

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
VINOD KALLIANPUR : DECISION :
 : DTA NO. 828271 :
for Redetermination of a Deficiency or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law and New York City Personal Income Tax :
pursuant to the Administrative Code of the City of New :
York for the Years 2013 and 2014. :
:

Petitioner, Vinod Kallianpur, filed an exception to the determination of the Administrative Law Judge. Petitioner appeared by Whiteman Osterman & Hanna LLP (Scott D. Shimick, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard on November 29, 2018, in Albany, New York, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of deficiency for tax years 2013 and 2014.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 1, 4, 5, 6 and 15, which have been modified to more accurately reflect the record. We have also made additional findings of fact, numbered 16 and 17 herein. The Administrative Law Judge’s findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

1. The Division of Taxation (Division) issued the following notices of deficiency (notices):

Notice #	Tax Year	Notice Date
L-045170762	2014	August 17, 2016
L-045173785	2013	August 22, 2016

2. Petitioner filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices. The request was postmarked April 24, 2017 and received by BCMS on April 26, 2017.

3. On May 12, 2017, BCMS issued a conciliation order dismissing request to petitioner. The order determined that petitioner’s protest of the subject notices was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on August 17, 2016 and August 22, 2016, but the request was not received until April 26, 2017, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order dismissing request on July 17, 2017. The Division filed a motion to dismiss the petition or, alternatively, for summary determination on November 16, 2017, arguing that the notices were

properly mailed to petitioner's last known address. Petitioner filed a cross motion for summary determination.

5. To show proof of proper mailing of notice number L-045170762, dated August 17, 2016, the Division provided the following with its motion papers: (i) an affidavit, dated October 18, 2017, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for DTF-962-E - Not of Deficiency DTF - 962-F-E - Not of Def Follow Up" (CMR) postmarked August 17, 2016; (iii) an affidavit, dated October 24, 2017, of Fred Ramundo, a Stores and Mail Operations Supervisor in the Division's mail room; (iv) a copy of the August 17, 2016 notice with the associated mailing cover sheet; (v) a copy of petitioner's request for conciliation conference, postmarked April 24, 2017; (vi) petitioner's New York nonresident and part-year resident income tax returns for the years 2012, 2014 and 2015, dated October 15, 2013, October 15, 2015, and October 17, 2016, respectively, each of which lists the same address in Schenectady, New York for petitioner as that listed on the subject notices; and (vii) form IT-370 applications for automatic six-month extension of time to file for the years 2013, 2014, 2015 and 2016 for Vinod and Renu Kallianpur, which list the same address in Schenectady, New York for petitioner as that listed on the subject notices. The 2014 income tax return was the last return filed with the Division by petitioner before the notices were issued.

6. To show proof of proper mailing of notice number L-045173785, dated August 22, 2016, the Division provided the following with its motion papers: (i) an affidavit, dated October 18, 2017, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified

Record for DTF-962-E - Not of Deficiency DTF - 962-F-E - Not of Def Follow Up” (CMR) postmarked August 22, 2016; (iii) an affidavit, dated October 24, 2017, of Fred Ramundo, a Stores and Mail Operations Supervisor in the Division’s mail room; (iv) a copy of the August 22, 2016 notice with the associated mailing cover sheet; (v) a copy of petitioner’s request for conciliation conference, postmarked on April 24, 2017; (vi) petitioner’s New York nonresident and part-year resident income tax returns for the years 2012, 2014 and 2015, dated October 15, 2013, October 15, 2015, and October 17, 2016, respectively, each of which lists the same address in Schenectady, New York for petitioner as that listed on the subject notices; and (vii) form IT-370 applications for automatic six-month extension of time to file for the years 2013, 2014, 2015 and 2016 for Vinod and Renu Kallianpur, which list the same address in Schenectady, New York for petitioner as that listed on the subject notices. The 2014 income tax return was the last return filed with the Division by petitioner before the notices were issued.

7. The affidavits of Deena Picard, who has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and has been Acting Director of MAPS since May 2017, set forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division’s Case and Resource Tracking System (CARTS) and the Division’s past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division’s general practice, this date was manually changed on the first and last page of the CMRs, in the present case, to the actual mailing dates of “8/17/16” and “8/22/16.” In

addition, as described by Ms. Picard, generally, all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to the Division. According to Ms. Picard, the pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

8. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

9. The August 17, 2016 CMR consists of 9 pages and lists 117 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 to 15 such entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated August 17, 2016 to each page of the CMR, initialed each page, and wrote and circled the number "117" on page 9 next to the heading "Total Pieces Received at Post Office."

10. Page 8 of the August 17, 2016 CMR indicates that the notice number L-045170762, with certified control number 7104 1002 9735 2951 7245, was mailed to petitioner at the Schenectady, New York, address listed on the subject notice. The corresponding mailing cover

sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

11. The August 22, 2016 CMR consists of 29 pages and lists 421 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 to 15 such entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated August 22, 2016 to each page of the CMR, initialed each page, and wrote the number “421” on page 29 next to the heading “Total Pieces and Amounts.”

12. Page 28 of the August 22, 2016 CMR indicates that the notice number L-045173785, with certified control number 7104 1002 9735 2978 9369, was mailed to petitioner at the Schenectady, New York, address listed on the subject notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

13. Each of the affidavits of Fred Ramundo, a supervisor in the mail room since 2013 and currently a Stores and Mail Operations Supervisor, describes the mail room’s general operations and procedures. Mr. Ramundo attests that he is familiar with the Division’s present and past office procedures as related to statutory notices, and that these procedures have remained essentially unchanged since approximately 1992. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff

members then weigh, seal and place postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of page 9 of the August 17, 2016 CMR indicates that the USPS employee complied with this request by writing and circling the number of pieces received, 117, and initialing the same. The August 22, 2016 CMR reveals that the USPS employee complied with this request by writing the number of pieces received, 421, and initialing the same.

14. According to the Picard and Ramundo affidavits, copies of the subject notices were mailed on the dates indicated as claimed.

15. Petitioner filed a request for conciliation conference, dated July 14, 2016, in protest of a notice of disallowance for tax year 2012. Petitioner listed an address in Seoul, South Korea on the request for conciliation conference. BCMS responded to the request by letter dated July 25, 2016, sent to petitioner at the Seoul, South Korea, address, stating that a conciliation conference for the tax year 2012 would be scheduled. It appears that petitioner's July 14, 2016 request for conciliation conference also protested statements of proposed audit changes for tax years 2014 and 2013 dated July 1, 2016 and July 5, 2016, respectively. BCMS responded by letter dated July 22, 2016, also sent to the South Korea address, advising petitioner that such protest was

premature since notices of deficiency had not been issued for those years.

16. On January 4, 2016, the Division sent a letter to petitioner indicating that his 2012 income tax return had been selected for review and possible audit. That letter and a subsequent request for residency documentation sent on January 5, 2016 were sent to petitioner at the Schenectady address. Thereafter, on March 9, 2016, the Division mailed a statement of proposed audit changes and on May 25, 2016, it mailed a notice of deficiency for the 2012 tax year to the Schenectady address. On July 1, 2016 and July 5, 2016, the Division mailed statements of proposed audit changes for tax years 2014 and 2013, respectively, to petitioner's Schenectady address.

17. On December 28, 2016, petitioner's attorney sent a letter to the Division regarding the assessments for 2013 and 2014. On March 28, 2017, the Division responded with two letters, which indicated that notices of deficiency for 2013 and 2014 had been issued in August 2016. Petitioner's counsel received copies of the subject notices of deficiency from the Division on April 20, 2017 and filed a request for conciliation conference on petitioner's behalf on April 24, 2017, listing petitioner's South Korea address. On May 12, 2017, BCMS issued a conciliation order sent to petitioner's South Korea address dismissing the request as untimely.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first determined that a motion for summary determination is the proper vehicle to consider the timeliness of petitioner's request and then she reviewed the standards for the granting of such a motion. She noted that the proponent of a summary determination motion must make a prima facie showing of entitlement to judgment as a matter of law and that the opponent of such a motion must produce evidentiary proof in admissible form

sufficient to show material questions of fact requiring a trial.

Next, the Administrative Law Judge reviewed the statutory provisions that provide for administrative review if a taxpayer files a timely protest of a notice of deficiency and she reviewed the law relevant to the timeliness of protests of statutory notices. The Administrative Law Judge observed that where the timeliness of a request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address. The Administrative Law Judge concluded that the Division offered proof sufficient to establish the mailing of the statutory notices for the years 2013 and 2014 to petitioner's Schenectady, New York address on August 22, 2016 and August 17, 2016, respectively. She observed that the affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMRs and thereby establish that the general mailing procedure was followed in this case.

As to the question of petitioner's last known address, the Administrative Law Judge found that the address on the mailing cover sheet and CMRs conform with the address listed on petitioner's 2014 resident income tax return, which satisfies the "last known address" requirement of the law. Thus, she concluded that the Division properly mailed the notices for tax years 2013 and 2014. The Administrative Law Judge determined that petitioner's request for conciliation conference for both notices was filed on April 24, 2017, which date fell beyond the 90-day period of limitations for the filing of such a request. Consequently, she found that the request was untimely and, accordingly, dismissed by the May 12, 2017 conciliation order issued by BCMS.

The Administrative Law Judge next addressed petitioner's contention that his last known

address was not the address listed on his most recent tax return but, rather, the address in Seoul, South Korea, that was listed on the request for conciliation conference. The Administrative Law Judge reviewed the definition of last known address set forth in Tax Law § 691. She also referred to federal case law and statutes regarding issuance of analogous statutory notices to clarify the meaning of the term “last known address” and what constitutes an appropriate notification of a change of address. She found that, generally, the last known address is the address listed on the taxpayer’s most recent tax return filed with the Internal Revenue Service (IRS), unless there is “clear and concise notification” by the taxpayer of a change of address. The Administrative Law Judge determined that petitioner’s most recent return filed before the issuance of the subject notices reported petitioner’s address in Schenectady, New York. She found that the request for conciliation conference in protest of the notice of deficiency for tax year 2012 reported petitioner’s address as Seoul, South Korea, but did not clearly indicate that the former address was no longer to be used. Further, it did not indicate that the South Korea address was petitioner’s new permanent address and, thus, did not give the Division clear and concise notice of a change of address from the Schenectady address listed on petitioner’s last filed return. She determined that such correspondence, therefore, was insufficient to provide clear and concise notification of an address change, especially where petitioner used the Schenectady address on his returns both before and subsequent to his request.

The Administrative Law Judge granted the Division’s motion for summary determination and denied petitioner’s cross motion for summary determination.

ARGUMENTS ON EXCEPTION

Petitioner contends that he began residing in Seoul, South Korea on a permanent basis on

October 1, 2012 and that his South Korea address is his last known address. Petitioner argues that the Administrative Law Judge erred in granting the Division's motion and not granting his cross motion because the facts show that the Division failed to correctly mail the subject notices to his last known address. Petitioner contends that his request for a conciliation conference constituted notice of a change of address and that the Division demonstrated actual knowledge of that change of address by virtue of the fact that BCMS sent correspondence to the South Korea address before the subject notices were issued. Petitioner also contends that the Administrative Law Judge erred in not finding an issue of material fact in that the Division's lead person on the audit stated that the subject notices of deficiency were not properly mailed to petitioner's last known address.

The Division responds that the deficiency notices for 2013 and 2014 were properly mailed to petitioner's last known address and that petitioner filed his request for conciliation conference after the expiration of the 90-day limitation period. The Division thus contends that summary determination was properly granted in its favor. The Division argues that petitioner's last known address was the address listed on his 2014 income tax return, which was the last return filed prior to the issuance of the subject notices. It avers that the request for conciliation conference did not provide clear and concise notification to the Division of a change of address and that neither the request nor the correspondence from BCMS established the South Korea address as petitioner's last known address.

OPINION

We begin our decision in this matter by noting our agreement with the Administrative Law Judge that the Division's alternative motion for summary determination, rather than dismissal, is

the proper vehicle for accelerated determination under our rules (20 NYCRR 3000.9 [b]). Such a motion may be granted “if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]). A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212 (20 NYCRR 3000.9 [c]). “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where a material issue of fact is arguable (*see Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], *citing Zuckerman*).

The central issue to be decided here is whether the Division properly mailed notices of deficiency for the tax years 2013 and 2014. The statutory requirements of such notices are set forth in Tax Law § 681. Tax Law § 681 (a) authorizes the Division to mail a notice of deficiency

by certified or registered mail to the taxpayer at his last known address, if it determines that there is a deficiency of income tax. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

The Administrative Law Judge correctly stated that where timeliness of the filing of a protest is at issue, the initial inquiry is determining whether the Division has met its burden of showing the date and fact of mailing of the statutory notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furn.*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of its standard mailing procedure and proof that such procedure was followed in that particular instance in order to meet its burden of proving proper mailing (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal,

October 20, 2011). As we held in *Katz*, proper mailing of the statutory notice includes the fact of mailing to the taxpayer's last known address (*id.*; *see also Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Actual receipt of the notice is unnecessary; if it is mailed to the taxpayer's last known address, it is adequate for the purposes of the statute (*see Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019). Here, we agree with the Administrative Law Judge that the CMRs and affidavits presented by the Division were sufficient to establish its standard mailing procedure and that the notices were mailed to the Schenectady, New York address on August 17 2016 and August 22, 2016, as claimed.

However, in order to prevail the Division bears the burden of showing that the statutory notices were sent to the taxpayer's last known address as part of its proof that it followed its own standard mailing procedure in this case. Tax Law § 691 (b) provides that "a taxpayer's last known address shall be the address given in the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the [Division] of a change of address." The Tax Law does not specifically set forth what constitutes appropriate notice of a change of address. Terms under article 22 are given the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required (Tax Law § 607 [a]). Therefore, where the effect of a statutory notice conferring protest rights is at issue, it is appropriate to refer to federal case law and statutes regarding issuance of analogous statutory notices to clarify the meaning of the term "last known address" and to determine what constitutes appropriate notice of a change of address.

The "last known address" has been defined for federal purposes as the taxpayer's last permanent address or legal residence known by the IRS or the last known temporary address of a

definite duration to which the taxpayer has directed the IRS to send all communications (*see Sicari v Commr.*, 136 F3d 925 (2d Cir 1998); *Matter of Campos-Liz*, Tax Appeals Tribunal, January 12, 2017, citing *Alta Sierra Vista, Inc. v Commr.*, 62 TC 367, 374 [1974]), *affd* 538 F2d 334 [1976]). It is the address at which the IRS reasonably believed the taxpayer wished to be reached (*see Follum v Commr.*, 128 F3d 118 [2d Cir 1997] [the reasonableness of the Commissioner's belief as to what is the taxpayer's last known address is to be assessed as of the time of the IRS mailing]). "The relevant inquiry pertains to the Commissioner's knowledge rather than to what may in fact be the taxpayer's most current address in use. Administrative realities demand that the burden fall upon the taxpayer to keep the Commissioner informed as to his proper address" (*Alta Sierra Vista, Inc.* 62 TC at 374). Thus, for federal purposes, the address shown on the taxpayer's most recently filed return is his last known address unless the taxpayer has provided the IRS with "clear and concise notification" of any change in address (*see Follum v Commr.; Tadros v Commr.*, 763 F2d 89 [2d Cir 1985]).

Petitioner contends that he moved out of New York State on September 30, 2012 and that he began residing on a full time basis in Seoul, South Korea as of October 1, 2012. Despite this purported change in residence, however, petitioner continued using the Schenectady address when filing his tax returns. Each of the New York State nonresident and part-year resident income tax returns for 2012, 2014 and 2015 (the record does not include information regarding the 2013 return) were filed after petitioner claims to have moved out of New York, yet each of them lists Schenectady, New York as petitioner's mailing address (*see* finding of fact 5). The 2014 income tax return was the last return filed before the subject notices were issued. That return was dated October 15, 2015. The 2015 income tax return was dated October 17, 2016,

and filed after the subject notices were issued. Furthermore, petitioner filed form IT-370 applications for automatic six-month extension of time to file for years 2013, 2014, 2015 and 2016 for Vinod and Renu Kallianpur, all using the Schenectady address (*id.*).

In early 2016, the Division selected petitioner's 2012 income tax return for review and possible residency audit. The Division notified petitioner of the audit and requested residency documentation in separate letters dated January 4, 2016 and January 5, 2016 that were mailed to petitioner's Schenectady address. Thereafter, on March 9, 2016, the Division mailed a statement of proposed audit changes for the 2012 tax year and on May 25, 2016, it mailed a notice of deficiency for 2012. Both were mailed to the Schenectady address. On July 1, 2016 and July 5, 2016, the Division sent to petitioner's Schenectady address statements of proposed audit changes for tax years 2014 and 2013, respectively.

Petitioner does not allege that he notified the Division of a change of address to South Korea anytime prior to July 5, 2016 nor does he contend that he did not receive any of the aforementioned mailings made to the Schenectady address. To the contrary, petitioner filed a timely request for conciliation conference with BCMS relative to the tax year 2012 notice of deficiency on July 14, 2016. He used the South Korea address on that request. Apparently, at the same time, he also requested a conciliation conference to address the notices of proposed audit changes for 2013 and 2014 (*see* finding of fact 15). BCMS responded by sending two letters to petitioner, and for the first time, used the South Korea address. On July 22, 2016, BCMS advised petitioner that it rejected his request for a conciliation conference relative to the 2013 and 2014 tax years as premature, since notices of deficiency had not yet been issued for those years (*id.*). In the second letter, on July 25, 2016, BCMS acknowledged receipt of the

request for conciliation conference for the 2012 tax year and indicated that a conference would be scheduled in the near future (*id.*). As noted previously, the subject notices of deficiency for 2013 and 2014 were mailed soon thereafter, in August 2016, to the Schenectady address.

Petitioner allegedly became aware of the notices of deficiency for 2013 and 2014 only after his attorney sent a letter to the Division on December 28, 2016 (*see* finding of fact 17). On March 28, 2017, the Division responded by letter indicating that notices had been issued in August of the previous year. Petitioner's counsel received copies of the subject notices of deficiency from the Division on April 20, 2017 and filed a request for conciliation conference on petitioner's behalf on April 24, 2017. On May 12, 2017, BCMS issued a conciliation order sent to petitioner's South Korea address dismissing the request as untimely.

Petitioner asserts that the address listed on the July 14, 2016 request for conciliation conference constitutes notification of a change of address (*see* finding of fact 15). We do not agree. A request for conciliation conference is not a "return" and the address on such a document cannot establish petitioner's last known address without more information (*see Beard v Commr.*, 82 TC 766 [1984], *affd* 793 F2d 139 [6th Cir 1986] [most commonly, a return is a document that is used to report a tax liability]). "In order to supplant the address shown on the most recent return, a taxpayer must clearly indicate that the former address is no longer to be used" (*Hylar v Commr.*, 84 TCM 717 [2002], *affd without published opinion* 104 Fed Appx 13 [9th Cir 2004], *citing Tadros v Commr.*). Here, petitioner did not indicate on the request that he had permanently moved. Neither did he mention the Schenectady address or indicate that it was no longer to be used (*see Tadros v Commr.*). Thus, we agree with the Administrative Law Judge that the address on the request for conciliation conference did not amount to clear and concise notification to the Division that petitioner changed his address permanently and that he no longer

wished to receive notices at the Schenectady address (*see King v Commr.*, 857 F2d 676 [9th Cir 1988] [correspondence bearing an address different from that on the most recent return does not, by itself, constitute clear and concise notice]).

As stated above, the burden is on the taxpayer to keep the Division informed as to his or her proper address (*see Alta Sierra Vista, Inc. v Commr.*). That is not to say, however, that the Division has no obligation to exercise reasonable diligence to ascertain the taxpayer's correct address if, prior to the mailing of a statutory notice, it has become aware that the address last known to the agency may be incorrect (*see Follum v Commr.*). Where it is shown that the Division has failed to exercise reasonable care in determining an address, a notice sent to the wrong address will not satisfy the statutory requirement, and the 90 day period will not begin to run (*see Tadros v Commr.*).

In determining whether the Division used reasonable diligence in ascertaining petitioner's last known address, we must consider the information the Division had at the time it mailed the subject notices of deficiency (*see Sicari v Commr.*). Further, we must examine the totality of the circumstances and balance the relevant factual elements surrounding the controversy (*see King v Commr.*). The fact that the Division was auditing petitioner's residency status clearly indicates its awareness of a possible change of address. Further, the Division, through BCMS, responded to petitioner's request for conciliation conference by mailing two letters to the South Korea address. Those facts are counterbalanced by the fact that petitioner continued to report the Schenectady address on his tax returns and extension requests after his claimed move to South Korea. In addition, prior to the mailing of the subject notices, petitioner had never provided the Division with notice of a change of address or direction to no longer use the Schenectady address. Further weighing in favor of the Division is the fact that petitioner has not alleged or

presented evidence to show that any of the correspondence sent by the Division to the Schenectady address from early January 2016, including the subject notices, was not received by him or was returned to the Division by the postal service. Indeed, petitioner's request for conciliation conference evidences the fact that he received the notice of deficiency for the 2012 tax year and the notices of proposed audit findings for 2013 and 2014, which were sent to the Schenectady address the month before the subject notices were mailed there. Thus, unlike the circumstances in *Sicari* and some other "last known address" cases (*see e.g., Gaw v Commr.*, 45 F3d 461 [DC Cir 1995]), we do not find that the Division was put on notice that the Schenectady address was ineffective or incorrect. To the contrary, in view of petitioner's continued course of conduct in filing his returns and requests for extension using the Schenectady address after his claimed residency began in South Korea, it was reasonable for the Division to believe that petitioner wished to continue using that address, particularly when there was no clear and concise notification or direction to change his address to South Korea (*see Follum v Commr.*). Viewing all of the circumstances as they were at the time the notices were issued, the Division acted reasonably and cannot be faulted for using the address on the last filed return when faced with two addresses for petitioner corresponding to different locations. Accordingly, we find that the Division exercised the requisite diligence in relying on the address used in petitioner's last filed return when it mailed the subject statutory notices.

Finally, petitioner asserts that the Administrative Law Judge failed to address a material issue of fact in that the Division employee overseeing the instant residency audit stated to petitioner's attorney in a telephone conversation that she had spoken with her supervisor and that the "department agreed that it had failed to deliver the notices of deficiency to the correct address." Petitioner's attorney submitted an affidavit based on that conversation in opposition to

the Division's motion below. As stated above, an opponent of a motion for summary judgment must come forward with evidentiary proof in admissible form sufficient to require a trial (*see Zuckerman v City of New York*). Here, the attorney's affidavit presented an opinion of a Division employee, with no apparent authority to speak on behalf the Division, on a matter of law. Such evidence is insufficient to raise a material issue of fact to require a hearing in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Vinod Kallianpur is denied.
2. The determination of the Administrative Law Judge affirmed;
3. The petition of Vinod Kallianpur is denied; and
4. The May 12, 2017 conciliation order dismissing petitioner's request for conciliation conference is sustained.

DATED: Albany, New York
May 29, 2019

s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner