

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ORDER OF DISMISSAL

This collection due process ("CDP") case, filed pursuant to section 6330(d) of the Internal Revenue Code (26 U.S.C.), is before the Court on a motion to dismiss for lack of jurisdiction, filed by the Internal Revenue Service ("IRS") on November 1, 2013. The only issues are: (1) whether erroneous advice provided to petitioner Harsh Sharma by the IRS's Office of Appeals ("Appeals") could extend the period for petitioning this Court past the 30 days provided in section 6330(d)(1) (we hold it cannot); and (2) whether Mr. Sharma's petition was timely filed (we must hold that it was not). Because Mr. Sharma's petition was untimely, we will reluctantly grant the IRS's motion to dismiss.

BACKGROUND

Throughout this case, including when he filed his petition, Mr. Sharma has been incarcerated at a low-security satellite prison adjacent to the Federal Correction Institution: Jesup ("FCI Jesup") in Jesup, Georgia.

After notice and demand that Mr. Sharma remit unpaid taxes for years 2004, 2005, 2006, 2007, and 2008, the IRS informed Mr. Sharma of its intent to collect unpaid taxes by issuing a "Notice of Jeopardy Levy and Right of Appeal" (dated September 18, 2009) and a "Notice of Federal Tax Lien and Your Right to a Hearing under IRC 6320" (dated September 21, 2009). The notices were addressed to Mr. Sharma at FCI Jesup. Mr. Sharma timely submitted Forms 12153 requesting agency-level review of both the notice of jeopardy levy and notice of lien. Appeals conducted the CDP hearing via two telephone conferences with Mr. Sharma on February 5, 2010, and February 17, 2010.

After conducting the CDP hearing, IRS Appeals sent to Mr. Sharma a "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330" dated January 11, 2011 (a copy of which is attached to respondent's answer), which sustained the jeopardy levy action and filing of a notice of lien regarding tax years 2004, 2005, 2006, 2007, and 2008. The IRS attached to its motion to dismiss a copy of the Certified Mail List, as evidence of the fact that the notice of deficiency was sent to the petitioner by certified mail. However, the Court is unable to tell (either from the Certified Mail List or other evidence in the record) when Mr. Sharma actually received the notice of determination.

The notice of determination stated that Mr. Sharma had "30 days from the date of this letter" to petition this Court for review. This statement was correct: Pursuant to § 6330(d)(1), a petition challenging the determination was due to be filed in this Court "within 30 days of a determination under this section" -- i.e., no later than February 10, 2011. The notice warned: "The time limit (30 days from the date of this letter) for filing your petition is fixed by law. The courts cannot consider your case if you file late."

Mr. Sharma did not meet that deadline. Rather, sometime before February 1, 2011--i.e., on a date on which a petition could have been timely mailed to the Court -- Mr. Sharma sent a letter to Appeals expressing his desire to dispute the notice of determination and requesting an extension of time. That letter does not appear in our record.

Appeals responded by a letter dated February 1, 2011. Our record does not show when Mr. Sharma received this letter (except that we know, from its inclusion with his petition, that he received it no later than February 24, 2011). Like the notice of determination, this letter stated, "The time limit (30 days from the date of this letter) for filing your petition is fixed by law. The courts cannot consider your case if you file late." The letter was correct in stating that the deadline was fixed by law but was incorrect in stating that the petition must be filed "within 30 days of this letter" (emphasis added), which would have been March 3, 2011. Rather, as is noted above, a petition was due within 30 days of the issuance of the notice of determination, i.e., by February 10, 2011.

On or before February 24, 2012, Mr. Sharma transferred possession of his petition challenging the notice of determination to FCI Jesup personnel with the intent that it be mailed to the Tax Court for filing. The back of the envelope containing Mr. Sharma's petition bears a stamp reading "FCI Jesup FEB 24 2011 Mail Room" and the handwritten word "LEGAL". The IRS contends that this stamp indicates that Mr. Sharma's petition was mailed by FCI Jesup personnel on February 24, 2011, a contention that Mr. Sharma does not deny. However, Mr. Sharma asserts (in his objection to respondent's motion to dismiss) that he "gave it to the authorities for mailing on Feb 1"[, 2011] * * *

This Court received the petition on March 2, 2011. The envelope containing Mr. Sharma's petition does not bear a notation of the date of the United States postmark. Instead, the back of the envelope in which the petition was mailed bore the date of February 24, 2011, as stamped by FCI Jessup.

Given his incarceration, Mr. Sharma contends that the date the petition should be deemed filed was the date he turned over the petition to the mailing authorities at FCI Jessup. Mr. Sharma maintains that this date was February 1, 2011, when he completed the last act within his power to mail the petition, and that any delay past February 1, 2011, was "beyond the control of the Petitioner". Though Mr. Sharma asserts in his objection to the IRS's motion to dismiss that he handed the petition to the FCI Jessup personnel on February 1, 2011, the record contains no evidence of this exchange in any form -- i.e., such as a log book or affidavit of FCI Jessup personnel or any other witness.

The IRS does not dispute that Mr. Sharma may have given his petition to FCI Jessup personnel before it was mailed. Instead, it argues that the only date the Court may consider is the date stamped by FCI Jessup on the back of the envelop containing the petition: February 24, 2011.

Thus, the IRS contends that the petition (due February 10, 2011) was mailed on February 24, 2011 -- i.e., not 30 days but 44 days after the issuance of the notice of determination, and therefore 14 days late. Mr. Sharma counters that, since he was incarcerated and was prohibited from physically placing the envelope in the mail himself, it was "mailed" -- for purposes of section 7502 -- when he relinquished possession and control of the envelop to FCI Jessup personnel on February 1, 2011 -- i.e., not 44 days but 21 days after the issuance of the notice of determination, and therefore nine days early.

The IRS moved the Court to dismiss the petition for lack of jurisdiction. By its Order dated November 18, 2013, the Court directed Mr. Sharma to file with the Court a written response to respondent's motion to dismiss, which was received by the Court on February 3, 2014. Respondent filed his reply to Mr. Sharma's response on February 28, 2014.

DISCUSSION

Because the petition -- due February 10, 2011 -- was filed late, we lack jurisdiction over this case. See sec. 6330(d)(1) ("The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to the matter)"); Gray v. Commissioner, 138 T.C. 295, 299 (2012) (holding the Tax Court lacks jurisdiction under section 6330(d)(1) to consider a petition that was not filed, or treated as filed, within the 30 day period).

The application of that clear and simple rule to this case is made awkward by two unfortunate circumstances specific to Mr. Sharma:

I. The IRS incorrectly advised Mr. Sharma of the Tax Court filing deadline

Appeals incorrectly stated the deadline for filing a Tax Court petition in its letter of February 1, 2011. If Mr. Sharma received that letter by February 10, 2011 (which our record does not show), and if -- notwithstanding the warning he had previously received in the notice of determination -- that letter led Mr. Sharma to believe that he had until March 3, 2011, to file a petition with this Court (which our record also does not show), then it would appear that the untimeliness of the petition may have been the fault of the IRS and not of Mr. Sharma.

However, our jurisdiction to review collection matters is prescribed and circumscribed by an act of Congress. Neither the IRS nor this Court has the power to grant jurisdiction beyond what Congress has conferred, "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 McCune v. Commissioner, 115 T.C. 114, 117 (2000) (holding that the 30-day period provided by section 6330(d)(1) is jurisdictional and cannot be extended). It is equally well established that erroneous or misleading advice by the IRS cannot extend the statutory period for filing a timely petition with the Court. See, e.g., Friedland v. Commissioner, T.C. Memo. 2011-217 (whistle blower case); Parlin v. Commissioner, T.C. Memo. 2006-18 (innocent spouse case); Elgart v. Commissioner, T.C. Memo. 1996-379 (deficiency case); Schoenfeld v. Commissioner, T.C. Memo. 1993-303 n.4 (deficiency case); Hinman v. Commissioner, T.C. Memo. 1978-133 (deficiency case).

An error of this sort is most unfortunate. An agency charged with broad nation-wide responsibility and necessarily staffed by fallible humans can never avoid such errors entirely; but the discovery of such an error should incline the IRS to take action within its discretion to compensate for the error and to provide reasonable remedies for a taxpayer who has been disadvantaged by the agency error.

II. The Eleventh Circuit does not extend the "prison mailbox" rule to Tax Court petitions

Another unfortunate possibility is that Mr. Sharma may have done everything in his power to mail his petition in a timely manner, and yet still have been ultimately unsuccessful because of a delay in mailing the petition caused by prison officials. However, the law provides that Mr. Sharma's petition was not timely filed, no matter how inequitable such a result may be.

Under section 7502, the delivery of a petition by mail will be treated as filing, and "the date of the United States postmark * * * shall be deemed to be the date of the delivery." The envelope in which Mr. Sharma's petition was mailed does not bear a notation of the date of the United States postmark. If the postmark on the envelope is made by any other than the United States Postal Service, then "[t]he postmark * * * must bear a legible date on or before the last date, or the last day of the period, prescribed for filing the document". 26 C.F.R. sec. 301.7502-1(c)(1)(iii)(B). The back of the envelope bears the stamp of FCI Jessup dated February 24, 2011 -- i.e., the date respondent contends is the earliest the petition could be deemed mailed under the statute.

In his response to the IRS's motion to dismiss, Mr. Sharma asserts that his petition should be deemed mailed on the date he handed the petition to prison personnel for mailing, not on the date FCI Jessup personnel stamped the back of the envelope containing the petition. Mr. Sharma claims that the petition "was probably received on or around February 1st[, 2011]" and that he "responded to all Legal mail within a day of when he received it".

Mr. Sharma thus attempts to invoke what is known as the "prison mailbox" rule. Such an attempt by a Tax Court petitioner was considered by the Tenth Circuit in Crook v. Commissioner, 173 Fed. Appx. 653, 655 (10th Cir. 2006):

[The petitioner] argues that he is entitled to the benefit of the prison mailbox rule, pursuant to which timeliness would be determined by the date upon which he gave his petition to the prison authorities for mailing to the court * * *

In Houston v. Lack, the Supreme Court ruled that a prison inmate's notice of appeal in a habeas corpus case was deemed filed at the time he delivered it to prison authorities for forwarding to the court. 487 U.S. 266, 270, 276 (1988). The prison mailbox rule was subsequently extended and codified in Rules 4(c)(1) and 25(a)(2)(C) of the Federal Rules of Appellate Procedure. While Rule 4 governs the filing of a notice of appeal by an inmate, Rule 25 applies to "a paper filed by an inmate confined in an institution." FED. R.APP. P. 25(a)(2)(C). Despite the broad scope of Rule 25, both rules apply only to the courts of appeals, FED. R.APP. P. 1(a)(1), not the United States Tax Court.

Mr. Sharma's argument is unavailing here, as the same argument was in Crook, for two reasons:

First, appeal of Mr. Sharma's case would lie in the Court of Appeals for the Eleventh Circuit, and that court does not extend the "prison mailbox" rule to the filing of Tax Court petitions. The Eleventh Circuit would follow the opinion in Rich v. Commissioner, 250 F.2d 170 (5th Cir. 1957), in which the Court of Appeals for the Fifth Circuit held that a prisoner providing an envelope with a Tax Court petition to prison personnel does not constitute a deemed mailing pursuant to section 7502. Mr. Rich "delivered his petition [challenging a valid notice of deficiency] to the officer in charge of the prison mail room, properly addressed to the Tax Court in Washington, D.C., with the request that it be sent by registered mail and paid the necessary postage" 12 days before the expiration of the 90-day filing period. Rich v. Commissioner, 250 F.2d at 173. The Tax Court dismissed the case for lack of jurisdiction because the petition was not timely filed. Id. at 172-173. The Court of Appeals affirmed the dismissal, despite the "grossly inequitable situation", id. at 175, and even though "but for the negligence of one or more employees of the Government at the federal penitentiary, the mailing, registration and actual filing of the petition would have been well within the ninety day period." Id. at 173. Even though Rich v. Commissioner was decided by the Fifth Circuit, it is binding law in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981). This Court is bound to follow any "Court of Appeals decision which is squarely on point where appeal from our decision lies to that Court of Appeals and that court alone." Golsen v. Commissioner, 54 T.C. 742, 757 (1970), affd 445 F.2d 985 (10th

Cir. 1971). Thus, even though the Rich case is more than 50 years old and, as far as we can tell, has not been cited for this proposition in all that time, we have no power to declare that the opinion has lost its vitality.

Even if "[a]ll of the equities are with" Mr. Sharma, Rich v. Commissioner, 250 F.2d at 173, we are thus precluded from granting him relief. That is, no matter when Mr. Sharma may have provided his petition to FCI Jesup personnel for mailing, and no matter what FCI Jesup personnel may have done that may have resulted in mailing the petition late, the sole determining factor in the Eleventh Circuit appears to be whether the petition was stamped by prison officials as mailed before the filing deadline. Here, Mr. Sharma's petition was stamped as mailed by FCI Jesup personnel on February 24, 2011 -- after the filing deadline and therefore depriving the Tax Court of jurisdiction.

Second, as petitioner, Mr. Sharma bears the burden of proving facts supporting jurisdiction. See Mason v. Commissioner, 68 T.C. 354, 356 (1977). Therefore, even if we were able to apply the "prison mailbox" rule (which Rich v. Commissioner expressly precludes us from doing), Mr. Sharma has not met his burden of proof. Courts that do extend the "prison mailbox" rule to the filing of Tax Court petitions require petitioners to meet a high burden of proof that the transfer of the petition to prison personnel was timely. When applying the "prison mailbox" rule to find that a Tax Court petition was timely filed in Curry v. Commissioner, the Court of Appeals for the Fourth Circuit emphasized that --

[A]bundant evidence, including letters from prison officials, supported the Tax Court's finding that [the taxpayer] attempted to mail his petition on time and that its timely delivery was prevented by a penitentiary staff member. This opinion should not be construed to suggest that a prisoner may avoid the requirements of [section] 6213 by an uncorroborated claim that he placed his petition in the institution's mail system within the * * * deadline.

571 F.2d 1306, 1309-10 (4th Cir. 1978). Where courts extend the "prison mailbox" rule to cover the filing of a Tax Court petition, they note evidence that the petitioner relinquished control of the petition and performed every act within his power to mail the petition on time. Compare Anderson v. United States, 966 F.2d 487, 491 (9th Cir. 1992) (testimony of taxpayer, coupled with corroborating testimony of friend as to mailing, sufficient to comply with common law presumption of delivery), and Curry v. Commissioner, 571 F.2d 1306, 1309-1310 (4th Cir. 1978) ("abundant" evidence of attempted compliance with mailing requirements supported holding that petition was timely mailed), with Sorriento v. Commissioner, 383 F.3d 1187, 1191 (10th Cir. 2004) ("Self-serving declarations of mailing, without more, are insufficient to invoke the presumption [of delivery]"), Washton v. United States, 13 F.3d 49, 50 (2d Cir. 1993) (taxpayers' own statements insufficient to prove timely mailing), and Spencer Med. Assoc. v. Commissioner, 155 F.3d 268, 272 (4th Cir. 1998) (same).

Other than Mr. Sharma's own statement, there is no evidence that he provided his petition to FCI Jesup personnel before the February 10, 2011, filing deadline, nor that the timely mailing of the petition was "prevented" by FCI Jesup personnel. As in Crook v. Commissioner, the only evidence as to timely placing the petition in the hands of prison personnel for mailing is Mr. Sharma's "uncorroborated assertion in his * * * response to the motion to dismiss * * *" 173 Fed. Appx. at 657.

But ultimately, even if Mr. Sharma provided evidence that he had done all that was within his power to mail his petition from within his confinement, the petition would still be untimely under Rich v. Commissioner, which is binding precedent in the Eleventh Circuit and therefore binding in this case. It is therefore

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction filed November 1, 2013, is granted, and this case is dismissed for lack of jurisdiction on the ground that the petition was not filed within the time prescribed by section 6330(d).

(Signed) David Gustafson
Judge

ENTERED: APR 11 2014