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Organic Cannabis Foundation, LLC,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

Electronically Filed
Docket No. 381-22L
Document No. 30

**Opposition to Motion to Dismiss for Lack of Jurisdiction as to
2018**

SERVED 07/27/22

UNITED STATES TAX COURT

NORTHERN CALIFORNIA SMALL
BUSINESS ASSISTANTS, INC., ET AL,

Petitioners,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

Docket Nos: 26889-16
26890-16
26891-16
21033-18
21034-18
21035-18
24708-21L
381-22L

Filed Electronically

PETITIONERS' OPPOSITION TO RESPONDENT'S

MOTION TO DISMISS FOR LACK OF JURISDICTION AS TO THE TAXABLE

YEAR 2018 AND TO STRIKE [IN DOCKET NO. 381-22L]

PETITIONER Organic Cannabis Foundation, LLC, pursuant to the Court's Orders of February 28, 2022, March 25, 2022, and April 5, 2022, files this opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction as to the Taxable Year 2018 and to Strike [In Docket No. 381-22L]:

IN SUPPORT THEREOF, Petitioner Organic Cannabis Foundation, LLC (Organicann) respectfully states:

1. Petitioner Organicann is a California Limited Liability Company which, for the tax year ending December 2018, filed a Form 1120, selecting to be taxed as a corporation. Organicann's sole member is Northern California Small Business Assistants, Inc.,

(NCSBA). NCSBA is California Corporation owned entirely by Dona Ruth Frank (Ms. Frank), an individual. The Organicann Form 1120 for 2018 reported an unpaid income tax liability.

2. On March 29, 2021, counsel for Organicann received at counsel's offices in Mather, California, a letter dated "03/25/2021" along with a copy of a "Notice of Federal Tax Lien and Your Right to A Hearing Under IRC 6320" (Letter 3172) relating to Organicann's 2018 tax year. The Letter 3172 bore a date of "03/16/2021", and said a Notice of Federal Tax Lien had been filed "03/16/2021."

3. The two Notices of Federal Tax Lien enclosed with the Letter 3172 were both dated "03/05/2021," not "03/16/2021," as the 3172 letter suggests.¹ Further, the Letter 3172 contained language

¹I.R.C. § 6320(a)(2)(C) provides that the notice of lien filing shall be sent by certified or registered mail to a person's last known address not more than 5 business days following the filing of the notice. There has been no explanation provided as to why the Letter 3172 was dated 11 days after the date of the Notices of Federal Tax Lien enclosed therewith.

Other reasons to question the 3/16/21 date the Letter 3172 says the "lien notice" was filed include:

1. On page 2 of Exhibit A attached to Respondent's Motion to dismiss there are duplicate entries that notices of the lien were filed on 03-16-2021 and 03-18-2021.
2. A public records search shows that neither of the referenced liens was filed on March 16, 2021. The Sonoma County Notice of Federal Tax Lien was filed March 15, 2021,

that "You must request your hearing by "04/22/2021," a date that is not 30 days (plus 5 business days) after either March 05, 2021, the date the Notices of Federal Tax Lien were supposedly prepared; March 15, 2021, the date a Notice of Federal Tax Lien was filed with Sonoma County; or March 18, 2021, a date Respondent's transcripts allege a Notice of Federal Tax Lien was filed.

4. Respondent has failed to produce a certified mail list demonstrating that the Letter 3172 was actually mailed on the date alleged.

5. Counting from the March 25, 2021 date on the letter to Petitioner's counsel, Petitioner's counsel timely requested the CDP hearing on April 23, 2021, a mere 24 days following the March 29, 2021 receipt of the letter by Petitioner's counsel, and within 30 days of March 25, 2021.

6. In addition to the inconsistent dates in the Notice of Federal Tax Lien and the mailing of said notice, with respect to this Petitioner, numerous letters or notices which Respondent has claimed to have processed correctly, in fact were not processed correctly.

at 9:31 a.m. The Notice of Federal Tax Lien filed with the California Secretary of State was received at 5:00 p.m. on April 7, 2021.

7. In one instance a letter to Petitioner's counsel dated October 10, 2019, included a Notice of Federal Tax Lien and Your Right to a Hearing Under IRC 6320 dated September 26, 2019. That Notice stated a request for a hearing had to be submitted no later than November 4, 2019. Petitioner's counsel provided a request for hearing with respect to that notice on November 1, 2019.

8. In another instance, a Final Notice of Intent to Levy and Notice of Your Rights to a Hearing (Letter 1058) dated 11/27/2019, was sent to Petitioner for the 2010 and 2011 years. By letter dated December 11, 2019, Petitioner's counsel again requested a due process hearing.

9. Neither Petitioner nor Petitioner's counsel was notified about any Appeals Hearing following the November or December 2019 CDP hearing requests, before Petitioner received a Notice of Levy (Form 668-A(ICS)) dated 02/22/2021. After several communications, the Revenue Officer finally acknowledged, pursuant to a letter to Petitioner's counsel dated and faxed March 16, 2021, that the levy was erroneously sent because neither hearing request had been logged in to Respondent's case history.

10. Even though Respondent's Revenue Officer was aware of the CDP Hearing requests for 2010 and 2011, by no later than March 16, 2021, there was another unexplained delay in forwarding the CDP requests to Respondent's Independent Office of Appeals.

Petitioner's Counsel was notified that Appeals had finally received the CDP hearing requests on July 12, 2021. Within that notification, Respondent's settlement officer set a telephone hearing for August 17, 2021.

11. Following a series of phone conversations (the Appeals Hearing) discussing whether Organicann's taxes were correct, whether penalty procedures were proper and, if any taxes were owed, whether Organicann had the ability to pay the liabilities for the 2010, 2011, and 2018 years, Respondent's settlement officer issued the Notice of Determination dated December 13, 2021. A copy of the Notice referencing the 2010, 2011, and 2018 years was attached to the Petition which was filed on January 11, 2022.

12. Shortly after the filing of the Petition and while Petitioner's counsel and Respondent's counsel informally discussed the timing of the CDP hearing request for the 2018 year, Respondent's counsel questioned whether Petitioner's CDP request dated April 23, 2021, was actually faxed on that date because Respondent's facsimile receipt records were dated several days later. After Petitioner's counsel provided a dated facsimile transmittal sheet, coupled with a USPS certified mail number reflecting Petitioner's mailing of the CDP request on the same date that facsimile was sent, *Respondent's counsel conceded that Respondent's date records were not accurate.*

13. After the conversation referred to in the previous paragraph regarding Petitioner's CDP request dated April 23, 2021, nearly simultaneously with the filing of Respondent's motion in this case, and nearly three months after Respondent's settlement officer last spoke with Petitioner's counsel, Respondent's settlement officer issued an alleged Decision Letter on Equivalent Hearing Under Internal Revenue Code Sections 6320 and/or 6330 (Letter 3210). That Letter 3210 was dated 02/17/2022, but the version mailed to Petitioner arrived in an envelope with electronic postage showing a date of 02/22/2022.

14. In the Letter 3210 dated 02/17/2022, the settlement officer who issued the Notice of Determination identifying the 2018 year alleged that an Equivalent Hearing was held for the 2018 tax year. However, no separate hearing was ever held for the 2018 year. Noteworthy on this point is that the timing of the Equivalent Hearing notice appears to be nothing but a *post factum* attempt to bolster Respondent's new legal theory that there never was a Notice of Determination issued for the 2018 year, notwithstanding the clear reference to the 2018 year in the aforementioned Notice of Determination dated December 13, 2021.

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I. Even if the Independent Office of Appeals issued a Notice of Determination for the 2018 year by mistake, the Tax Court has acquired CDP jurisdiction.

15. Respondent, in essence, bases his entire argument as to why the 2018 year must be dismissed for lack of jurisdiction on his assertion that the CDP hearing request was untimely because the request was not dated until one day after the deadline listed in his letter offering a CDP hearing bearing. Respondent then attempts to buttress his case by asking the Court to look behind the face of the Notice of Determination dated December 13, 2021, and conclude that his reference to the 2018 year in that Notice of Determination was simply a misunderstanding.

16. Under I.R.C. § 6320(a), Respondent is to notify the taxpayer of the filing of a notice of tax lien filing. The notice shall be given in person, left at the dwelling or usual place of business of the person, or sent by certified or registered mail to the last known address. Further, that notice is required to be issued not more than five days after the filing of the lien. Subsection (b) of I.R.C. § 6320 goes on to say that, when the taxpayer requests a hearing, the hearing will be held by the Internal Revenue Service Independent Office of Appeals. Once requested, the hearing referred to in I.R.C. § 6320 is to be

conducted pursuant to subsections (c), (d) (other than paragraph (3)(B) thereof), (e), and (g) of I.R.C. § 6330.

17. Despite issuing a Notice of Determination clearly mentioning 2018, Respondent now asks this Court to ignore that and find new facts that (1) the Notice of Determination was not meant to cover 2018, and (2) Respondent was really intending to wait a few months before issuing a new Equivalent Hearing Decision for 2018 (in February 2022). Respondent has put forth no evidence as to when or how this alledged "Equivalent Hearing" was held. No evidence shows how the hearing covering the 2018 year was separate and distinct from the CDP hearing for the 2010 and 2011 years.

18. This Court has consistently and unambiguously held that erroneously issued Notices (including Notices of Determination following a so-called equivalent hearing) vest this Court with subject matter jurisdiction. See the list of examples in *Vera v. Commissioner*, 157 T.C. 78, 84-85 (2021). The CDP Notice case cited in *Vera*, specifically, *Kim v. Commissioner*, T.C. Memo. 2005-96, 89 T.C.M. (CCH) 1123 (2005), establishes in the CDP context that, when a facially valid notice is issued by Respondent, the Tax Court

will not look behind the notice to determine that notice's validity. *Vera, supra* at 85.²

19. The case of *Wilson v. Commissioner*, 131 T.C. 47 (2008) cited by Respondent in his motion, also does not contradict the holdings in *Vera* or *Kim*. In *Wilson*, the request for an equivalent hearing was nearly three years after the issuance of a levy notice. The ONLY hearing held therefore, was that equivalent hearing from a request three years after the notice. By contrast and in this case, the ONLY hearing held by the Independent Office of Appeals was intended as a Collection Due Process hearing. Although Respondent lost the CDP hearing requests for the 2010 and 2011

² In *Kim*, T.C. Memo. 2005-96, 89 T.C.M. (CCH) 1123 (2005), the Court denied the motion to dismiss for lack of jurisdiction, but deemed the jurisdictional motion to be a summary judgment motion under T.C. Rule 121. The Court went on to rule the taxpayer was not entitled to relief because the CDP hearing request was not made within 30 days. For this case, no Answer has been filed and the pleadings are not closed, making a T.C. Rule 121 summary judgment unavailable. Further, in a motion for summary judgment, the party must prove there is no dispute over material facts, and disputed facts will be interpreted in favor of the party opposing the motion. See *Dahlstrom v. Commissioner*, 85 T.C. 812, 821 (1985). There are numerous material facts in dispute, including that the 03/16/2021 notice does not accurately reflect the date the lien notices were actually filed at the state and local government offices. Thus, Petitioner is not intending this opposition to address issues of summary judgment since Respondent's motion in this case does not comply with T.C. Rule 121.

years and the hearing was not held until more than a year and a half after those requests, that *hearing* covered three tax years, 2010, 2011 and 2018.

20. Similarly, the opinion for the case of *Offiler v. Commissioner*, 114 T.C. 492 (2000), does not support Respondent's argument that it can simply "unring" the bell after mistakenly issuing a Notice of Determination.³ Respondent erroneously asserts that, in *Offiler*, the Court held it cannot acquire jurisdiction unless a request for a hearing is properly made within 30 days of the date on the lien or levy notice. The holding of that case is consistent with the Court's holdings that its jurisdiction is dependent upon a valid Notice of Determination and a timely petition.⁴ The facts in *Offiler* establish that there was no "determination" issued by the Independent Office of Appeals. Rather, the taxpayer in *Offiler* made a request for a hearing under

³ Petitioner does not concede that a 2018 CDP hearing was not properly requested or that the 2018 year was erroneously included in the Notice of Determination. Petitioner is merely addressing the allegations in Respondent's Motion that the Notice of Determination "erroneously" included the 2018 year.

⁴ The Supreme Court has since held in *Boechler, P.C. v. Commissioner*, No. 20-1472, April 21, 2022, that the 30-day time limit to file a Tax Court petition for review of an IRS collection due process determination per I.R.C. § 6330(d)(1) is a nonjurisdictional deadline subject to equitable tolling.

Respondent's Collections Appeal Program. *Id.* at 494. This Petitioner did not request a hearing under the Collections Appeal Program.

21. Regardless of whether Respondent believes the Notice of Determination was issued in error, this Court now has subject matter jurisdiction over the determination made with respect to the 2018 year. Respondent has not yet, and is not yet eligible to move for summary judgment as the pleadings have not yet closed. So, for the foregoing reasons, the Court must deny Respondent's motion to dismiss and to strike the 2018 year.

II. The 30-day time limit to respond to the Notice of Respondent's filing of a Notice of Federal Tax Lien cannot be a jurisdictional bar based on Supreme Court's instructions that timing deadlines are not jurisdictional requirements unless Congress "clearly states" that the time limit is jurisdictional.

22. The Respondent has asserted this Court lacks jurisdiction over the Petitioner's CDP claims relative to the amount of its 2018 income tax liability. Respondent's grounds, that the Petitioner submitted its request for a Collection Due Process hearing one day after his arbitrary⁵ deadline for making

⁵ See paragraph 3, *supra*, discussing the erroneous lien notice filing date used in Respondent's Letter 3172.

the request given in his Letter 3172. Irrespective of the facts that the hearing request was dated within 30 days of the date the Letter 3172 was mailed to Petitioner's Counsel and the CDP hearing request was made only 16 days following the filing of the lien notice with the California Secretary of State, the Supreme Court has clarified that:

Many [procedural requirements] simply instruct "parties [to] take certain procedural steps at certain specified times" without conditioning a court's authority to hear the case on compliance with those steps. *Henderson v. Shinseki*, 562 U. S. 428, 435 (2011).

Boechler v. Commissioner, No. 20-1472, slip. op. p. 2 (April 21, 2022)

23. When a notice of federal tax lien filing is challenged in the CDP context, there are two 30-day periods that are part of that procedure. Pursuant to I.R.C. § 6320(a)(3)(B), the first 30-day (plus 5 business days) period starts after the notice of federal tax lien is filed, and after a notice of the filing (and right to a CDP hearing) is provided to the taxpayer. Pursuant to I.R.C. § 6320(c) (which references I.R.C. § 6330(d)), the second 30-day period, which starts after the CDP hearing is conducted and Appeals sends the notice of determination, involves how long the taxpayer has to request judicial review in the Tax Court. While, in *Boechler*, the Supreme Court dealt with the second of these two 30-day time periods in the CDP process, the statutory language of the first of the two 30-day time periods (set forth in I.R.C.

§6320(a)(3)(B)) is less likely to establish a jurisdictional requirement. Yet Respondent, without addressing the differences in language between I.R.C. §6230(a)(3)(B) and I.R.C. §6330(d)(1), continues to assert that the 30-day period to request an Appeals hearing which is set forth in I.R.C. § 6320(a)(3)(B), must be treated as a jurisdictional bar, notwithstanding the Supreme Court's ruling in *Boechler*.⁷

24. To start, I.R.C. § 6320 (a)(3)(B) lays out one of the several items of required information that must be included in the notice to the taxpayer when a notice of federal tax lien has been filed:

[T]he right of the person to request a hearing *during the 30-day period beginning on the day after the 5-day period* described in paragraph (2) (emphasis added).⁸

⁷ It should be noted Respondent filed his Motion to Dismiss for Lack of Jurisdiction before the Supreme Court's *Boechler* opinion was issued. However, Respondent's counsel is no doubt familiar with the April 2022 unanimous ruling by the Supreme Court. Respondent has had ample opportunity to withdraw his motion, but he has chosen not to. Thus, it is reasonable to assume that Respondent believes that the Supreme Court's reasoning does not apply to the first of the two 30-day periods relating to the CDP lien notice procedure, AND that its reasoning only applies to the second 30-day deadline.

⁸ If one chooses to use the April 7, 2021 date the federal tax lien notice was filed with the California Secretary of State as starting the time period to request a hearing, there is no argument the April 23, 2019 request was timely. Petitioner's counsel transmitted the CDP hearing request well within the

The above provision, covers what the *notice* must contain. The statutory provisions which *establish the hearing* in the first place are part of a different subsection, specifically I.R.C. § 6320(b).

25. There is nothing in Supreme Court jurisprudence that suggests the first of the two CDP 30-day processing limits (to request a CDP hearing following the notice of the filing of a

period of 30 days *after* the *actual* filing of the Notice of Federal Lien. See I.R.C. § 6320(a)(3)(B) in combination of the flush language of I.R.C. § 6320(a)(2). If Respondent interprets the language of I.R.C. § 6320 as simply the final day he has to issue the notice to the taxpayer it could lead to some rather absurd results. The statute requires that the language of the notice shall include the "right" to request the CDP hearing. The "30-day period" to request that hearing does not *begin* until *after* the conclusion of the 5-day (5 business days) grace period Respondent has to provide the notice *after* the public filing of the lien notice. Thus, as the Secretary of State filing occurred on April 7, 2021, the 5 business day grace period concluded April 14, 2021, and 30 days after April 14, 2021, would have been May 14, 2021. If Respondent wants to use the March 15, 2021 date the notice was filed with the Sonoma County (rather than the *incorrect* March 16, 2021 date specified in the Letter 3172), there is another problem--the deadline for Respondent to receive the CDP request should have been April 21, 2021, not the April 22, 2021 date Respondent specified near the bottom of his Letter 3172. This would mean a hearing request hypothetically made April 22, 2021, would have been too late as well. One could then reason that Respondent's specification of the incorrect date in his Letter 3172 invalidates the whole notice to the taxpayer, meaning the Notice of Federal Tax Lien must be withdrawn and the process started all over again.

notice of federal tax lien pursuant to I.R.C. § 6320(a)(3)(B)) would fare any better than the second 30-day period (relative to petitioning the Tax Court following a Notice of Determination pursuant to I.R.C. § 6330(d)(1)). The language of the first of these two 30-day periods in the CDP lien context (in I.R.C. § 6320(a)(3)(B)) has even less to do with the word "jurisdiction" than I.R.C. § 6330(d)(1) does.

26. Supreme Court jurisprudence has endeavored to "bring some discipline" to the use of the term "jurisdictional." *Boechler* slip op. p. 3, citing *Henderson v. Shinseki*, 562 U. S. 428, 435 (2011). The consequences that attach to the "jurisdictional" label may be drastic. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Hence, even if, Respondent is correct that this Petitioner's request for an Appeals Review filed April 23, 2021, was one day late, courts must carefully weigh whether a statutory filing deadline or other procedural proscription is jurisdictional.⁹

⁹ See e.g., *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843 (2019); *Hamer v. Neighborhood Hous. Servs*, 583 U.S. ___, 138 S. Ct. 13 (2017); *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. United States*, 546 U.S. 12 (2005); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan*, *supra*, 540 U.S. 443, 452 (2004); *Becker v. Montgomery*, 532 U.S.

27. As the Supreme Court in *Boechler* slip op. p. 3, instructs:

[W]e treat a procedural requirement as jurisdictional only if Congress "clearly states" that it is. *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 515 (2006). Congress need not "incant magic words," *Auburn*, 568 U. S., at 153, but the "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences," *United States v. Kwai Fun Wong*, 575 U. S. 402, 410 (2015).

Absent such a clear statement, the time restriction must be treated as nonjurisdictional. *Auburn*, 568 U.S. at 153.

28. In *Boechler*, the Court noted that the *only* jurisdictional language in I.R.C. § 6330 (d)(1) occurs in a parenthetical at the end of the sentence.¹⁰ *Boechler* slip op. p. 3. Evaluating any time limit described in I.R.C. § 6320(a), nowhere is the word "jurisdiction" ever referenced. In fact, the only reference in the entire statute to a "30-day" period is in the part of the statute referring to what information must be included in the "notice" sent to the taxpayer. Thus there is nothing in the words used in the statute that approximates the "clear statement"

757 (2001); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990).

¹⁰ I.R.C. Section 6330(d)(1) reads in its entirety:

The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

needed to transform the 30-day period to request a CDP hearing as a jurisdictional bar to the Tax Court.

III. Under the doctrine of equitable tolling the Tax Court can treat the April 23, 2021, request for hearing as within thirty (plus five) days of the date on the Letter 3172 dated March 16, 2021.

29. As discussed *supra*, with respect to the Respondent's treatment of this Petitioner, including the lien filing date errors, the lost requests for CDP hearings, the Notice of Determination which refers to the 2018 year, etc., it presents a situation that can, at best, be considered an unmitigated debacle. First, there were the 2010 and 2011 Lien and Levy notices which no one disputes Petitioner filed timely requests for CDP hearings in November and December 2019. Those requests were never transferred to Respondent's Independent Office of Appeals. Instead, Respondent's Revenue Officer began levies for those years in February, 2021. After initially questioning the authenticity of Petitioner's counsel's records corroborating the dates of those filings, the Revenue Officer finally acknowledged the CDP requests

were received, but lost and not recorded in the case history (e.g. not recorded in Respondent's records).¹¹

30. Next, the Court can take judicial notice of the incorrect dates on the supposed mailing of the Letter 3172, which includes copies of two Notices of Federal Tax Lien, one for the California Secretary of State and one for Sonoma County. Respondent's notice to Petitioner claims those notices of federal tax lien were "filed" 03/16/2021. These records are public and show those notices were dated and presumably signed "03/05/2021." Yet, neither notice of federal tax lien was actually "filed" on 03/16/2021, as Respondent asserts in his Letter 3172. Sonoma County recorded the Notice of Federal Tax Lien on 03/15/2021, and the California Secretary of State notice filed the Notice of Federal Tax Lien on April 7, 2021. The period in which to notify the taxpayer, and the deadline

¹¹ Although no evidence has been offered to establish why Respondent was so careless with those hearing requests (especially since he, at least at that time--before the *Boechler* ruling, thought of them as jurisdictional prerequisites to obtaining Tax Court review), the Court can take judicial notice of the confusion and disruptions, worldwide, beginning in February and March of 2020, due to the Covid-19 pandemic. Petitioner's counsel believes that the beginning of "social distancing" and remote operations due to the uncertainties caused by the Covid-19 pandemic contributed to employees leaving behind at their offices, and perhaps forgetting, to follow up various time sensitive tasks.

Respondent told the Petitioner it supposedly had to request a CDP hearing was tied to the erroneous date of 03/16/2021, not March 15, 2021 and not April 7, 2021.¹²

31. Next, no explanation is provided as to why the letter transmitting the "03/16/2021" Letter 3172 to Petitioner's counsel was delayed until "03/25/2021." The April 23, 2021 hearing request was faxed and mailed within 30 days of March 25, 2021, but, as Respondent's counsel has admitted, Respondent's facsimile records show that the faxed request was not "received" until several days after April 23. Presumably, Respondent's facsimile receipts are tied to a centralized electronic calendar, which one would hope would bear the correct date if Respondent uses those dates to determine if procedural deadlines are met. Obviously, Respondent's date records are not reliable, and trying to determine whether the "magical" 30 days to request one type of hearing, versus the so-called "equivalent" hearing, is rather arbitrary.

32. Next, there is the undisputed fact that, after a "hearing", Respondent's settlement officer submitted a "Notice of

¹² Again, it is Petitioner's counsel's belief that remote operations of Respondent's employees due to the Covid-19 pandemic, continued through at least 2022, and is, perhaps, the reason why Respondent's records continued to be imprecise.

Determination" concerning the 2018 year.¹³ Despite Respondent's attempt to "fix" his problem by having the settlement officer submit a new equivalent hearing "Decision Letter" for 2018 around the same time Respondent moved to dismiss the 2018 year from this case, there was never any Appeals "hearing" to separately discuss 2018, as opposed to the 2010 and 2011 years.

33. Finally, as further proof that Respondent's representations cannot be trusted with respect to when "deadlines" begin in this post Covid-19 environment, one need not look any further than the Petition which started the CDP case given Docket No. 5442-22L. There, the "Decision Letter" was dated 02/17/2022, but clearly placed in an envelope not given postage (hence, not capable of being mailed) until 02/22/2022. Since the Petition was filed before March 19, 2022, presumably Respondent will not challenge that Petition as untimely.

34. Noting that the April 23, 2021 CDP hearing request was made within 30 days of the delayed notice given to Petitioner's counsel, and that Petitioner's counsel have also had to deal with "social distancing" and isolation from the office because of the

¹³ Admittedly an "EH" follows the year, but with no further explanation of what "EH" could stand for, it could just have easily been referring to an "Equivalent Hearing" as it could have been referring to the initials of someone processing the case, possibly someone named "Ernest Hemmingway"?

Covid-19 virus, it is indubitably equitable to treat an April 23, 2021 (one day "late") request for a CDP hearing concerning the 2018 year as timely.

IV. The request for a CDP hearing was filed within 29 days of the mailing of the notice to the Petitioner's Counsel, plus Respondent has not yet provided a certified mail list corroborating that he mailed the Notice of Right to Hearing for 2018 on the date alleged.

35. The issue of the Tax Court's jurisdiction of the petitions filed by this Petitioner and collection determinations against this Petitioner for its 2010 through 2014 and 2018 tax years has been the subject of extended disputes going back over six years. Throughout that period, one law firm - and principally the undersigned attorney as an employee of the firm - has dealt with the IRS on behalf of this Petitioner. Those responses have been prompt and in good faith, and Petitioner's Counsel's mailing address has never changed. In contrast, Respondent's employees (who have failed to follow numerous required steps) have changed repeatedly.

36. For reasons unknown, Respondent has failed to provide with his motion to dismiss for lack of jurisdiction a certified mail list which might show when the March 16, 2021 notice was mailed to Petitioner. Similarly, no explanation has yet been given as to why, when dealing with the 2018 year, Respondent was

justified in his delay in providing counsel a copy of the 2018 notice by nine days (March 16 as opposed to March 25, 2021).¹⁴

37. In *Gaw v. Commissioner*, 45 F.3d 461, 465 (D.C.Cir.1995), the court summarized the history of the last known address rule, including the near impossibility of requiring Respondent to personally deliver notices. Instead, the term of "last known address" is used to allow mailing of a notice, regardless of whether or not the Post Office follows through with actual delivery. *Id.*

38. A last known address is, "[T]he, taxpayer's last permanent address known by the Commissioner or the last known temporary address of a definite duration to which the taxpayer has directed the Commissioner to send all communications." *Id.* (citations omitted). Generally speaking, Respondent can rely on the address used on the last filed tax return as that taxpayer's last known address. *Id.* But, this does not excuse Respondent's equitable obligation to attempt to ascertain the correct address, when Respondent knows of a different address for the taxpayer. *Id.*

¹⁴ Again, this assumes Respondent actually mailed the notice dated 03/16/2021, on 03/16/2021, because, as is common practice when Respondent moves to dismiss a case for failing to adhere to deadlines, in this case the Respondent has yet to provide to Petitioner's counsel a certified mailing list.

39. In *Gaw*, that court held that Respondent's failure to contact the taxpayer's representative for a better address constituted a failure to use a last known address. *Id.* at 467. For this case, Petitioner does not suggest that the address on the letter dated 03/16/2021 was not the address on the Petitioner's last filed tax return, but Respondent's Revenue Officer definitely knew Petitioner's counsel's address on March 16, 2021, nine days earlier than when the March 25, 2021 was sent. Respondent's Revenue Officer was most likely embarrassed about losing the earlier CDP requests and prematurely attempting a levy, and knew it would be Petitioner's counsel, not Petitioner (at a P.O. Box), who would need to make a request for a CDP hearing. Further, and if nothing else, the Revenue Officer had already faxed a letter to Petitioner's counsel about withdrawing levies *on the same day* Notices of Federal Tax Lien were alleged to have been filed for the 2018 year. Beginning in February 2021, Respondent's Revenue Officer sent to Petitioner's counsel all of the communications concerning the premature levies and Respondent's loss of the 2019 CDP hearing requests. Thus, as of March 16, 2021, the Revenue Officer was well aware of how to reach Petitioner's counsel.

40. By applying equitable principles, if not for other reasons stated herein, Petitioner's request for a CDP hearing for the 2018 year should be treated as a timely CDP hearing request as

soon as it was provided to Respondent's Revenue Officer on April 23, 2021. The hearing request was made less than 30 days after Petitioner's counsel became aware of the filing of a Notice of Federal Tax Lien for 2018. Respondent should not be rewarded for playing a "cat and mouse game" by delaying notifications or using misleading dates in the hopes of depriving this Petitioner with access to the Tax Court to review, *de novo*, the correct amount of its 2018 income tax liability.

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WHEREFORE, it is prayed that the Court deny Respondent's Motion to Dismiss for Lack of Jurisdiction as to the Taxable Year 2018 and to Strike [In Docket No. 381-22L].

July 27, 2022



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