

UNITED STATES TAX COURT
 WASHINGTON, DC 20217

MICHAEL T. SESTAK,)
)
 Petitioner,)
)
 v.) Docket No. 17286-18.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

In February 2015 Michael Sestak timely filed his 2014 return but did not include his tax payment. On his 2014 Form 1040, U.S. Individual Income Tax Return, Mr. Sestak listed a Yulee, Florida address.

In September 2015 Mr. Sestak began a 5-year prison sentence at U.S. Penitentiary McCreary, a federal prison in Kentucky. On November 24, 2015, while in prison, Mr. Sestak sent a letter to the Internal Revenue Service informing the Service of his new address. On the top right side of the letter, Mr. Sestak provided his new address as:

SCP McCreary; PO Box 3000
 Pine Knot, KY 42635

Mr. Sestak did not include his prisoner registration number--the number used to identify individual inmates--in his address. In the body of the letter Mr. Sestak noted his change of address. He also stated, "Please note that I am currently an inmate in custody of the Federal Bureau of Prisons." He continued, "Any future correspondence should be directed to the above address, which should remain my current residence until January 2018."

In that same letter, Mr. Sestak asked the Commissioner to waive interest and the late filing penalty for 2014, citing his incarceration as the reason for late payment. And citing that incarceration, the Commissioner granted the request in

May 2016 when he issued a Reasonable Cause Summary abating Mr. Sestak's penalty for failure to timely pay.

At the same time this was happening, a relative of Mr. Sestak sent the Commissioner a letter that discussed Mr. Sestak's incarceration and provided the IRS with his new address, including Mr. Sestak's prisoner registration number. The IRS retained this letter in its records regarding Mr. Sestak.

On January 9, 2017, the Commissioner sent Mr. Sestak a notice of deficiency for the 2014 tax year. The notice determined a deficiency due to underpayment and included a substantial underpayment penalty. The Commissioner sent the notice to Mr. Sestak at SCP McCreary, as Mr. Sestak requested in his November 24, 2015 letter. The address on the notice read:

Michael T Sestak
SCP McCreary
PO Box 3000
Pine Knot KT 42635-3000

Like the address sent by Mr. Sestak to the IRS, the address used by the Commissioner did not contain Mr. Sestak's prisoner registration number.

Mr. Sestak never received the notice of deficiency. He claims he became aware of the deficiency when he started to receive collection notices from the Commissioner in May 2017.

On September 4, 2018, a year-and-a-half after the Commissioner mailed the notice of deficiency, Mr. Sestak filed a petition with this Court. He lived in Florida at the time of filing his petition. In the petition, Mr. Sestak challenges the Commissioner's notice of deficiency. He argues the Commissioner did not send the notice of deficiency to his last known address because the Commissioner failed to include Mr. Sestak's prisoner registration number in the mailing address on the notice.

The Commissioner moved to dismiss for lack of jurisdiction citing Mr. Sestak's untimely filing of his petition. He argues he mailed the notice of

deficiency to Mr. Sestak's last known address as required by section 6212(b).¹ The Commissioner claims he reasonably relied on Mr. Sestak's letter--which did not specify a prisoner registration number in the change of address notification--when he sent the notice of deficiency.

The question before us is whether this Court lacks jurisdiction because Mr. Sestak untimely filed his petition or because the Commissioner did not send the notice of deficiency to Mr. Sestak's last known address.² We conclude that the Commissioner did not send the notice to Mr. Sestak's last known address.

Discussion

We are a court of limited jurisdiction and may exercise that jurisdiction only to the extent authorized by Congress.³ Whether we have jurisdiction is a question that may be raised by either party or the Court itself.⁴ This Court has jurisdiction if the Commissioner sends a valid notice of deficiency and the taxpayer timely files a petition with the Court.⁵ "If the notice is not validly sent or the petition is not timely filed, we do not have jurisdiction to redetermine the deficiency."⁶

A notice of deficiency is valid if sent to the taxpayer's last known address.⁷ A notice sent to the taxpayer's last known address is valid regardless of whether the taxpayer actually received the notice.⁸ A taxpayer's last known address is generally "the address that appears on the taxpayer's most recently filed and properly processed Federal tax return, unless the Internal Revenue Service (IRS) is given clear and concise notification of a different address."⁹ Clear and concise notification is a statement signed by the taxpayer notifying the Commissioner of

¹Unless otherwise indicated, all section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

²Keeton v. Commissioner, 74 T.C. 377, 379 (1980).

³See sec. 7442; Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

⁴Midland Mortgage Co. v. Commissioner, 73 T.C. 902, 905 (1980).

⁵Secs. 6212; 6213(a).

⁶Gregory v. Commissioner, 152 T.C. ___, ___ (slip op. at 5) (Mar. 13, 2019).

⁷Sec. 6212(b)(1).

⁸McKay v. Commissioner, 89 T.C. 1063, 1067 (1987), aff'd, 886 F.2d 1237 (9th Cir. 1989).

⁹Sec. 310.6212-2(a), Proced. & Admin. Regs.

the taxpayer's change of address.¹⁰ The clear and concise notification is supposed to include the taxpayer's full name, old address, and social security number.¹¹

To determine the taxpayer's last known address we focus on what the Commissioner knew at the time he sent the notice of deficiency.¹² The last known address is the address, in light of surrounding facts and circumstances, the Commissioner reasonably believes the taxpayer wishes the notice to be sent.¹³

If the Commissioner is notified of a change of address before mailing the notice of deficiency, he "must exercise reasonable care and diligence in ascertaining, and mailing the notice of deficiency to, the correct address."¹⁴ If the Commissioner has reason to believe a taxpayer's address is incorrect, the Commissioner is expected to reasonably inquire further to determine the correct address.¹⁵ A reasonably diligent inquiry is only required if the Commissioner knows his records are incorrect before mailing the notice of deficiency.¹⁶ The Commissioner is not required to ascertain a taxpayer's correct mailing address after the postal service returns a notice of deficiency for failure to deliver.¹⁷

Once the Commissioner learns that the taxpayer is no longer at the address shown on the taxpayer's last return, "he must exercise reasonable care and diligence in ascertaining and mailing the notice of deficiency to the correct address."¹⁸ If the Commissioner does not exercise reasonable diligence and sends the notice of deficiency to an incorrect address, the notice of deficiency is deemed invalid.¹⁹

¹⁰Rev. Proc. 2010-16, sec. 5.04(1)(a), 2010-19 I.R.B. 664, 666.

¹¹Rev. Proc. 2010-16, sec. 5.04(1)(a).

¹²King v. Commissioner, 88 T.C. 1042, 1048 (1987), aff'd, 857 F.2d 676 (9th Cir. 1988)

¹³Weinroth v. Commissioner, 74 T.C. 430, 435 (1980).

¹⁴Abeles v. Commissioner, 91 T.C. 1019, 1031 (1988).

¹⁵Stroupe v. Commissioner, T.C. Memo 1998-380, 76 T.C.M. (CCH) 713, 718 (1998).

¹⁶Monge v. Commissioner, 93 T.C. 22, 33 (1989).

¹⁷Monge v. Commissioner, 93 T.C. at 34.

¹⁸Keeton v. Commissioner, 74 T.C. at 382.

¹⁹See Fernandez v. Commissioner, T.C. Memo 1987-557, 54 T.C.M. (CCH) 1036, 1040 (1987) (where the Commissioner was not reasonably diligent because he did not contact a business with the petitioner's last name, the Department of Motor Vehicles, or a hospital to determine petitioner's address); Taylor v.

The Commissioner must still exercise reasonable diligence when the taxpayer's new address is a prison. In Keeton v. Commissioner, we held the Commissioner did not send a notice of deficiency to the taxpayer's last known address when the Commissioner knew the taxpayer was incarcerated and did not send the notice to the prison.²⁰ In Keeton, the taxpayers, husband and wife, were criminally prosecuted for violating Federal income tax laws.²¹ The husband was incarcerated at a Federal penitentiary and his wife moved to be near him.²² After the incarceration, the Commissioner sent a notice of deficiency to the taxpayers at their old address.²³ The taxpayers filed an untimely petition with this Court.²⁴

In Keeton, we found the Commissioner did not exercise reasonable diligence when he sent the notice of deficiency to the taxpayers' old address.²⁵ Because the Commissioner knew of the conviction and incarceration, he was "on notice" of the taxpayers' change of address.²⁶ The notice of incarceration and change of address necessitated reasonable care and diligence from the Commissioner to "at least inquire" into the taxpayers' whereabouts.²⁷ The Court explained that it would have been "no burden" for the Commissioner to contact Federal prison authorities and the Department of Justice to verify the taxpayer's address before issuing the notice of deficiency.²⁸

The Commissioner had notice of Mr. Sestak's incarceration. Mr. Sestak repeatedly referenced his incarceration in his letter to the IRS. Mr. Sestak's family member also sent the Service a letter--which the IRS maintained in its record--which referenced Mr. Sestak's incarceration and included his full address at SCP

Commissioner, T.C. Memo 1988-152, 55 T.C.M. (CCH) 596, 597-598 (1988) (where the Commissioner was not reasonably diligent when IRS personnel did not search the IRS's own computer systems to ascertain the petitioner's address); Pyo v. Commissioner, 83 T.C. 626, 637-639 (1984) (where the Commissioner was not reasonably diligent when IRS personnel who were communicating with petitioners at their new address did not update their address in IRS files).

²⁰Keeton v. Commissioner, 74 T.C. 377.

²¹Keeton v. Commissioner, 74 T.C. at 380.

²²Keeton v. Commissioner, 74 T.C. at 380.

²³Keeton v. Commissioner, 74 T.C. at 379.

²⁴Keeton v. Commissioner, 74 T.C. at 379.

²⁵Keeton v. Commissioner, 74 T.C. at 383.

²⁶Keeton v. Commissioner, 74 T.C. at 383.

²⁷Keeton v. Commissioner, 74 T.C. at 383.

²⁸Keeton v. Commissioner, 74 T.C. at 383.

McCreary with Mr. Sestak's prisoner registration number. Moreover, in 2016, the Service determined Mr. Sestak had reasonable cause for late payment of his 2014 taxes because he was incarcerated. Mr. Sestak's incarceration was thus known to the Commissioner well before he issued the notice of deficiency.

The Commissioner knew Mr. Sestak's address was incorrect because he knew a prisoner registration number was necessary. The Commissioner's own manual gives instructions for mailing notices of deficiency to incarcerated taxpayers. The Internal Revenue Manual (IRM) states that the address on the notice of deficiency "should reference the prisoner locator number, if available."²⁹ The IRM provides a link to the Bureau of Prisons website where Service personnel may find prison locator numbers and addresses.³⁰ The IRM thus states that a complete address for a prisoner contains the prisoner registration number and then provides a link to find that number. Therefore, the Commissioner knew he had an incomplete address for Mr. Sestak because the IRM stated that a prisoner address should contain the prisoner's registration number.

Although the Commissioner knew Mr. Sestak's address was incomplete, he did not exercise reasonable diligence by ascertaining Mr. Sestak's prisoner registration number. Merely clicking a link already embedded into the IRM was all that was needed to determine Mr. Sestak's complete address.

The Commissioner argues that the use of the automated underreporter (AUR) system precluded the Commissioner from taking any additional steps to complete Mr. Sestak's address. The Commissioner claims that because the AUR system issues notices of deficiency without relying on examinations by revenue agents, the Commissioner had no reason to know of Mr. Sestak's incarceration or his prisoner registration number. Thus, the Commissioner asserts he acted reasonably when the AUR system mailed Mr. Sestak's notice of deficiency to the address on file. But, the last known address rule of section 6212(b) does not toggle on and off on the basis of what system the Commissioner used to mail his notice of deficiency. He is required to mail notices to the last known address and if he is aware that an address is incorrect or incomplete, he must exercise due diligence in

²⁹Internal Revenue Manual 4.8.9.8.2.8(2) (July 9, 2013). While the I.R.M. does not have the force of law, it "can be persuasive authority * * * and a review of relevant IRM provisions is instructive in ascertaining the procedures the IRS expects its employees to follow". Gurule v. Commissioner, T.C. Memo. 2015-61, at * 23 n.9.

³⁰I.R.M. 4.8.9.8.2.8(4).

correcting or completing that address. Use of an automated system does not override that obligation.

Conclusion

The Commissioner did not mail the notice of deficiency to Mr. Sestak's last known address. As such, the notice of deficiency is not valid and we lack jurisdiction over the matter. Accordingly, it is

ORDERED that the Commissioner's motion to dismiss for lack of jurisdiction filed October 24, 2018, is denied. It is further

ORDERED that on the Court's own motion this case is dismissed for lack of jurisdiction because the Notice of Deficiency is not valid and we lack jurisdiction over the matter.

**(Signed) Ronald L. Buch
Judge**

Entered: **OCT 23 2019**