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UNITED STATES TAX COURT
Los Angeles, CA 90012

THOMAS T. & MARIANNE JOHNSON,)
 Petitioners,)
))
 v.) Docket No. 3657-98)
))
COMMISSIONER OF INTERNAL REVENUE,)
))
 Respondent.)

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

On April 20, 1998, respondent filed a Motion to Dismiss for Lack of Jurisdiction on the ground that the petition was not filed within the 90-day period prescribed in section 6213(a). (All section references are to the Internal Revenue Code. All Rule references are to the Court's Rules of Practice and Procedure.) On May 8, 1998, petitioners filed an objection to respondent's motion to dismiss, alleging that Mr. Magnuson relied upon the postmark on the envelope in which his copy of the notice of deficiency was contained.

In 1996, respondent commenced an examination of petitioners' 1984 and 1985 returns. In that year, petitioners signed and filed Form 2848, Power of Attorney and Declaration of Representative, appointing their attorney, Charles H. Magnuson, (Mr. Magnuson) as their attorney in fact for the taxable years 1984 and 1985. Line 7 of the Form 2848 provides:

Notices and Communications.--Notices and other written communications will be sent to the first representative listed in line 2. [i.e., Mr. Magnuson]

On the Form 2848, petitioners stated their home address as 1070 Palisair Pl., Pacific Palisades, CA 90272 (the Palisair address).

By notice of deficiency dated November 21, 1997, respondent determined deficiencies in petitioners' 1984 and 1985 Federal income taxes. The notice of deficiency was sent by certified mail to petitioners at the Palisair address. According to the certified mail receipt, the deficiency notice was delivered by the U.S. Postal Service and signed for by petitioner Marianne Johnson on November 24, 1997.

In a letter also dated November 21, 1997, Marvin Weisbart, Associate Chief, IRS Appeals, Las Vegas, Nevada, advised Mr. Magnuson that materials pertaining to petitioners were being furnished to him pursuant to a power of attorney on file with the IRS. The letter further stated that the "originals have been mailed to [petitioners]." A copy of the notice of deficiency, clearly dated November 21, 1997, was enclosed with the letter. The envelope containing this letter and the copy of the deficiency notice was postmarked November 24, 1997. The copy of the deficiency notice sent to Mr. Magnuson was not sent by certified mail or registered mail.

Petitioners filed a petition for redetermination with this Court on February 25, 1998. The petition was delivered to the Court by certified mail in an envelope bearing a private postmeter stamp of February 20, 1998. The 90-day period for filing a petition with this Court based upon a notice of deficiency mailed on November 21, 1997, expired on Thursday, February 19, 1998, which date was not a legal holiday in the District of Columbia.

This Court's jurisdiction to redetermine a deficiency depends upon the timely issuance of a valid notice of deficiency and a timely filed petition. Rule 13(a), (c); Monge v. Commissioner, 93 T.C. 22, 27 (1989); Normac, Inc. v. Commissioner, 90 T.C. 142, 147 (1988). As relevant to this case, a petition is timely if it is filed (or mailed in conformance with the provisions of section 7502) on or before the 90th day after the mailing of the notice of deficiency. We have no authority to extend the 90-day period for any reason, regardless of the equities. Axe v. Commissioner, 58 T.C. 256, 259 (1972).

Section 6212(a) authorizes the mailing of a notice of deficiency to the taxpayer by certified or registered mail. Section 6212(b) provides generally that the notice of deficiency shall be sufficient if mailed to the taxpayer's last known address. However, the mailing of the notice of deficiency will meet the conditions of section 6212(a) no matter what address was used if a taxpayer receives actual notice without prejudicial delay. Frieling v. Commissioner, 81 T.C. 42, 53 (1983).

There is no question that the notice of deficiency mailed by respondent to petitioners at the Palisair address by certified mail complies with these statutory provisions. The Palisair address is the address shown on the Form 2848 as petitioners' address; it is the address stated in the petition to be petitioners' address. Accordingly, that mailing on November 21, 1997, commences the running of the 90-day period for filing of a timely petition.

The last day to file a timely petition with this Court was February 19, 1998; however, the petition was not mailed until, at the earliest, February 20, 1998. Petitioners failed to file the petition within the 90-day period prescribed in section 6213(a). Accordingly, petitioners did not timely file their petition, and we lack jurisdiction.

It could be argued that the Form 2848 constitutes a change of petitioners' last known address. See Honts v. Commissioner, T.C. Memo. 1995-532. Nevertheless, because petitioners timely received the notice of deficiency sent by certified mail, that notice was valid and commenced the running of the 90-day period. Clodfelter v. Commissioner, 527 F.2d 754 (9th Cir. 1975), affg. 57 T.C. 102 (1971).

In Sandor v. Commissioner, T.C. Memo. 1992-643, the notices of deficiency were mailed by certified mail on September 11, 1991, to the taxpayer at an address in Wheaton, Maryland. The taxpayer received the notices on or about September 16, 1991, at an address in Laurel, Maryland, having moved from Wheaton. The envelope in which one of the notices had been mailed was postmarked September 14, 1991. The petition filed by Ms. Sandor was mailed on December 11, 1991, within 90 days of September 14, 1991 but outside of the 90-day period calculated from September 11, 1991. Under those facts and circumstances, we held that the notice of deficiency in the envelope postmarked September 14, 1991, was "mailed" to Ms. Sandor on that date, and that her petition in respect of that notice of deficiency was timely. The other notice of deficiency was received in an envelope with an illegible postmark, and as to that year we held the petition to be untimely, as there was not sufficient evidence to prove that the date of mailing of the notice of deficiency was other than September 11, 1991.

Sandor is distinguishable from the instant case. In Sandor, the envelope with a postmark date different from the enclosed notice of deficiency had been sent to the taxpayer by certified mail and was the only mailing of the subject notice of deficiency. In the instant case, the envelope bearing a postmark date different from the enclosed notice of deficiency was not sent by certified mail and included a letter which clearly stated that the original notice of deficiency had been sent to petitioner and that the enclosed was a copy thereof. Under those circumstances, Mr. Magnuson was not entitled to rely on the postmark.

Accordingly, because the petition was not mailed until 91 days after the mailing of the notice of deficiency, we conclude that the petition was not timely filed within the meaning of sections 7502(a) and 6213(a). Accordingly, we shall grant

respondent's motion to dismiss this case for lack of jurisdiction. Although petitioners cannot pursue their case in this Court, they are not without a remedy. In short, petitioners may pay the tax, file a claim for refund with the IRS, and, if the claim is denied, sue for refund in the appropriate Federal District Court or in the U.S. Court of Federal Claims. See McCormick v. Commissioner, 55 T.C. 138, 142 (1970). Premises considered, it is

ORDERED that respondent's motion is granted, and this case is dismissed for lack of jurisdiction.

(Signed) Larry L. Namerick

Special Trial Judge

Entered: NOV 19 1988