STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **FREDERICK M. OBERLANDER** | : | DECISION<br>DTA NO. 828957 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2013. | : | |

Petitioner, Frederick M. Oberlander, filed an exception to the determination of the Administrative Law Judge issued on July 18, 2019. Petitioner appeared by Tenenbaum Law P.C. (Leo Gabovich, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Charles Fishbaum and Maria Matos, Esqs., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard on January 9, 2020 in New York, New York, during which the parties were asked to submit additional written comments. The last of these comments were received on February 24, 2020, which date began the six-month period for the issuance of this decision.

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

## *ISSUE*

Whether the Division of Taxation has established that there are no material facts at issue and that the material facts as presented entitle it to an order granting summary determination in its favor on the law, in that petitioner's request for a conciliation conference was untimely.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for findings of fact 1, 2 and 5, which have been modified to more accurately reflect the record and findings of fact 11 and 12 which have been modified and renumbered 11 through 16 to more accurately and completely reflect the record. As so modified, the Administrative Law Judge's findings of fact appear below.[1]

1. The Division of Taxation (Division) brought a motion, the notice of motion and supporting papers dated February 19, 2019, for dismissal of the petition, or in the alternative, for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of a notice of deficiency, dated February 20, 2018, and bearing assessment identification number L-047739184 (notice). The notice is addressed to petitioner, Frederick M. Oberlander, at a post office box address in Montauk, New York (Montauk address). An additional copy of the notice was addressed to petitioner's then representative at an address in New York, New York (New York address). A notice and demand for payment of tax due was issued to petitioner on June 7, 2018, for assessment identification number L-047739184, and addressed to the Montauk address. On June 13, 2018, the Division provided a copy of the notice to petitioner's then representative by facsimile transmission.

2. Petitioner filed a request for conciliation conference (RFCC) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. Petitioner

[1] Both parties directly or indirectly requested adjustments to certain findings of fact or that additional findings of fact be made. Such requests have either been: (1) substantially incorporated herein; (2) addressed in our opinion as they are properly deemed legal conclusions; or (3) in the case of facts presented in the first instance on exception, such as the facts asserted regarding petitioner's health situation in a post-oral argument submission, not addressed pursuant to ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991.

asserts that his RFCC was filed on June 21, 2018. In the record in support of his assertion, there is a copy of a certified mail receipt for mail addressed to BCMS and date-stamped June 21, 2018 by the Niagara Square Station in Buffalo, New York. There is also a copy of a domestic return receipt that bears a date stamp of June 25, 2018 and appears to have been received by the "NY TAX DEPT," although the copy is difficult to read. The Division asserts that petitioner's RFCC was filed on or about September 24, 2018. In the record in support of its assertion is a copy of petitioner's RFCC date-stamped received by BCMS on September 24, 2018.

3. On October 19, 2018, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice 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 February 20, 2018, but the request was not received until September 24, 2018, or in excess of 90 days, the request is late filed."

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on November 1, 2018.

5. In support of the motion and to show proof of proper mailing of the notice, the Division provided, along with an affidavit of Charles Fishbaum, sworn to on February 19, 2019, the following with its motion papers: (i) an affidavit, dated December 13, 2018, 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 Presort Mail - Assessments Receivable" (CMR) postmarked February 20, 2018; (iii) an affidavit, dated December 14, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (iv) copies of the notice mailed to petitioner and his then representative with the associated mailing cover

sheets; (v) a power of attorney form marked as received by BCMS on July 6, 2017, for personal income tax for the year 2013, listing petitioner's then representative at the New York address; (vi) a copy of petitioner's request for conciliation conference, stamped as received by BCMS on September 24, 2018; (vii) a copy of the conciliation order issued by BCMS on October 19, 2018; and (viii) a copy of petitioner's 2013 New York State resident income tax return, form IT-201, dated July 3, 2017, and filed on or about that date. The tax return filed on or about July 3, 2017 was the last return filed with the Division by petitioner before the notice was issued.

6. The affidavit of Deena Picard, who has been in her current position since February 2006 and Acting Director since May 2017, sets 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 pages of the CMR in the present case to the actual mailing date of "2/20/18." 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. 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.

7. 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."

8. The CMR in the present matter consists of 17 pages and lists 183 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 17, which contains 7 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 February 20, 2018, to each page of the CMR, wrote the number "183" on page 17 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 17.

9. Page five of the CMR indicates that a notice with certified control number 7104 1002 9730 0222 8330 and reference number L-047739184 was mailed to petitioner's then representative at the New York address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and petitioner's then representative name and address as noted. Page 11 of the CMR indicates that a notice with certified control number 7104 1002 9730 0222 9030 and reference number L-047739184 was mailed to petitioner at the Montauk address listed on the notice. The

corresponding mailing cover sheet, also attached to the Picard affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Fred Ramundo, a supervisor in the Division's mail room, describes the mail room's general operations and procedures. Mr. Ramundo has been in this position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. 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 receives 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 of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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. Each page of the CMR in exhibit "A" of the Picard affidavit contains a USPS postmark of February 20, 2018. On page 17, corresponding to "Total Pieces and Amounts," is the preprinted number 183 and next to "Total Pieces Received At Post Office" is the handwritten entry "183." There is a set of initials or a signature on page 17. According to the Picard and Ramundo affidavits, copies of the notice were mailed to petitioner and his then representative on February 20, 2018, as claimed.

11. Prior to the issuance of the notice, the Division had issued a prior notice of deficiency for personal income tax to petitioner for the year 2013 (initial notice). In response to the initial notice, petitioner filed a request for conciliation conference, dated July 3, 2017 (initial RFCC), and a power of attorney form, dated March 2, 2017 (initial power of attorney), authorizing his representation for personal income tax for the tax year 2013, both of which were filed on or about July 3, 2017 and received by BCMS on July 6, 2017.

12. The initial RFCC lists petitioner's address as the Montauk address and petitioner's then representative's address as an address in Buffalo, New York (Buffalo address).

13. The initial power of attorney lists petitioner's address as a residential street address located in Montauk, which is different than the Montauk address that was set forth in the initial RFCC. Petitioner explains in an affidavit that he made a mistake in listing the residential street address in Montauk on the initial power of attorney as there is no mail delivery to his residential street address. The initial power of attorney lists petitioner's then representative's address as the New York address.

14. Also on or about July 3, 2017, petitioner filed his form IT-201 for the tax year 2013. The IT-201 lists the Montauk address as petitioner's address. In response to petitioner filing his IT-201 for the tax year 2013, the Division canceled the initial notice and eventually issued the notice.

15. A letter dated September 12, 2017 from BCMS addressed to petitioner at the Montauk address, informed petitioner that a conciliation conference would be held on October 19, 2017 in Buffalo. The letter indicates that a copy was sent to petitioner's then representative at the Buffalo address.

16. With regard to the notice, petitioner included in his submission a copy of page 5 of the February 20, 2018 CMR, along with what appears to be a USPS tracking printout for certified control number 7104 1002 9730 0222 8330 (the same certified control number as the notice mailed to petitioner's then representative). The printout states that delivery of the certified article was attempted at a New York, New York, address but was undeliverable ("moved, left no address") and was delivered to the original sender in Albany, New York, on March 5, 2018. A copy of page 11 of the CMR was also included, with what appears to be a USPS tracking printout for certified control number 7104 1002 9730 0222 9030 (the same certified control number as the notice mailed to petitioner). The printout states that the certified article was delivered to the original sender in Albany, New York, on March 20, 2018.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge initially determined that the Division's motion seeking an order dismissing the petition or, in the alternative, granting summary determination would be treated as a motion for summary determination because the Division of Tax Appeals has jurisdiction over the issue of whether petitioner timely filed his request for a conciliation conference. The Administrative Law Judge then noted that for a party to prevail on a motion for summary determination, the Administrative Law Judge must find that no material issues of fact exist and that therefore the Administrative Law Judge can find in favor of either party as a matter of law.

Next, the Administrative Law Judge observed that there is a 90-day statutory time limit to file a petition for hearing or a request for a conciliation conference following the issuance of a notice of deficiency and that the Division of Tax Appeals lacks jurisdiction to consider the merits

of any petition filed beyond the 90-day statutory time limit. The Administrative Law Judge explained the requirements for the mailing of a notice of deficiency and concluded that the Division had met its burden of proving proper mailing here by establishing both its standard mailing procedure and that such procedure was followed in this specific case. Furthermore, that Administrative Law Judge found that "the address on the mailing cover sheet for each recipient and on the CMR conforms with the address listed on petitioner's New York State income tax return for the year 2013 and the power of attorney form, respectively, which satisfied the 'last known address' requirement in Tax Law § 681 (a)." Thus, the Administrative Law Judge concluded that the notice was properly mailed to petitioner and his then representative on February 20, 2018, and that date began the 90-day statutory time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals.

The Administrative Law Judge found that petitioner's argument that the notice was sent to an incorrect address for him and his then representative was without merit. With regard to petitioner's address, the Administrative Law Judge noted that petitioner conceded that he used an incorrect P.O. box number "on his form IT-201[2] for 2013 which resulted in the Division using this incorrect box number on the notice." With regard to petitioner's then representative's address, the Administrative Law Judge notes that petitioner argued that the Division was on notice that the representative's address had been changed to the Buffalo address because the Buffalo address was listed for the representative in the initial RFCC filed with BCMS. However, the Administrative Law Judge concluded that petitioner's argument was meritless.

[2] The determination references an IT-203 filed by petitioner. However, this appears to be a typographical error as nothing in the record supports a finding that petitioner filed an IT-203. Rather, the record indicates that petitioner filed an IT-201.

Initially, the Administrative Law Judge found that because the initial notice was canceled, no request for a conciliation conference was processed. Additionally, the Administrative Law Judge concluded that as the initial RFCC listing the Buffalo address for petitioner's then representative was filed on the same day that petitioner filed his IT-201 for the tax year 2013 with the attached power of attorney listing petitioner's then representative's address as the New York address, the New York address constituted petitioner's then representative's last known address.

The Administrative Law Judge addressed the evidence submitted by petitioner possibly indicating that the notice was not received by either petitioner or petitioner's then representative by noting that Tax Law § 681 requires only that the notice be properly mailed, and does not require that the taxpayer actually receive the notice.

Finally, the Administrative Law Judge concluded that as the 90-day statutory time limit for petitioner to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals began on February 20, 2018 and petitioner's request was filed on September 24, 2018, a date beyond the 90-day statutory time limit, petitioner's request for conciliation conference was properly dismissed by BCMS.

***ARGUMENTS ON EXCEPTION***

Petitioner argues that his then representative never received the notice and that the 90-day statutory time limit for his request for a conciliation conference should have been tolled until the representative actually received the notice on June 13, 2018. Petitioner asserts that the facts show that petitioner's then representative listed the Buffalo address on the initial request for conciliation conference filed with BCMS and that BCMS responded to petitioner's

representative at the Buffalo address confirming that a conference would be held in Buffalo. Accordingly, petitioner asserts that the Division was aware of the change of address of petitioner's then representative and that the Administrative Law Judge's finding that the initial request for conciliation conference was "not processed" is not supported by the record. Petitioner argues that as his then representative received the notice on June 13, 2018, his request for a conciliation conference was filed well within the 90-day statutory time limit allowed and thus was timely.

Petitioner additionally argues that as the Division was aware that the notice as mailed to petitioner's then representative was returned by the USPS as undeliverable, the Division was required to resend the notice to the Buffalo address. Because that was not done, it was the June 13, 2018 date of petitioner's actual receipt of the notice that started the 90-day statutory time limit for petitioner to file his request for conciliation conference with BCMS.

Petitioner argues that the Division's point that the address listed on the power of attorney filed on the same day as the initial RFCC controls because the forms were filed at the same time and the power of attorney specifically addresses the issue of where and to whom communications are to be sent is incorrect for several reasons. First, petitioner argues that the power of attorney was filed previous to the initial RFCC, requiring the conclusion that the address listed in the RFCC, the last document filed, is the then representative's most recent address. Second, petitioner argues that there are no laws, rules or regulations that require a representative to file a new power of attorney in order to change his or her address. Third, petitioner asserts that if the address for petitioner's then representative listed on the power of attorney controlled, there would be no reason for the request for conciliation conference form to

ask for the address of a petitioner's representative.

It is petitioner's position that this Tribunal's decision in ***Matter of Kallianpur*** (Tax Appeals Tribunal, May 29, 2019) does not control this case in that ***Matter of Kallianpur*** dealt with the last known address of a taxpayer and this case deals with the address of a representative. In particular, the rule of using the address from the last return filed by a taxpayer does not work when dealing with a representative, and even if a power of attorney was used in a similar manner, the Division itself, on its website provides methods other than filing a new power of attorney for a representative to change his or her address. Furthermore, petitioner notes that ***Matter of Kallianpur*** can be distinguished from the present case, because the facts herein show that the Division did not use reasonable diligence in determining petitioner's then representative's correct address.

Petitioner also argues that there is a material question of fact as to when his RFCC was filed with BCMS. Petitioner contends that his representative's affirmation in opposition to the Division's motion that the RFCC was filed with BCMS on June 21, 2018, together with documents in the record, directly contradict the Division's affirmation that it was filed on or about September 24, 2018 and the copy of the request with a date stamp of September 24, 2018. Thus, petitioner asserts that there exists a triable, or arguable, material issue of fact and the Division's motion should not have been granted.

Finally, petitioner argues that under ***Jones v Flowers***, 547 US 220 (2006), the Division's attempt to issue the notice was constitutionally infirm in that the Division was aware that the notice was not received by either petitioner or petitioner's then representative.

The Division asserts that the Administrative Law Judge was correct concluding that the

Division carried its burden of proving that it properly mailed the notice by certified mail by showing both its standard procedure and that the procedure was followed in this particular instance. Furthermore, the Division asserts that the Administrative Law Judge was correct in concluding that the notice was mailed to the last known address of petitioner and petitioner's then representative. The Division notes that it sent the notice to petitioner at the Montauk address listed on the return and that petitioner admitted that he listed an incorrect address on his return. The Division argues that on the same day that petitioner filed the initial RFCC setting forth the Buffalo address for petitioner's then representative, petitioner also filed the power of attorney, which is the only document in the record that clearly and concisely indicates where communications should be directed. That document sets forth the New York address of petitioner's then representative, not the Buffalo address. Additionally, the Division notes that the initial RFCC was filed in connection with the initial notice, which is not at issue here as it was canceled and therefore of no significance to the present matter.

It is the Division's position that this Tribunal's decision in ***Matter of Kallianpur*** should control the outcome of the present case. The Division argues that, as in ***Matter of Kallianpur***, the address listed on a request for conciliation conference form does not constitute notification to the Division of a change of address without further information. Specifically, the Division argues that it was petitioner's burden to highlight in some manner that the address of his then representative listed on the RFCC was a new address for that representative that should be used to contact the representative from the time of the Division's receipt of the RFCC forward.

Finally, the Division asserts that petitioner's constitutional argument is spurious in that petitioner has offered no support for his assertion that the Division was required to use another

method to issue its assessment after the USPS returns certified mail to the Division as undeliverable. In any event, the Division notes that petitioner could potentially pay the deficiency, file for a refund, file a timely protest and then have the opportunity to argue the substance of his case.

***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 v City of New York*** 49 NY2d at 562).

The initial question is whether the Division properly mailed the notice to petitioner. 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. 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).

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 Furniture***, 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). 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 notice was mailed to the Montauk address on February 20, 2018, 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.

Although the issue of whether the notice mailed to petitioner was mailed to his last known address is addressed in the determination of the Administrative Law Judge and by the Division on exception, we do not find that there is any question that the Division has shown that it was. Contrary to the Administrative Law Judge's determination and the assertions of the Division, petitioner never contested that the notice was mailed to his proper address, nor admitted that the address on the last return filed by him was incorrect or placed on the return mistakenly by him. The notice was mailed to petitioner at his Montauk address. The Montauk address was listed by petitioner in his IT-201 for 2013, the last return filed by petitioner prior to the issuance of the notice by the Division. Indeed, the Montauk address was also listed on the initial RFCC. It is true that on the initial power of attorney, petitioner's address was listed as a residential street address in Montauk and petitioner indicated in his affidavit that this was a mistake as there is no mail delivery to his residential street address. However, as petitioner did not assert that the address listed on the initial power of attorney was his correct address, this mistake is not relevant to the question of whether the Division mailed the notice to petitioner's last known address.

However, there is a question as to whether the Division properly served the notice on petitioner's representative. This question is crucial to the issue of whether petitioner's RFCC was timely filed with BCMS because, although there is no provision in the Tax Law requiring the Division to serve a taxpayer's duly authorized representative with a copy of a statutory notice, this Tribunal has held that if a duly authorized representative is not served with a notice, the taxpayer's 90-day statutory time limit for filing a petition with the Division of Tax Appeals or a request for conciliation conference with BCMS is tolled until the representative is served

(***see Matter of Hyatt Equities***, Tax Appeals Tribunal, May 22, 2008; ***see also Matter of Multi Trucking***, Tax Appeals Tribunal, October 6, 1988, citing ***Matter of Bianca v Frank***, 43 NY2d 168, 173 [1977] [this is because once the representative has appeared in a matter, he or she is "deemed to act as his agent in all respects relevant to the proceeding")]. What this Tribunal has not previously addressed that is raised in these proceedings is whether the requirements for proper service of a notice on an authorized representative should be based upon the requirements for the proper mailing of a notice to a taxpayer's last known address. Petitioner asserts that they should not. We disagree.

In tax matters in New York State, a representative appears before the Division by filing a power of attorney (20 NYCRR Part 2390). The initial power of attorney was dated March 2, 2017. We do not know if the initial power of attorney was received by any office of the Division prior to July 6, 2017, but we do know that it was received by BCMS on that date. The initial power of attorney authorized petitioner's then representative to appear on his behalf in connection with personal income tax matters for 2013. Having thus initially appeared on behalf of his client, petitioner's representative essentially stepped into petitioner's shoes in connection with petitioner's personal income tax matters for 2013. Accordingly, no time limit could begin until petitioner's then representative was properly served with the document that initiated the time limit (***see Matter of Bianca v Frank***, 43 NY2d at 173).

Proper mailing to a taxpayer requires that a notice be mailed to the taxpayer's last known address. A taxpayer's last known address is generally the address shown on a taxpayer's last filed return unless the taxpayer has provided the taxing authority with "clear and concise notification" of any change of address (***see Tadros v Commr***, 763 F2d 89 [2d Cir 1985; ***Matter***

***of Kallianpur***). Petitioner is obviously correct that a representative's last known address cannot be determined by starting with the address shown on a tax return. However, petitioner has not convinced us that such a determination should not start with the address listed by a representative on the power of attorney form that authorizes that representative to act on behalf of a taxpayer. Indeed, there is no logical reason that it should be easier for a representative to change his or her address than it is for a taxpayer to change his, as the representative is stepping into the shoes of the taxpayer (***see Matter of Bianca v Frank***, 43 NY2d at 173). As it is the power of attorney that puts the representative in the taxpayer's place, it is reasonable to treat the power of attorney the same as a last return filed.

The original power of attorney was received by BCMS on July 6, 2017. It listed petitioner's then representative's address as the New York address. Accordingly, this would constitute petitioner's then representative's last known address absent clear and concise notification of a change of address. There is an issue in this case because on the same date, July 6, 2017, BCMS received the initial RFCC listing petitioner's then representative's address as the Buffalo address. Furthermore, BCMS responded by sending a letter to petitioner's then representative at the Buffalo address, scheduling a conciliation conference in Buffalo. In that we have determined that the same inquiries made regarding whether the Division mailed a notice to a taxpayer's last known address are appropriate when determining whether the Division properly served a petitioner's representative, we find our decision in ***Matter of Kallianpur*** controlling here. In particular, in ***Matter of Kallianpur***, we found that a different address listed on an RFCC did not constitute adequate notice of the change in a petitioner's address. In that case, we noted that an RFCC was not a return. In the present case, we note that an RFCC is not

a power of attorney. As with petitioner in ***Matter of Kallianpur***, the representative in the present case did not indicate that the Buffalo address listed on the RFCC was a new address, or that the New York address should no longer be used by the Division. Accordingly, the filing of the initial RFCC with a different address than the initial power of attorney, without more, does not constitute a clear and concise notification to the Division that petitioner's then representative's address had changed.

While the burden was on petitioner's representative to notify the Division that there was a change of address (***see Alta Sierra Vista, Inc. v Commr***, 62 TC 367, 374 [1974] ["administrative realities demand that the burden fall upon the taxpayer to keep the Commissioner informed as to his proper address"], where the Division has reason to believe that there may be an issue with an address, the Division must show that it exercised reasonable diligence in determining a last known address prior to attempting mailing (***Matter of Kallianpur***). The Division, through BCMS, responded to petitioner's initial RFCC by mailing a letter to petitioner's then representative's Buffalo address and scheduling a conciliation conference to be held in Buffalo. This is the only indication that the Division had reason to believe that the New York address was no longer the address of petitioner's then representative. There is no further evidence in the record regarding that initial BCMS proceeding, such as what happened next or whether there were any additional mailings. All that is known is that the initial notice was canceled, thereby obviating the need for further BCMS proceedings regarding the initial RFCC.[3] Viewing all of

[3] The determination of the Administrative Law Judge and the Division in its arguments on exception contend that because the initial RFCC did not result in a complete BCMS process in that the initial notice was canceled, that somehow petitioner's then representative's address as listed on the initial RFCC is not relevant to the current matter. Although we have concluded that the initial RFCC did not result in a change of address for petitioner's then representative, we fail to see how a document with a different address submitted to the Division is not relevant.

the circumstances as they were at the time the notice was issued, the Division acted reasonably and cannot be faulted for using the address on the initial power of attorney when faced with two addresses for petitioner's then representative. Accordingly, we find that the Division exercised the requisite diligence in relying on the address used in petitioner's then representative's power of attorney when it mailed the notice.

Petitioner asserts that the fact that both the notice addressed to petitioner at his Montauk address and the notice addressed to his then representative at the New York address were returned to the Division by the USPS should weigh in favor of finding the Division's actions in mailing the notice to those addresses unreasonable. We again disagree. First, we note that this information was not available to the Division at the time it mailed the notice and therefore cannot be used to determine if the Division exercised the requisite diligence in mailing the notice. Second, the evidence in the record on which petitioner bases his assertion that both notices were returned to the Division consists of what appears to be two USPS tracking print outs. Petitioner has provided no evidence of any USPS explanations as to the notations thereon, nor any evidence of USPS procedures indicating how such conclusions are arrived at or any affidavits from any USPS employees explaining the printouts. Accordingly, we find that petitioner's contention that the notice mailed to petitioner at his Montauk address or the notice mailed to his representative at the New York address were returned is speculative and thus does not rise to the level of an issue of material fact (***see Matter of Ahmed***, Tax Appeals Tribunal, June 29, 2017).

In light of our conclusion that the Division properly mailed the notice to petitioner's representative's last known address on February 20, 2018, the issue of whether the RFCC was filed on June 21, 2018 or September 24, 2018 does not present a material question of fact and

will not be addressed herein as both dates are beyond the 90-day statutory time limit for petitioner to file an RFCC with BCMS or a petition with the Division of Tax Appeals.

We also do not address petitioner's constitutional argument as it is based upon the Division's knowledge that the notice addressed to petitioner and the notice addressed to petitioner's representative were returned to the Division. In that we found that petitioner has not raised an issue of fact on this point, there is no foundation for petitioner's argument.

In conclusion, we find that the Division has established that there are no material facts at issue and that the material facts as presented entitle it to an order granting summary determination in its favor on the law, as such facts established that petitioner's request for a conciliation conference was untimely.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frederick M. Oberlander is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Frederick M. Oberlander is denied; and,
4. The notice of deficiency dated February 20, 2018, is sustained.

DATED: Albany, New York
August 24, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner