

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

PA

ORGANIC CANNABIS FOUNDATION, LLC. )  
D.B.A. ORGANICANN HEALTH CENTER, )  
 )  
Petitioner(s), )  
 )  
v. ) Docket No. 10593-15.  
 )  
COMMISSIONER OF INTERNAL REVENUE, )  
 )  
Respondent )  
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**ORDER OF DISMISSAL FOR LACK OF JURISDICTION**

This matter is before the Court on the parties' cross-motions to dismiss for lack of jurisdiction. On July 29, 2016, respondent filed a Motion to Dismiss for Lack of Jurisdiction asserting that petitioner did not file its petition within the time prescribed by section 6213(a) or section 7502.<sup>1</sup> On August 22, 2016, petitioner filed an objection to respondent's motion to dismiss, and on October 19, 2016, respondent filed a reply.

On August 22, 2016, petitioner filed its Motion to Dismiss for Lack of Jurisdiction asserting that the notice of deficiency upon which this case is based is invalid as it was not sent to petitioner's last known address. On September 14, 2016, respondent filed an objection to petitioner's motion to dismiss, and on October 19, 2016, petitioner filed a reply.

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<sup>1</sup> Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended and in effect for the years in issue. Rule references are to the Tax Court Rules of Practice and Procedure. All monetary amounts are rounded to the nearest dollar.

Petitioner was a Limited Liability Corp. (LLC) organized in the State of California at the time the petition was filed.

### Background

On January 22, 2015, respondent mailed a notice of deficiency to petitioner for the 2010 and 2011 tax years, asserting a deficiency of \$537,749 and a section 6662(a) penalty of \$107,550 for the tax year ending December 31, 2010; and a deficiency of \$591,527 and a section 6662(a) penalty of \$118,305 for the tax year ending December 31, 2011. The notice properly listed the petitioner's last known address as follows:

Organic Cannabis Foundation LLC  
Organicann Health Center  
C/O Dona Ruth Frank  
PO Box 5286  
Santa Rosa CA 95402-5286

However, on Form 3877, Certified Mailing List, petitioner's address appears handwritten as follows:

Organic Cannabis Foundation LLC  
Organicann Health Center  
c/o Dona Ruth Frank  
Santa Rosa CA 95402-5286

While the address listed on Form 3877 is missing petitioner's P.O. Box number, the U.S. Postal Service's track and confirm results show that the notice was delivered to petitioner on February 3, 2015.

Respondent's notice identified April 22, 2015--90 days after the notice was mailed--as the last day to file a petition with the Court. On April 21, 2015, petitioner delivered its petition to FedEx for delivery, designating FedEx's "First Overnight" delivery service with an expected delivery date of April 22, 2015. The Court was open during its regular business hours on April 22, 2015, but FedEx was unable to deliver the petition on April 22, 2015. When petitioner's counsel did not receive confirmation of delivery, its law firm's employee contacted FedEx. The employee recalls being told that the FedEx delivery driver responsible for

delivering the envelope initially attempted to deliver the petition to the Court, but the driver could not access the Tax Court Clerk's Office because "he or she could not get to the door for some plausible reason like construction, or some sort of police action (perhaps the [FedEx] representative said the access was blocked off because of a safety threat)." However, FedEx, in accordance with its normal operating procedures, no longer has tracking data for the petition.

As our Rules are silent as to the proper standard for deciding a motion to dismiss for lack of jurisdiction, we look to the Federal Rules of Civil Procedure. See Rule 1(b); Whistleblower 11332-13W v. Commissioner, 142 T.C. 396, 399 (2014) (citing Estate of Miller v. Commissioner, T.C. Memo. 1994-25). A court deciding a motion to dismiss for lack of jurisdiction "must construe the undisputed allegations of the complaint in a manner favorable to the plaintiff". Whistleblower 11332-13W v. Commissioner, 142 T.C. at 400 (citing Dacosta v. United States, 82 Fed. Cl. 549, 552 (2008)). When considering contested facts, "allegations in the petition are taken as true for the purposes of deciding a motion to dismiss for lack of jurisdiction". Whistleblower 11332-13W, at 400. We, therefore, take the facts as pleaded in the petition as true for purposes of deciding this motion.

### Discussion

The Tax Court is a court of limited jurisdiction and may exercise jurisdiction only to the extent expressly provided by statute. Breman v. Commissioner, 66 T.C. 61, 66 (1976); sec. 7442. This Court's jurisdiction to redetermine a deficiency depends on: (1) the issuance of a valid notice of deficiency; and (2) the timely filing of a petition. Rule 13(a), (c); Normac, Inc. v. Commissioner, 90 T.C. 142, 147 (1988).

#### I. Validity of Notice of Deficiency

Petitioner argues that the notice of deficiency at issue here is not valid because it was not mailed to petitioner's last known address, citing the incomplete address on Form 3877. Under section 6212(b), a notice of deficiency must be mailed to the taxpayer's last known address. We have held, however, that an improperly addressed notice actually received by the taxpayer with sufficient time remaining to file a petition for redetermination, without prejudice, is valid under section 6212(a). See, e.g., Kuykendall v. Commissioner, 129 T.C. 77, 81 (2007) (holding that 30 days was a sufficient amount of time based on a review of our prior case law). By contrast, a misaddressed notice returned to the Commissioner as undeliverable is deemed null and void. Mulvania v. Commissioner, 769 F.2d

1376, 1378-1379 (9th Cir. 1985); see also Roszkos v. Commissioner, 850 F.2d 514, 517 (9th Cir. 1988), vacate'g, 87 T.C. 1255 (1986). In Bulakites v. Commissioner, T.C. Memo. 1998-256, 1998 WL 386405, at \*2, for example, the taxpayers received the notice with at least 45 days to file a timely petition but mailed their petition to the Court 122 days after the notice of deficiency was mailed. We concluded that the taxpayers had sufficient time to file their petition and suffered no prejudice, and therefore held that the notice of deficiency was valid and their petition was untimely. Id. at \*4.

In this case, the address shown on the notice of deficiency (showing petitioner's last known address) did not match the address shown on the Form 3877 (omitting petitioner's P.O. Box number) but the record does not include the envelope used to mail the notice. We need not resolve which address appeared on the envelope, however, because there is no dispute that the notice was received by petitioner on February 3, 2015--78 days before the petition was due on April 22, 2015. This allowed sufficient time for petitioner to file its petition without prejudice.

We conclude, therefore, that respondent's notice of deficiency is valid. We now must determine whether the petition was timely, even though it was received by the Court one day late.

## II. Timeliness of Petition

Taxpayers seeking to challenge a valid notice of deficiency must file a timely petition for redetermination with the Court. Section 6213(a) provides that the taxpayer's petition must be filed with the Court "[w]ithin 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day)." A petition that is timely mailed is treated as timely filed, if it is sent via United States mail, or a designated private delivery service. Sec. 7502(a), (f).

Notice 2004-83, 2004-2 C.B. 1030--which was in effect at the time petitioner's petition was filed--listed the following FedEx services as designated private delivery services: "FedEx Priority Overnight, FedEx Standard Overnight, FedEx 2 Day, FedEx International Priority, and FedEx International First". The FedEx First Overnight service used by petitioner was not included on this list. It was, however, listed as a designated private delivery service in Notice 2015-38, 2015-21 I.R.B. 984, but that notice did not take effect until May 6, 2015.

Therefore we must conclude that petitioner may not rely on the timely-mailing rule in section 7502(a), even though petitioner delivered the petition to FedEx on April 21, 2015, one day before the last day of filing.

Because FedEx failed to deliver the package to the Court on the last day for filing the petition, April 22, 2015--a day that was not a Saturday, Sunday, or a legal holiday--we must conclude that the petition was not timely filed. We do not have equitable powers to extend this deadline. See e.g., Austin v. Commissioner, T.C. Memo. 2007-11, 2007 WL 105522, at \*4.

Petitioner urges the Court apply Guralnik v. Commissioner, 146 T.C. 230 (2016), to conclude that the petition was timely filed because the Clerk's office was not accessible to the FedEx delivery driver on the last day for filing. In Guralnik, the taxpayer's statutorily prescribed filing deadline ended on a day the Court was officially closed due to a snow emergency. Id. at 233-234. We concluded that the "timely mailed, timely filed" rule did not apply because the taxpayer used the FedEx First Overnight service (as petitioner used here), which service was not then listed among the designated private delivery services under section 7206(f). Id. at 240-241. We also declined to give Notice 2015-38 retroactive effect. Id. at 241. However, we applied Rule 6(a)(3), Federal Rules of Civil Procedure, to hold that when the Clerk's office is inaccessible because of inclement weather, government closings or for other reasons, the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday. Unlike the snow emergency closing in Guralnik, here, the Court's Clerk's office was open during its normal business hours and was not inaccessible the entire day due to inclement weather, government closings, or other reasons. We, therefore, find Guralnik distinguishable and we decline to expand our holding in Guralnik to cover circumstances where an unspecified event may have blocked access for a period of time but the Clerk's office is not inaccessible due to closure for the entire day.

Because the petition was not filed within the requisite time period prescribed by section 6213(a), this case must be dismissed for lack of jurisdiction.

Upon due consideration, it is

ORDERED that petitioner's Motion to Dismiss for Lack of Jurisdiction, filed on August 22, 2016, is denied. It is further

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction, filed on July 29, 2016, is granted, and this case is dismissed for lack of jurisdiction on the ground that petitioner's petition was not filed within the time prescribed by section 6213(a) or section 7502.

**(Signed) Cary Douglas Pugh  
Judge**

ENTERED: **JUL 25 2017**