

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

On July 30, 2013, respondent filed a Motion to Dismiss for Lack of Jurisdiction on the ground that the petition was not timely filed within the period prescribed by the Internal Revenue Code (I.R.C.). Respondent alleges, in the alternative, that petitioner did not have legal capacity to commence this case at the time the petition was filed because the California Franchise Tax Board suspended petitioner's powers, rights and privileges on January 2, 2013, prior to the filing of the petition.

Petitioner was served with a copy of respondent's Motion to Dismiss for Lack of Jurisdiction and given the opportunity to file an Objection. On August 21, 2013, petitioner filed an Objection in which petitioner argues that the notice of deficiency issued to petitioner on November 2, 2012, was not valid because it was not sent to petitioner's representative. Petitioner's Objection further argues that respondent's alternative argument concerning petitioner's capacity to commence this action is moot due to the invalid notice of deficiency.

On October 24, 2013, respondent filed a Response to petitioner's Objection arguing that the notice of deficiency at issue is valid since it was sent to petitioner's last known address as required by I.R.C. section 6212, and petitioner's Form 2848 did not change petitioner's last known address pursuant to I.R.C. section 6212(a).

The Tax Court is a court of limited jurisdiction, and we may exercise that jurisdiction only to the extent authorized by Congress. Naftel v. Commissioner, 85 T.C. 527, 529 (1985). This Court's jurisdiction to redetermine a deficiency depends on the issuance of a valid notice of deficiency and a timely filed petition. Rule 13(a), (c), Tax Court Rules of Practice and Procedure; Monge v. Commissioner, 93 T.C. 22, 27 (1989); Normac, Inc. v. Commissioner, 90

T.C. 142, 147 (1988). If jurisdiction is lacking because of the Commissioner's failure to issue a valid notice of deficiency, as petitioner alleges, we dismiss on that ground, rather than on the ground that the taxpayer failed to file a timely petition, as respondent alleges. Heaberlin v. Commissioner, 34 T.C. 58, 59 (1960); Lerer v. Commissioner, 52 T.C. 358 (1969). This distinction is significant because where a notice of deficiency is found invalid, the effect would be to vitiate the notice and any assessment of tax related thereto, whereas dismissal for lack of timely filing a petition does not affect the validity of the underlying notice and assessment. Sec. 6213(a); Burke v. Commissioner, T.C. Memo. 1981-186 (citing O'Brien v. Commissioner, 62 T.C. 543, 548 (1974)).

Petitioner argues that the notice of deficiency at issue is invalid because it was not sent to petitioner's representative. It is sufficient for jurisdictional purposes if the Commissioner mails the notice of deficiency to the taxpayer's "last known address". Sec. 6212(b)(1); Frieling v. Commissioner, 81 T.C. 42, 52 (1983). Generally, a taxpayer's last known address is the address that appears on the taxpayer's most recently filed and properly processed Federal tax return, unless the IRS is given clear and concise notification of a different address. 26 C.F.R. sec. 301.6212-2(a). Petitioner maintains that petitioner's Form 2848, Power of Attorney, submitted to the IRS in October 2012 ("October 2012 POA") effectively changed petitioner's "last known address" to petitioner's representative's address. The Tax Court has held that a new address for a taxpayer on a Form 2848 submitted after the most recent returns were submitted may serve as a change of address for purposes of determining a petitioner's last known address. Downing v. Commissioner, T.C. Memo. 2007-291; Hunter v. Commissioner, T.C. Memo. 2004-81. Furthermore, in Honts v. Commissioner, T.C. Memo. 1995-532, the Court held that where a Form 2848 directs that "notices and other written communications will be sent" to the taxpayer's designee such language may be sufficient to render the address of the taxpayer's representative as the "last known address" of the taxpayer. However, neither of these situations is applicable here.

Petitioner's October 2012 POA continued to list petitioner's address as "7064 Wamego Trail, Bld. 1, Yucca Valley, California 92284". This is the "last known address" respondent had on file for petitioner and the address to which the notice

of deficiency was sent. We also note that this is the address used by petitioner in filing the petition to commence this case. As a result, the October 2012 POA did not expressly change petitioner's last known address. Furthermore, notwithstanding any arguments by petitioner's representative that the October 2012 POA form was confusing, it did not expressly direct that all notices and other written communications should be sent to petitioner's representative as give the IRS clear and concise notification that petitioner intended to use the address of the taxpayer's representative as his own. As a result, the Court's holding in Honts is inapplicable here. Based on the foregoing, we conclude that the October 2012 POA did not change petitioner's "last known address" for purposes of I.R.C. section 6212 and petitioner's "last known address" at the time the notice of deficiency was issued was 7064 Wamego Trail, Bld. 1, Yucca Valley, California 92284.

Petitioner further alleges that respondent's prior practice of sending petitioner's representative copies of notices required that respondent send the notice of deficiency to the representative for it to be valid. We disagree. This Court has held that if a Form 2848 only directs that copies of notices and communications be sent to a taxpayer's representative, then sending those copies to the power of attorney on file is a mere courtesy extended by the Service and in no way effects the mailing requirements of I.R.C. section 6212. Triangle Investors LTD. Partnership v. Commissioner, 95 T.C. 610 (1990); Houghton v. Commissioner, 48 T.C. 656, 661 (1967).

Based on the foregoing, we find that the notice of deficiency was properly sent to petitioner's last known address and is therefore valid. We now address the timeliness of the petition filed to commence this case.

Respondent attached to the motion to dismiss a copy of the Form 3877, Certified Mail List, as evidence of the fact that a notice of deficiency for fiscal years 2009, 2010, and 2011 was sent to petitioner by certified mail on November 2, 2012. The petition was filed with the Court on April 23, 2013, which date is 172 days after the notice of deficiency was mailed to petitioner. The petition arrived in an envelope delivered by FedEx Express bearing a shipping label dated April 19, 2013, which date is 168 days after the mailing of the notice of deficiency. We note that petitioner has never alleged that it did not receive the notice of deficiency in time to timely petition this Court.

Section 6213(a) of the I.R.C. provides that the petition must be filed with the Court within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day). The Court has no authority to extend this 90-day (or 150-day) period. Joannou v. Commissioner, 33 T.C. 868, 869 (1960). The last date by which petitioner could timely petition this Court with respect to the notice of deficiency for fiscal years 2009, 2010, and 2011 was January 31, 2013. The petition was not filed within this time. Accordingly, we are obliged to dismiss this case for lack of jurisdiction.

Since we will dismiss this case for lack of jurisdiction on the ground of an untimely petition, we do not need to address whether petitioner had the legal capacity to commence this case at the time the petition was filed.

In view of the foregoing, it is

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction, filed July 30, 2013, is granted, and this case is dismissed for lack of jurisdiction.

Daniel A. Guy, Jr.

Special Trial Judge

ENTERED: