

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**VINOD KALLIANPUR** : DETERMINATION  
 : 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. :  
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Petitioner, Vinod Kallianpur, filed a petition 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.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), brought a motion dated November 16, 2017 seeking summary determination pursuant to sections 3000.5, 3000.9 (a) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On December 12, 2017, petitioner, appearing by Whiteman, Osterman, & Hanna, LLP (Scott D. Shimick, Esq., of counsel), filed a response to the Division of Taxation's motion, and filed a cross-motion to dismiss the notices of deficiency, or seeking summary determination in favor of petitioner. The 90 day period for deciding these motions began on January 11, 2018. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

***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***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of 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.

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 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 for petitioner as that listed on the subject notices; and (vii) Form IT-370 application 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 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 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 for petitioner as that listed on the subject notices; and (vii) Form IT-370 application 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 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 between 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 between 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 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.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

16. The Division argues that petitioner did not file a timely request for conciliation conference with BCMS following the issuance of the notices for tax years 2013 and 2014, and thus the petition should be dismissed or summary determination should be granted in the Division's favor. Petitioner argues that the Division did not mail the notices to petitioner's last known address and as such, the Division's motion should be denied and petitioner's cross-motion to dismiss the notices or for summary determination in favor of petitioner should be granted.

**CONCLUSIONS OF LAW**

A. As noted, the Division brings this motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or a motion for summary determination under section 3000.9 (b). As the petition in this matter was filed within 90 days of the conciliation order (*see* Finding of Fact 4), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9 (b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This order shall address the instant motion as such.

A motion for summary determination "shall 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" (20 NYCRR 3000.9 [b] [1]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "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 the material issue of fact is "arguable" (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). 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*).

C. 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 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 the 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 American 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 determination 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).

D. Where, as here, the timeliness of a request for conciliation conference or petition 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 (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard

procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see id.*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices for the years 2014 and 2013 to petitioner's last known address on August 17, 2016 and August 22, 2016, respectively. The CMRs have been properly completed and therefore constitute highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). 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 (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, 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. It is thus concluded that the Division properly mailed the notice for tax year 2014 on August 17, 2016, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals in protest of that notice commenced on that date (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Similarly, it is concluded that the Division properly mailed the notice for tax year 2013 on August 22, 2016, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals in protest of that notice commenced on that date (*id.*).

F. Petitioner's request for conciliation conference for both notices was filed on April 24,

2017. This date falls after the 90-day period of limitations for the filing of such a request.

Consequently, the request was untimely (*see* Tax Law §§ 170 [3-a] [b]; 681 [b]; 689 [b]) and the same was properly dismissed by the May 12, 2017 conciliation order issued by BCMS.

Petitioner has offered no evidence to meet his burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notices expired.

G. Petitioner argues that the Division did not mail the subject notices to petitioner's last known address, contending that petitioner's last known address was the address in Seoul, South Korea, as listed on the request for conciliation conference dated July 14, 2016. The Division argues that petitioner's last known address was the address listed on petitioner's 2014 resident income tax return, filed on October 15, 2015, which was the last return filed prior to the issuance of the subject notices.

In order to prevail on its motion, the Division bears the burden of showing that the statutory notices were sent to petitioner's last known address as part of its proof that it followed its own mailing procedures in this case (*see Matter of Campos-Liz*, Tax Appeals Tribunal, January 12, 2017). The phrase "last known address" is defined by Tax Law § 691 (b) as "the address given in the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the tax commission 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 of the Tax Law 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 (*see* Tax Law § 607 [a]). Here, 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 what constitutes an appropriate notification of a change of address.

The last known address of a taxpayer has been defined for federal purposes as the taxpayer’s last permanent address or legal residence known by the Internal Revenue Service (IRS) or the last known temporary address of a definite duration to which the taxpayer has directed the IRS to send all communications (*Matter of Campos-Liz*, citing *Alta Sierra Vista, Inc. v Commr.*, 62 TX 367, 374 [1974]), *affd sub nom Alta Sierra Vista, Inc. v. Commr.*, 538 F2d 334 [1976]). Generally, the last known address will be the address listed on the taxpayer’s last tax return filed with the IRS, unless there is “clear and concise notification” by the taxpayer of a change of address (*id.*; *Weinroth v Commr.*, 73 TC 690 [1980], concluding that the IRS’s designation of a temporary address as the taxpayer’s last known address was unreasonable in light of the circumstances). “The ‘last known address’ inquiry requires an examination of the totality of circumstances and a balancing of many relevant factual elements, factors which indicate that the inquiry is ‘essentially factual’” *King v Commr.*, 857 F2d 676 (1988). “While the Commissioner is bound to exercise reasonable diligence in ascertaining the taxpayer’s correct address, he is entitled to treat the address appearing on a taxpayer’s return as the last known in the absence of clear and concise notification from the taxpayer directing the Commissioner to use a different address” (*King v Commr.*, citing *Alta Sierra Vista, Inc. v Commr.*).

In *King*, the taxpayers filed federal income tax returns for 1978 and 1979 with the IRS reporting a Mossvine Drive, Dallas, address. When the IRS selected the taxpayers’ 1978 and 1979 returns for review, the taxpayers filed two powers of attorney listing the Mossvine, Dallas, address. In October 1980, the taxpayers moved to Club Hill Drive, Dallas. However, the

taxpayers subsequently filed an additional power of attorney erroneously listing their Mossvine address. The taxpayers first used their Club Hill address on correspondence to the IRS in April 1981, requesting an extension to file their 1980 return. On June 15, 1981, the taxpayers filed their 1980 return using the Club Hill address. On August 17, 1981, the IRS sent taxpayers a 30-day letter at the Mossvine address, which was forwarded to the Club Hill address. On September 17, 1981, the taxpayers' attorney responded by filing a verified protest letter which erroneously listed the Mossvine address. On February 19, 1982, the IRS sent a notice of deficiency to the Mossvine address, with copies to the taxpayers' representatives. The IRS argued that the protest letter filed by the taxpayers' attorney on September 17, 1981, showing the Mossvine address for the taxpayers, constituted clear and concise notice and that the IRS was entitled to rely on it. The court rejected the IRS's argument, holding that:

“the protest letter did not constitute ‘clear and concise’ notice as a matter of law. Correspondence bearing an address different from that on the most recent return does not, by itself, constitute clear and concise notice. . . . In order to supplant the address on his/her most recent return, the taxpayer must clearly indicate that the former address is no longer to be used” (*King v Commr.*).

Similarly, in *Matter of Campos-Liz*, the Tribunal found that the Division's affidavit and exhibits indicating that the taxpayer had informed the conciliation conferee of a new address during proceedings with the Bureau of Conciliation and Mediation Services was insufficient to show that petitioner has made a clear and concise notification of an address change, especially where petitioner used a different address, as reported on his last filed return, both prior and subsequent to the conciliation conference (*Matter of Campos-Liz; see also Tadros v Commr.*, 763 F2d 89 [2d Cir 1985] [letter from taxpayer that did not indicate taxpayer had permanently moved or that address on letterhead was his new place of residence, or mention the older address

or indicate that it was no longer to be used was inadequate to notify the Commissioner of a change of address]).

In the present matter, petitioner's most recent return filed before the issuance of the subject notices reported petitioner's address in Schenectady, New York. The request for conciliation conference in protest of a notice of deficiency for the year 2012, dated July 14, 2016, 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. Similar to the facts in *King v Commr.*, while the request filed for a prior year's notice bore an address different from that on the most recent return, petitioner did not clearly indicate that the former address was no longer to be used or that the Seoul, South Korea, address was his new permanent address. Such correspondence was, therefore, insufficient to provide clear and concise notification of an address change, especially where petitioner used the Schenectady, New York address, as reported on his last filed return, both prior and subsequent to the request in his New York resident income tax returns for the years 2012, 2014 and 2015, dated October 15, 2013, October 15, 2015, and October 17, 2016, respectively, and applications for automatic six-month extension of time to file for the years 2013, 2014, 2015, and 2016 (*see Matter of Campos-Liz*).

H. The Division's motion for summary determination is hereby granted, petitioner's cross-motion is denied, the May 12, 2017 conciliation order dismissing petitioner's request is sustained, and the petition is denied.

DATED: Albany, New York  
April 5, 2018

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE