of determination. The 30-day period within which petitioner had to file the petition expired on September 3, 2015.

In the response, petitioner takes the position that the petition was timely filed under sections 6330(d) and 7502, I.R.C., and per the instruction in the notice of determination which stated: "If you want to dispute this determination in court, you must file a petition with the United States Tax Court within a 30-day period beginning the day after the date of this letter." Specifically, petitioner contends as follows regarding timeliness:

1. The Notice of Determination Concerning Collection Action received by petitioner was dated August 4, 2015. Per the letter, a petitioner would have 30 calendar days from the following day (August 5, 2015), of the date the letter was transcribed, to file a timely petition.
2. Thus, August 5, 2015 to August 6, 2015, would then be considered day number one, August 6 to August 7, 2015, would be day two, etc. with September 5, 2015, being day number thirty.

However, petitioner's construction of the operative language effectively results in August 4, 2015, as being day zero and August 5, 2015, as being day one. Such construction is contrary to the manner in which deadlines are set forth in the Internal Revenue Code, as fully explained in Rule 25(a) of the Tax Court Rules of Practice and Procedure, which provides:

- (a) Computation: (1) General: In computing any period of time prescribed or allowed by these Rules or by direction of the Court or by any applicable statute which does not provide otherwise, the day of the act, event, or default from which a designated period of time begins to run shall not be included, and (except as provided in subparagraph (2) [dealing with Saturdays,

Sundays, and holidays]) the last day of the period so computed shall be included. If service is made by mail, then a period of time computed with respect to the service shall begin on the day after the date of mailing.

Applying Rule 25(a) of the Tax Court Rules of Practice and Procedure to the case at hand would then proceed as follows. The notice of determination was dated and mailed on August 4, 2015, so this date is not counted as part of the 30-day period. Day one is therefore August 5, 2015, day two is August 6, 2015, and so forth. Proceeding in this manner shows that day 30, the deadline, is September 3, 2015. Thus, a petition would need to be filed, or, alternatively, sent under the section 7502, I.R.C., timely mailing standards, on or before September 3, 2015, in order to be considered timely and to afford the Court jurisdiction to hear the case. This application of Rule 25(a) is consistent with respondent's calculations.

Petitioner's theory of computing time likewise stands in opposition of decades of this Court's jurisprudence dismissing as untimely petitions mailed or filed one day late, where the day after the mailing of the underlying notice was counted as day one (not day zero). See, e.g. Slattery v. Commissioner, T.C. Memo. 1995-274; Dovidio v. Commissioner, T.C. Memo. 1991-211; Haaland v. Commissioner, T.C. Memo. 1984-33; Bumpass v. Commissioner, T.C. Memo. 1981-103; Blank v. Commissioner, 76 T.C. 400 (1981). Similarly, Appiah v. Commissioner, T.C. Memo. 1996-170, sets forth in detail the computation of time for purposes of Rule 25(a)(1) and rejects an analogous argument by the taxpayer there to add an extra day. Notable also in this regard is Appleton v. Commissioner, T.C. Memo. 2008-231, a collection proceeding wherein the Court parsed both section 6330(d), I.R.C., which mandates that an appeal to the Tax Court be filed "within 30 days of a determination", and the language of Rule 25. There, the notice of determination was mailed on February 29, 2008, and the Court stated: "The last date 'within 30 days' of Friday, February 29, 2008, was March 30, 2008".

Applying such well-settled principles to the instant case, establishes that the petition was neither timely filed nor timely mailed. The Court has no authority to extend the period provided by law for filing a petition "whatever the equities of a particular case may be and regardless of the cause for its not being filed within the required period." Axe v. Commissioner, 58 T.C. 256, 259 (1972). See also Weber v. Commissioner, 122 T.C. 258, 263 (2004); McCune v. Commissioner, 115 T.C. 114, 117-18 (2000). Therefore, the Court is obligated to dismiss this case for lack of jurisdiction because the petition was not timely filed.

Petitioner makes two other arguments in the response that do not bear upon the jurisdictional allegation raised by respondent. First, petitioner cites I.R.C. section 6320(a)(2), and argues that respondent must afford an additional 5 days to petitioner to file the petition in the Tax Court. However, this argument is misplaced as the cited code section applies to a petitioner's right to request a collection due process hearing in response to a notice of filing of lien. The 30-day time period by which a petitioner must file a petition in the Tax Court is as explained above. In addition, petitioner argues that because respondent did not send a copy of the notice of determination to petitioner's power of attorney, the 30-day period begins when petitioner actually received the notice, which according to petitioner, was August 11, 2015. Again, the Court must follow the statutory law in determining its jurisdiction as explained above. Moreover, the 30-day period is not based upon actual receipt by petitioner.

Although petitioner cannot prosecute a case in this Court, petitioner may pay the determined amounts, file a claim for refund with the Internal Revenue Service and then if the claim is denied or not acted on for 6 months, bring a suit for refund in the appropriate Federal court. See McCormick v. Commissioner, 55 T.C. 138, 142 n.5 (1970).

Premises considered, it is

ORDERED that respondent's Motion To Dismiss for Lack of Jurisdiction, filed November 3, 2015, is granted, and this case is dismissed for lack of jurisdiction.

**(Signed) L. Paige Marvel
Chief Judge**

ENTERED: **SEP 26 2017**