Docket No. 19-2229

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DAMIAN K. GREGORY AND SHAYLA A. GREGORY,

Appellants,

v.

COMMISSIONER OF INTERNAL REVEUNE,

Appellee.

On Appeal from the United States Tax Court (No. 1465-17) Honorable Ronald L. Buch

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BRIEF FOR THE APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

On October 13, 2016, pursuant to § 6212,[1] the Internal Revenue Service ("IRS") mailed to Damian and Shayla Gregory ("the Gregorys"), by certified mail, a Statutory Notice of Deficiency ("SNOD") determining additional income tax, interest, and penalties for their 2013 and 2014 taxable years. (A-40, A-94, A-161)[2]

Under § 6213(a), a SNOD affords taxpayers the right to petition the Tax Court for a redetermination of the deficiencies set forth therein within 90 days of its mailing.

On January 17, 2017, the Gregorys mailed a petition to the Tax Court to re-determine the deficiencies for the two taxable years. (A-1, A-214) The Tax Court received and filed the petition on January 23, 2017. (A-1, A-69, A-161)

On March 21, 2017, the IRS filed a motion to dismiss the Gregorys' petition for lack of jurisdiction on the ground that the Gregorys did not file their petition within the 90-day period. (A.42)

On May 31, 2018, the Gregorys cross moved to dismiss the petition for lack of jurisdiction on the ground that the SNOD was invalid because it was not sent to

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code (Title 26). All references to regulations are to Treasury Regulations at 26 CFR.

[2] Parenthetical references in the form of "(A-)" refer to page numbers in Volumes I and II of the Appendix.

their last known address, within the meaning of § 6212(b)(1). (A-228)

On March 13, 2019, the Tax Court dismissed the petition for lack of jurisdiction as untimely and denied the Gregorys' cross motion. (A-230)

On May 20, 2019, the Gregorys filed a timely notice of appeal with the Tax Court. § 7483 (allowing 90 days to file a notice of appeal). (A-35)

This Court has jurisdiction under § 7482(a)(1). Venue is proper in this Court, since the Gregorys resided in New Jersey when they filed their Tax Court petition. § 7482(b)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Gregorys ask that the Court rule that the Statutory Notice of Deficiency the IRS mailed to their prior address on October 13, 2016 was invalid because it was not sent to their last known address.

The questions facing the court are:

I. Whether the filing of a Form 2848 and a Form 4868 constitutes clear and concise notice of a change of address from the address shown on the most recently-processed tax return.

II. Whether the Court should give judicial deference to the IRS interpretation of clear and concise notification of last known address in Revenue Procedure 2010-16.

STATEMENT OF THE CASE

Prior to on or about June 30, 2015, the Gregorys resided at 7 Surry Court,

Jersey City, New Jersey 07305 (the "Jersey City address"). (A-135) On or about June 30, 2015, the Gregorys moved to a residence at their new home at 11 Insley Avenue, Rutherford, New Jersey 07070 (the "Rutherford address).[3] (A-130) For all relevant tax years, the Gregorys employed a Certified Public Accountant, Michael Chaffee, to prepare and file their joint income tax returns. (A 171-A-172) Mr. Chaffee was also the main point of contact between the IRS and the Gregorys in the audit of their 2013 and 2014 income tax returns. (A-172)

On October 15, 2015, Mr. Chaffee electronically filed the Gregorys' 2014 Form 1040. (A-135) The Gregorys timely filed the return pursuant to an extension to file that the IRS had granted. (A-187) Mr. Chaffee, however, mistakenly listed the Jersey City address on the form, even though the Gregorys had previously told him that they had moved to the Rutherford address. (A-174) The Tax Court record does not contain the address shown on the Gregorys' 2013 income tax return, but the Gregorys assume that it was also the Jersey City address.

On or about November 24, 2015, Mr. Chaffee faxed separate Power of Attorney Forms 2848 (rev. 7-2014), signed by each of the Gregorys, to IRS Revenue Agent Lauren Buzzelli ("Agent Buzzelli"). (A-130, A-138- A -141) Each

[3] In their objection to the IRS motion to dismiss, the Gregorys asserted that they filed a change of address form with the United States Postal Service at the time of their move. (A- 48) However, they did not enter a copy into the Tax Court record. Thus, the Tax Court properly made no finding that the Gregorys ever filed such a form.

Form 2848 listed the Gregorys' Rutherford address on line 1 (the line for the taxpayer's "name and address"). (A-138- A-139) Taken together, the Forms 2848 authorized Mr. Chaffee to represent the Gregorys for their 2004-2018 income taxes.

On December 2, 2015, Agent Buzzelli faxed to Mr. Chaffee an Information Document Request asking for information and documents concerning the Gregorys' 2013 income taxes. (A-136, A-142) This fax is evidence that Agent Buzzelli had actually received the Forms 2848, since IRS procedures would not have allowed her to communicate with Mr. Chaffee otherwise about the Gregorys' 2013 income taxes at that time.

On April 18, 2016 (the last day for filing a 2015 income tax return), Mr. Chaffee e-filed with the IRS on behalf of the Gregorys a Form 4868, Request for an Extension of Time, for a six-month extension to file their 2015 income tax return. (A-131) The Form 4868 listed their Rutherford address in Part I ("Identification"). (A-152) The IRS received and granted the extension request. *Id*.

On April 21, 2016, Agent Buzzelli mailed to the Gregorys at their prior, but no longer valid, Jersey City address a letter informing them that their 2014 income tax return was also under audit and asking them to call to discuss various parts of that return. (A-3)

On May 16, 2016, Agent Buzzelli faxed to Mr. Chaffee a new Information

Document Request, this one concerning the Gregorys' 2013 and 2014 income tax returns. (A -5- A-17)

Mr. Chaffee prepared the Gregorys' 2015 income tax return, and typed the Rutherford address in the address box. (A-132) Mr. Chaffee timely e-filed the Gregorys' 2015 income tax return on October 18, 2016, the extended due date. *Id*.

A few days earlier, on October 13, 2016, the IRS had mailed, by certified mail, a SNOD for the 2013 and 2014 tax years to the Gregorys at the Jersey City address, despite having received and processed the Form 2848 and the Form 4868 with Rutherford address. (A – 107, A- 212)

By November 11, 2016, the Postal Service returned the SNOD to the IRS as "Unclaimed." (A-107, A-108) Neither party disputes that the Gregorys' SNOD was not delivered to them by the Postal Service. (A-41)

Mr. Chaffee testified to the Tax Court that he did not receive a copy of the SNOD at his office, either, even though, under the Forms 2848, the Gregorys had asked the IRS to send copies of any notices concerning the years involved to Mr. Chaffee. (A-172; A-178)

Mr. Chaffee testified in the Tax Court that on January 17, 2017, he called the IRS Practitioner Priority Service phone number – trying to learn whether the IRS had issued a SNOD to the Gregorys for 2013 and 2014. (A-178) Mr. Chaffee testified that the IRS employee at that number told him that the IRS in fact had

already issued a SNOD for those years. (A-80) From what Mr. Chafee understood, the date of the phone call, January 17, 2017, was the last date to file a timely Tax Court petition in response to the SNOD. *Id*. Believing that they were therefore still within the period to timely petition the Tax Court, later that day, the Gregorys mailed by certified mail a petition to the Tax Court for the 2013 and 2014 years. *Id*. Not having a copy of a SNOD, they attached to the petition copies of Agent Buzzelli's letter to them dated April 21, 2016, and her Information Document Request that she had faxed to Mr. Chaffee on May 16, 2016. (A-2, A-3-A17). In fact, by January 17, 2017, the time to file a Tax Court petition had already expired by several days. The last date to file was January 11, 2017. (A-94)

On January 23, 2017, the Tax Court received and filed the Gregorys' petition. (A – 161)

On March 21, 2107, the IRS moved to dismiss the petition for lack of jurisdiction as untimely filed. The IRS attached to the motion a copy of the SNOD and its alleged evidence of proper mailing. (A-230)

On March 19, 2018, the Tax Court held a hearing on the motion. (A-156) At that hearing, the sole witness was Mr. Chaffee. (A-171) Prior to Mr. Chaffee testifying, Judge Ronald Buch, *sua sponte*, raised the question of how much deference he should give to IRS Revenue Procedure 2010-16, which disqualifies Forms 2848 and Form 4868 from adequate notification of last known address. (A-

169) The parties were then ordered to brief that issue as supplements to their respective Motion to Dismiss and Objection.[4] (A-191)

In its supplement, the IRS argued that the Tax Court should give the applicable regulation, Reg.§ 301.6212-2(b), the deference required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").[5] (A-199-A-200) With respect to Revenue Procedure 2010-16, the IRS argued that the Court should at least find its definitions persuasive under *Skidmore v. Swift*, 323 US 134(1944). (A-204)

On May 31, 2018, in a supplemental objection to the IRS' motion to dismiss, the Gregorys wrote: "Revenue Procedure 2010-16 is a self-serving pronouncement issued by one side to this litigation. It cannot possibly overcome the Due Process Clause of the Fifth Amendment to the United States Constitution, or judicial precedent." (A-225)

The Gregorys do not pursue a due process argument in this appeal, but they do continue to maintain that Revenue Procedure 2010-16 deserves no deference,

[4] Judge Buch specifically directed the parties to brief the following issue: "The Question is whether the IRS is correct to rely on Revenue Procedure 2010-16; and whether that revenue procedure – how much deference the Court owes to that revenue procedure, in light of previous case law." (A-169)

[5] On March 5, 2019, the Treasury Department issued a Policy Statement on the Tax Regulatory Process stating that it would no longer seek *Chevron*-deference of subregulatory guidance, including Revenue Procedures. *See* Section II.B. *infra.*

and, indeed, that the instructions in the forms do not deserve any deference, either. Rather, the Gregorys contend that it is for the courts to decide whether an address given in a Form 2848 or 4868 constitutes clear and concise notification of a taxpayer's change of address without deference to Revenue Procedure 2010-16. (A-220-A221)

On May 31, 2018, the Gregorys also cross moved to dismiss for lack of jurisdiction on the ground that the SNOD was invalid because it was not mailed to their last known address. (A-228) While this motion was styled one to dismiss the "Notice of Deficiency," it is apparent that the Gregorys sought to dismiss the Tax Court case for lack of jurisdiction because the SNOD was invalid, and the Tax Court so understood the motion. Cross motions to dismiss for lack of jurisdiction in cases occur when the Tax Court considers a taxpayer's motion to dismiss for an invalid or missing SNOD prior to considering the IRS' motion to dismiss because of an alleged late filing. *See Pietanza v. Comm'r*, 92 T.C. 729 (1989); *See also Galluzzo v. Comm'r*, 564 Fed. Appx. 656, 659 (3d Cir. 2014) (agreeing that it is the IRS' burden to show SNODs had been properly prepared and mailed to establish jurisdiction).

On March 13, 2019, Tax Court Judge Ronald Buch issued an opinion in this case. In it, he held that the SNOD was valid because the Jersey City address was the Gregorys' "last known address" at the time the IRS mailed the SNOD. (A-21).

Accordingly, since the SNOD was valid, the Gregorys did not timely file the petition, and the court had to dismiss the case for lack of jurisdiction. *Id*. In the opinion, Judge Buch relied for his holding on the language in Revenue Procedure 2010-16, and the instructions to Forms 2848 and 4868 – without any discussion of whether those authorities deserve judicial deference.[6]

Citing Reg. § 301.6212-2(a), he relied on its last known address definition as "the address that appears on the taxpayer's most recently filed and properly processed Federal tax return, unless the Internal Revenue Service (IRS) is given clear and concise notification of a different address." (A-26-A-28). He further relied on Revenue Procedure 2010-16, which provides that the filing of a Form 4868 is not a "return" for the purpose of the regulation. (A-28). Although Revenue Procedure 2010-16 also allows taxpayers to provide clear and concise notification of a different address in a manner other than filing a return, he held that the revenue procedure did not consider Forms 2848 and 4868 to constitute clear and concise notification. (A-26-A-27). Finally, he acknowledged that case law had previously considered a new address given on a Form 2848 to constitute clear and concise notification of a change of address, but he distinguished such case law because the instructions on Form 2848 and on Form 4868 had subsequently

[6] Judge Buch had ordered the parties supplement their Motion to Dismiss and Objection with a brief on the question of judicial deference to Revenue Procedure 2010-16. *See* FN 3 *supra*.

changed. (A-27, A-29, A-30-A-32). Judge Buch did not discuss whether the Gregorys' CPA had provided adequate oral notification of a change of address, nor what steps the IRS would have taken in verifying the address for purposes of validating the POA.

Pursuant to the opinion, on March 13, 2019, Judge Buch entered an order denying the Gregorys' motion to dismiss and granting the IRS' motion to dismiss.

This timely appeal followed.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. The Gregorys are unaware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this Court or any other court or agency, state or federal.

SUMMARY OF ARGUMENT

Treasury Department Regulation § 301.6212-2 defines the phrase "last known address" in 26 U.S.C. § 6212(b)(1) as the address on the taxpayer's most recently filed and properly processed tax return, unless the IRS is given "clear and concise notification of a different address." § 301.6212-2(a). In 2010, the IRS issued Revenue Procedure 2010-16 which changed the definition of last known address and the requirements for clear and concise notification without undergoing the notice and comment procedure that 5 U.S.C. § 553 requires of administrative

rulemaking. The change wrought by Revenue Procedure 2010-16 contradicts judicial interpretations of § 6212(b)(1) and Reg. § 301.6212-2 and places an unreasonable burden on the taxpayer by disqualifying certain forms of notice, such as a Form 2848 "Power of Attorney" or Form 4868 "Filing Extension Request."

While Congress has never defined last known address, the progression of case law in both the Tax Court and the United States Courts of Appeal has been toward an expansive and inclusive interpretation of what constitutes proper notification of a taxpayer's last known address. Courts have especially considered ever advancing computer technology that allows the IRS to better record and track information. Even prior to the 1980's, before computing technology was growing exponentially, courts analyzed particular facts and circumstances to determine if a taxpayer had given clear and concise notice of a last known address, rather than restricting the interpretation to whether a certain proscribed form had been filled out to notify a change of address.

Beginning with the case *Abeles v. Comm'r*, 91 T.C. 1019 (1988), the Tax Court articulated a rule that the last known address is the address on the taxpayer's most recently filed tax return unless the taxpayer had given "clear and concise notification" otherwise. However, the *Abeles* Court emphasized that the key analysis is what the IRS knew, or should have known through its computing system, at the time the SNOD was issued. In the thirty years since the *Abeles* case

was decided, advances in communications technology have only enhanced the argument that the IRS cannot turn a willful blind eye when a taxpayer has communicated an updated address through a formal communications channel with the IRS, such as a processed Form 2848 or 4868

Revenue Procedure 2010-16 sets forth the IRS definition of last known address and restricts taxpayers from relying on Forms 2848 and 4868 as notification of a change of address. This revenue procedure should not control the definition of last known address and should not be given judicial deference. As it is a sub-regulatory guidance document, without the force and effect of law, it is not entitled to deference under the *Chevron* framework. Furthermore, since Revenue Procedure 2010-16 was issued nine years after the regulation it purports to interpret and fails to meet the five-prong test of *Kisor v. Wilkie*, 139 S.Ct. 2400, 2412 (2019), it should not be granted deference under the framework of *Auer v. Robbins*, 519 U.S. 452 (1997). This reading is in line with the Treasury Department's own 2019 Policy Statement agreeing that IRS revenue procedures are not entitled to *Chevron* nor *Auer* deference. *See* FN 5 *Supra*; Sec. II.B *infra.*

Finally, Revenue Procedure 2010-16 is not persuasive under *Skidmore*. First, it may not even be entitled to *Skidmore* review at all as it presents no publicly available reasoning behind the rule excluding Form 2848 and Form 4868 from adequate methods to notify the IRS of a new address. Yet even if given analysis

under *Skidmore*, the revenue procedure lacks persuasiveness in that it was issued 84 years after the original statute and, in that its restrictive view of last known address is generally at odds with the language and purpose of the statute as illustrated by decades of case law.

ARGUMENT

Statement of the Standard and Scope of Review

This Court reviews decisions of the Tax Court as it would a non-jury district court decision. *Armstrong World Industries v. Comm'r*, 974 F.2d 422, 429 (3d Cir. 1992). This Court reviews the Tax Court's legal conclusions de novo and its factual findings for clear error. *Anderson v. Comm'r*, 698 F.3d 160, 164 (3d Cir. 2012). This Court reviews the Tax Court's view of the validity of IRS guidance de novo. *Armstrong*, 974 F.2d at 429.

I. "Last Known Address" Is a Judicially-Defined Concept That Has Changed Over Time.

The IRS collects taxes that have been assessed. §6201(a)(1) authorizes the IRS to assess taxes shown by taxpayers on returns. Sometimes taxpayers understate their correct taxes when they file returns. Such understatements are known as "deficiencies", currently defined at § 6211(a). Prior to 1924, taxpayers could contest deficiencies determined by the IRS in court only by paying the deficiencies and suing for a refund in a district court or the Court of Claims.

Finding this system burdensome for the recently-enacted income and estate taxes, in 1924, Congress created the Board of Tax Appeals in order to give taxpayers a prepayment forum to contest the IRS' proposed assessment of deficiencies in those taxes. *Flora v. U.S.*, 362 U.S. 145, 158-163 (1960). Under the system created in 1924, prior to the assessment of any deficiency, the IRS must have issued a "notice of deficiency" (a "SNOD"), which became a ticket to appeal to the Board of Tax Appeals. The statute directed the IRS to send the SNOD by registered mail,[7] but did not specify the address to which the notice should be sent. Revenue Act of 1924, ch. 234, §§ 274(a) (for income tax) and 308(a) (for estate tax). This omission was remedied in 1926, with the adoption of language that is currently in § 6212(b)(1), providing that "notice . . . of deficiency . . . if mailed to the taxpayer at his last known address, shall be sufficient . . . ." Revenue Act of 1926, Pub. L. No. 20, ch. 27, § 281(d); *Comm'r v. Rosenheim*, 132 F.2d 677, 679-80 (3d Cir. 1942) (the first opinion of this Court discussing a last known address issue). But, Congress has never defined what is the "last known address".

The Tax Court is the successor to the Board of Tax Appeals. *See* Tax Reform Act 83 Stat. 730 (1969).

[7] As a result of an amendment to § 6212(a) made by the Technical Amendments Act of 1958, Pub. L. 85-866, § 89(b), Congress later also authorized the IRS to mail notices of deficiency by certified mail – the method used in this case.

In *Delman v. Comm'r*, 384 F.2d 929 (3d Cir. 1967), a married couple had given an IRS power of attorney ("POA")[8] in favor of their accountant and lawyer. The IRS mailed the original SNOD in care of the accountant, who had listed his address on the second-filed tax return of two under audit as the "in care of" address to be used for the taxpayer. During the audit, both the husband and the accountant notified the Revenue Agent that the taxpayers' residence had changed from a New Jersey address to a Pennsylvania address. The accountant quickly forwarded the SNOD to the lawyer, who quickly forwarded it to the taxpayers. Because the taxpayers had the SNOD with plenty of time left to file a timely petition, but filed late, this Court held the SNOD valid and that the Tax Court case should be dismissed for lack of jurisdiction as untimely filed. In the opinion, this Court found no need to determine the last known address, since it held that mailing to the last known address was only an alternative way to make the SNOD valid, if the taxpayer had never actually received the notice in sufficient time to timely file. But, this Court set forth a summary of what it viewed to be the case law at the time concerning last known address. In addition to noting the origin of the phrase "last known address" in the Revenue Act of 1926, this Court wrote:

> Numerous cases have considered the question of whether a notice of deficiency was sent to taxpayer's "last known address." Few cases, however,

[8] The IRS currently uses Form 2848 to designate a "power of attorney." For discussion of the "power of attorney" forms we generally refer to the "POA" for purposes of readability.

> have attempted to define what Congress meant by the term. *Clark's Estate v. Commissioner of Internal Revenue*, 173 F.2d 13 (2nd Cir. 1949) suggests that a notice complies with the statute if it is sent to the address where the Commissioner reasonably believes the taxpayer wished to be reached. *Gregory v. United States*, 102 Ct. Cl. 642, 57 F. Supp. 962, 973 (1944), cert denied, 326 U.S. 747, 66 S. Ct. 26, 90 L. Ed. 447, states that the term "had reference to the last known permanent address or legal residence of the taxpayer, or the last known temporary address of a definite duration or period to which all communications during such period should be sent."

Delman 384 F.3d. at 932. Prior to the Tax Court's opinion in *Abeles v. Comm'r*, 91 T.C. 1019 (1988), there had been many Tax Court and appellate court opinions concerning whether particular kinds of taxpayer notices or letters (written or oral) to particular IRS individuals (Revenue Agents or persons in the IRS' Collection Division or in other IRS offices) were relevant to the issue of the last known address. "As a result of the increasing use of computers in tax collection, Congress, in 1966, authorized the Internal Revenue Service to divide the country into broad geographical regions for return filing purposes, and to require residents of each of these regions to file their return in one central location." Harold Dubroff and Brant Hellwig, *The United States Tax Court: An Historical Analysis* (2d ed. 2014), at p. 796. Thus, most of the opinions that the courts issued before the 1980s involved taxable years for which the IRS mostly kept tax returns and records relating thereto in District Directors' offices (where taxpayers filed returns), on paper, and where the IRS was not computerized sufficiently to keep

track of new addresses in a way that could easily be accessed by the Revenue Agent or other IRS employee preparing to mail a SNOD.

However, there was considerable case law on the issue of whether a taxpayer had given the IRS clear and concise notification of a change of address. These cases analyzed the particular facts and circumstances in each case to determine the address to which the taxpayer intended the IRS to send correspondence.[9]

In *Budlong v. Comm'r*, 58 T.C. 850 (1972), the Tax Court had written:

> Petitioners' filing of their 1969 return [a taxable year after the year under audit] with the North-Atlantic Service Center is not sufficient notification to [the Commissioner]. The service center does not have any responsibility with respect to the auditing of returns or the issuing of statutory notices of deficiency. The service center provides the means for handling in an effective, administrative fashion the millions of returns to be filed with the district directors within its realm. The Code does not require a check with a service center for verification of the "last known address" of a taxpayer prior to the issuance of a statutory notice. At best, petitioners' filing of their 1969 return would, upon final processing, indicate to [the Commissioner] that for the 1969 taxable year correspondence to petitioners should be directed to the address thereon.

Id. at 852-53. In *Crum v. Comm'r*, 635 F.2d 895 (D.C. Cir. 1980), however, the D.C. Circuit held that the filing of a return subsequent to the one under audit,

[9] For analysis of evolving case law on IRS service to a taxpayer's last known address, see Jerome Borison, "The Evolving Due Diligence Requirements of the Service in Determining a Taxpayer's Last Known Address, "41 Tax. L. Rev. 111,118-119 (1985) (The question of proper notification have arisen in cases where notification was purportedly given 1. Orally, 2. Through written communication not designated as a change of address, 3. Directly or indirectly to an IRS employee, 4. Too late for the IRS to respond, 5. By filing a POA, 6. By filing a temporary change of address.)

showing a different address, was a relevant, though not in itself sufficient, factor in its holding that the IRS had not sent a SNOD to the taxpayer's last known address. In the case, the Service Center and the IRS' Collection Division also knew of the new address. The court noted: "Before the deficiency notice for 1969 was issued, five separate communications (i. e., two tax returns, *a request for an extension of time* and the response to it, and a bill for 1967 tax due) bearing the Hong Kong Marina address passed between Crum and the IRS." *Id*. at 899 (emphasis added). In ruling against the IRS, the court wrote: "An innocent taxpayer should not be penalized because the tax collector neglects to tell his right hand what his left is doing." *Id*. at 900.

Next, in *McPartlin v. Comm'r*, 653 F.2d 1185 (7th Cir. 1981), the Seventh Circuit followed *Crum* and held "that subsequently filed returns must be considered relevant when determining a taxpayer's 'last known address.'" *Id*. at 1190.

Then, in a major change, the Ninth Circuit adopted a rule that the address that the taxpayer shows on the most recently processed tax return becomes the taxpayer's last known address, even for a prior taxable year under audit. *U.S. v. Zolla*, 724 F.2d 808, 810 (9th Cir. 1984) ("A taxpayer's last known address is that on his most recent return, unless the taxpayer communicates to the IRS 'clear and concise' notice of a change of address."). However, the court declined to hold that

any new address learned of by the Collection Division – even one not communicated to the IRS by the taxpayer – constituted the last known address. *Id*. at 811.

Citing this progression in appellate court precedent, in 1988, in *Abeles*, the Tax Court overruled its prior case law and held that a taxpayer's last known address "is that address which appears on the taxpayer's most recently filed return, unless respondent has been given clear and concise notification of a different address." *Abeles*, 91 T.C. at 1035. The Court emphasized that the key analysis is "what respondent knew at the time the statutory notice was issued, and attributing to respondent information which respondent knows, or should know, with respect to a taxpayer's last known address, ***through the use of its computer system***." *Id.* at 1035 [emphasis added].

In explaining why it changed its position, the court reasoned that into the 1970's, the IRS' computer capabilities did not allow agents responsible for issuing SNODs the ability to search files in a reasonable amount of time for most recent taxpayer addresses. However, the Court found that by 1988, "the state of the IRS' computer capabilities is such that a computer search of the information retained with respect to a certain taxpayer, including his or her last known address, may be performed by respondent's agent without unreasonable effort or delay." *Id.* at 1032. By 1988, a search for the taxpayer's most recent address "would take less

than a minute today, [whereas that same task would have taken approximately six weeks in 1972.]" *Id.* at 1033, *quoting Crum* 635 F.2d at 900. Today, that same search would probably only take a few seconds.

In sum, up through and including the time of the *Abeles* opinion in 1988:

(1) the "last known address" was an issue determined solely by the courts, essentially by common law holdings as to particular facts in each case,

(2) the IRS had not promulgated any definition of either "last known address" or how a taxpayer could provide "clear and concise notification of a change of address", and

(3) the courts' determinations changed over time as computer capability of the IRS made it unreasonable to hold that one part of the IRS could ignore what another part of the IRS knew as to the taxpayers' current address.

A lot has changed in the over-30 years since the Tax Court decided *Abeles*. The Internet has come into existence. The IRS now allows and encourages taxpayers to file tax returns and extension requests electronically over the Internet. Since the 1980s, the IRS has created the Centralized Authorization File ("CAF") to keep track of POA information. Furthermore, sometime in the last 20 years, the IRS created the toll-free Practitioner Priority Service to assist holders of POAs making inquiries via telephone about taxpayers who they represent. Finally, computer capability is many orders of magnitude greater today than it was in 1988.

To the extent that computing technology has improved since 1988, Revenue Procedure 2010-16's narrow definitions are antiquated, reverse the arc of case precedent, and ignores technological progress.

The Gregorys do not ask that this Court hold that the last known address is any address of which the IRS becomes aware. For example, the IRS often learns of taxpayer addresses from third parties who submit forms, such as employers who file Forms W-2 showing the taxpayer's address. In their extensive efforts to collect assessed taxes, IRS Collection Division employees often scour Internet databases to find additional addresses of taxpayers. Courts should not treat such addresses as the last known address because the taxpayer never indicated to the IRS that he or she actually resided at those addresses or wished that IRS should send communications there. *U.S. v. Zolla*, 724 F.2d at 810-811 ("information gained by a collector should not necessarily be imputed to the audit agents who mailed the notices of deficiency").

It has long been relevant in the case law whether a taxpayer submitted a new address to the IRS, rather than a third party submitting the address or the IRS finding the address on its own. "In reasonably determining a taxpayer's last known address, the Commissioner is entitled to use those documents submitted to him by the taxpayer." *Brown v. Comm'r*, 78 T.C. 215, 219 (1982) (citations omitted) (taxpayer sent IRS a letter telling the IRS where to communicate with him).

Further, there is no need in this case for this Court to consider the impact of addresses shown by taxpayers on various other forms that might be submitted by taxpayers, such as Forms 4506-T requesting copies of their IRS computerized transcripts.

This case only presents the issue of the impact on last known address on the submission by taxpayers of two particular forms, Form 2848 and 4868, showing one address after their most recent tax return was processed showing a different address. The Gregorys contend only that these two forms' addresses should cause the IRS to reset the last known address because of the importance and nature of the particular forms.

A. The Taxpayer's Address Shown on a Form 2848 Power of Attorney Filed After the Most Recently-Processed Return Should Become the Last Known Address Absent Later Taxpayer Notification to the IRS to Use a Different Address.

The courts have long discussed POAs as important documents in last known address cases. For example, this Court, in *Expanding Envelope & Folder Corp. v. Shotz*, 385 F.2d 402 (3d Cir. 1967), gave weight to the instructions given by the taxpayer in a POA, though the case did not involve the same fact pattern as is involved in the present case. In *Expanding Envelope*, the taxpayers had filed POAs with the IRS, which directed that correspondence should be sent to their representatives. *Id.* at 403-04. These POAs also contained the address of the taxpayers. The Court wrote "when a taxpayer, through a duly executed and filed

power, gives instructions such as those here given, he is in effect giving the Service a last known address for Section 6212 purposes." *Id*. at 404. The Court found that the POA was an explicit indication that the taxpayer desired to receive notice at that address. *Id*. at 403-04.

Thus, the POA was used to alter the last known address from what it otherwise would have been (the taxpayer's address). The logic of this Court's holding could easily be extended to a case where the POA did not direct that original notices be sent to the holder of the POA, but to the taxpayer, where the taxpayer showed their own new address on the POA. If the IRS has to record the representative's address shown on the power and follow instructions in that document, it should also have to put the taxpayer's new address in its systems for access by preparers of SNODs.

In *Johnson v. Comm'r*, 611 F.2d 1015 (5th Cir. 1980), a case that is still controlling case law in the present Fifth and Eleventh Circuits, the Fifth Circuit answered the question presented when it held that a commercial address that the taxpayers showed for themselves on a POA was the last known address of the taxpayers, and that it was incorrect for the IRS to send a SNOD to the taxpayers at the residential address that the taxpayers had shown as their address on the two earlier-submitted tax returns under audit. Important to the Fifth Circuit's ruling was also that IRS personnel had long been working with the representatives named

in the POA. The court wrote:

> To sustain the Commissioner's position would allow him to ignore with impunity his own printed powers of attorney so long as he found some other address that might qualify post hoc as a last known address.

Id. at 1019. Like in the *Johnson* case, the Gregorys were working directly with an IRS revenue agent, Agent Buzzelli. Agent Buzzelli had, in hand, their Form 2848 with the Rutherford address to allow her to deal with their CPA, Mr. Chaffee. Although Agent Buzzelli was using the Form 2848 to communicate with Mr. Chaffee for at least a year, the IRS still mailed the SNOD to the Jersey City address. Judge Buch's opinion in the Gregorys' case does not even mention the *Johnson* opinion nor Agent Buzzelli's personal knowledge of the Rutherford address. However, this Court should adopt the reasoning of its sister Circuit in *Johnson*.

The Tax Court also has already answered the question of whether a new taxpayer address shown on a POA resets the last known address. In two opinions, *Hunter v. Comm'r*, T.C. Memo. 2004-81, and *Downing v. Comm'r*, T.C. Memo. 2007-291 (the latter is also not mentioned in Judge Buch's opinion), taxpayers, in October 1998 and November 2002, respectively, submitted POAs to the IRS on which they set forth new addresses for themselves. The forms directed the IRS to send only copies of pertinent notices to the representatives listed thereon. The Tax Court in both cases held that the address shown on the POA reset the last known

address from that shown on the most recently processed tax return because the Form 2848 information constituted "clear and concise notification of a change of address."

The Gregorys rely, in part, on the standard the Tax Court laid out in *Hunter*, a case in which the taxpayer directed on the POA that copies of documents be sent to his accountant. The *Hunter* court rejected the notion that "a valid change of address notification must use language equivalent to 'please note that this is a change of address.'" *Hunter*, T.C. Memo at *4. Instead, the Court looked to "a more general theme in the case law; namely, that the IRS is chargeable with knowing the information that it has readily available when it sends notices to taxpayer." *Id*. The Court pointed out that actual IRS computing capabilities cannot be ignored in this analysis:

> As courts have repeatedly observed, the steady advance of technology continues to lighten the IRS's burden in searching its own records for current address information. *Union Tex. Intl. Corp. v. Comm'r*, 110 T.C. 321, 334 (1998).

Id. The Court further explained that by voluntarily asking taxpayers to list their address on the POA, and then by using that requested information, the IRS then "bears the burden of conforming [its] actions to the knowledge at [its] disposal." *Id.* at *5. It is therefore reasonable for taxpayers to assume that the address they provided to the IRS will be recorded and used by the IRS.

Furthermore, the Tax Court said in *Downing* (citing *Hunter*), "Upon receiving petitioner's Form 2848 on November 4, 2002, respondent should have known, with the exercise of reasonable diligence, that the address shown on the Form 2848 superseded the Idaho address shown on petitioner's 1999 return, which respondent had received 2 months earlier." This Court should also follow *Hunter* and *Downing* – for the reasons stated therein. *Downing*, T.C. Memo. at *20.

There have been further developments, not mentioned in *Hunter* and *Downing*, that also support requiring the IRS to check addresses shown for taxpayers on Forms 2848 before issuing SNODs – the creation of the IRS Centralized Authorization File ("CAF") system in the 1980s, and, later, the creation of the IRS Practitioner Priority Service ("PPS").[10]

The IRS created the CAF system as a way to keep track of all powers of attorney naming a particular representative so that, if necessary, the IRS could know where to contact that representative with respect to all of the taxpayers who gave a power of attorney to that representative. *See* Amendments to the Statement of Procedural Rules to Provide for the Centralized Authorization File, 47 Fed. Reg. 39676 (Sep. 9, 1982). POAs can be submitted to the IRS in two ways: They can be sent or given to an IRS employee (such as a Revenue Agent), or they can be faxed

[10] For information on the PPS, see https://www.irs.gov/tax-professionals/practitioner-priority-service-r.

or mailed to three centralized CAF Units in Memphis, Philadelphia, and Ogden, Utah. I.R.M. § 21.3.7.1.3.

The IRS allows the representative to send Forms 2848 to a location other than the CAF Unit when dealing directly with an IRS employee, such as in a call to the PPS to seek information concerning a new client. I.R.M. § 21.1.3.3. The PPS is the service line that Mr. Chaffee called on January 17, 2017 to ascertain whether the IRS had already sent a SNOD. (A- 170) In the case of a new client, the PPS employee will not speak to the representative until the employee is in possession of a Form 2848 naming the caller as a representative. *See* I.R.M. § 21.1.3.2.2. The PPS employee will then give the caller a fax number for a fax machine on or near the employee's desk and first ask the caller to fax the Form 2848 to that number. I.R.M. § 21.3.10.3.4. After the IRS employee receives the fax, only then will he or she come back on the line to speak to the caller about the taxpayer's IRS computerized recorded to which the PPS employee has access. *Id.*

In cases where a Form 2848 is already on file in the CAF system, a PPS employee follows a script to make sure that the caller really is the person named on the Form 2848. The PPS employees will not only ask the caller the taxpayer's name and Social Security Number, but will pull up the Form 2848 for review as they conduct the call. I.R.M. §21.1.3.3. Thus, the PPS employee has before him or her on a screen information from the POA including, presumably, the taxpayer's

address as taken from the Form 2848 or otherwise on file. If the caller gives a taxpayer address that is different from the address shown on IRS records, the PPS employee will ask if this is a new address for the taxpayer. Presumably, the PPS employee asks this to update the taxpayer's last known address. This doubtless constitutes clear and concise notification of a new taxpayer last known address.

Considering how the PPS employees can see the taxpayer's address and check it against what is in the IRS computer systems, it is disingenuous for the IRS to argue that it would be difficult to allow other IRS employees to know of an address shown on the Form 2848 and treat it as the last known address. The IRS should simply reprogram its computers or revise its internal instructions, if it needs to. Given the state of computerization in the IRS and the world outside the IRS, it is no longer defensible for the IRS to argue that one part of the IRS should not be required to know what the other part does – at least when the question is the taxpayer's address that the IRS has requested in connection with a Form 2848.

B. The Taxpayer's Address Shown on a Form 4868 Filing Extension Request Filed After the Most Recently-Processed Return Should Become the Last Known Address Absent Later Taxpayer Notification to the IRS to Use a Different Address.

It is odd that when the courts, starting with *Abeles*, changed to holding that the address shown on the most recent return processed was the last known address (absent clear and concise later notice from the taxpayer to use a different address), the courts did not also specifically discuss the impact of a different address shown

on a request for an extension to file an income tax return. However, in *Crum*, the D.C. Circuit noted that several filings showing a new address (ones that the IRS ignored) were relevant to determining the last known address. Among the items were not only the most recently-processed tax return, but a request for an extension of the time to file an income tax return. *Crum* 635 F.2d at 899. An extension request (Form 4868) is preliminary to filing a return. It is therefore illogical that an extension request showing a new address cannot also reset the last known address. Obviously, the IRS could give the extension request without asking for the taxpayer's address, but it does not do that. The IRS specifically asks for an address on the Form 4868 to identify the taxpayer beyond the Social Security Number shown thereon. If there is a conflict between the address shown on the extension request and that shown on the last return, it is nonsensical for the IRS to assume the address used on the prior return is still valid and ignore the conflict.

In the instant case, the taxpayers e-filed a Form 4868 for the taxable year 2015 with the IRS in April 2016 (6 months before the SNOD was issued), and the extension was granted. No doubt the IRS recorded these facts in a transcript of account created by the IRS for the taxpayer for the 2015 taxable year. Just as with the Form 2848, the notification of address provided by the taxpayer at the request of the IRS provides information which the IRS records in its database and which it should use in determining a taxpayer's last known address.

C. The IRS Responded to *Abeles* by Adopting Regulations and a Series of Revenue Procedures

The IRS responded to *Abeles*, first, by acquiescing in its holding. 1989-2 C.B. 1. (An acquiescence means that the IRS will not further contest the issue it lost.) Next, without first employing public notice and comment procedures, the IRS issued Revenue Procedure 90-18, 1990-1 C.B. 491, which for the first time laid down rules what the IRS considered "clear and concise" for purposes of the last known address. *Id*. at §5.04. The Revenue Procedure stated that a subsequently-filed return, for this purpose, does not include a Form 4868 filing extension request. *Id*. at § 5.01(4). It made no reference to Form 2848 or addresses shown thereon.

On November 22, 1999, the Treasury Department published new proposed regulations in the Federal Register under § 6212 to define last known address. REG-104939-99, 64 FR 63768. The main purpose of the proposed regulations was to provide that, henceforward, the IRS would regularly update addresses for taxpayers from data accumulated and maintained in the United States Postal Service (USPS) National Change of Address database. It also explained that "[t]he proposed regulations define last known address consistent with the definition set forth in *Abeles*." *Id*. at 63679.

On January 21, 2001, the Treasury adopted final regulations. T.D. 8939, 66

FR 2817. They differed principally from the proposed regulations in deleting any statement about the timing of updates from the USPS database. Without any explanation in the preamble, and not in response to any public comment, in the final regulation, the Treasury added the following sentence to the end of Proposed Reg. § 301.6212-2(a): "Further information on what constitutes clear and concise notification of a different address and a properly processed Federal tax return can be found in Rev. Proc. 90-18 (1990-1 C.B. 491) or in procedures subsequently prescribed by the Commissioner."

On February 20, 2001, without first employing public notice and comment procedures, the IRS adopted Revenue Procedures 2001-18, 2001-1 C.B. 708, to amplify and supersede Revenue Procedure 90-18. The principal change to this new revenue procedure was to incorporate the use of addresses from the USPS database in determining the last known address. Once again, the new revenue procedure stated that a subsequently-filed return, for the purpose of changing a last known address, does not include a Form 4868 filing extension request. Rev. Proc. 2001-18, § 5.01(4). Again, the new revenue procedure made no reference to Forms 2848 or addresses shown thereon.

On April 17, 2010, without first employing public notice and comment procedures, the IRS adopted Revenue Procedure 2010-16, 2010-1 C.B. 664, to supersede Revenue Procedure 2001-18. The new revenue procedure added

language to exclude Form 2848 from counting as a "return" for purposes of Last Known Address. It retained the language regarding Form 4868 from prior revenue procedures.

II. The Court is not precluded by Judicial Deference to IRS Revenue Procedure 2010-16 from Determining that the Taxpayer's Address Shown in a Form 2848 Power of Attorney or Form 4868 Filing Extension Request Should Become the Last Known Address.

The restriction on using Form 2848 or Form 4868 to report a new address to the IRS does not come from a statute or a Treasury Department regulation. Rather it is a creation of an IRS Revenue Procedure, a document that provides general policy guidance to the public but is not supposed to contain substantive rules with the force of law. Revenue Procedure 2010-16 is therefore not entitled to judicial deference under the framework of *Chevron v. Nat'l Res. Defense Counsel*, 467 U.S. 837 (1984) ("*Chevron*-deference"), nor under that of under *Auer v. Robbins*, 519 U.S. 452 (1997) ("*Auer* – deference"). Furthermore, the lack of reasoning behind Revenue Procedure 2010-16, its lack of consistency with earlier court rulings, its distance in time from the passage of the statute, or even the Treasury regulation, its failure to consider technological advancements in computing technology, and its general unpredictability cause it to lack persuasiveness under the principles of *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

A. The IRS Interpretation of Last Known Address Excluding Form 2848 and 4868 is Derived from Revenue Procedure 2010-16, Not 26.U.S.C. 6212(a) nor Treasury Regulation 301.6212(a).

By statute, the Notice of Deficiency ("SNOD") must be sent by registered or certified mail to the Taxpayer. 26 U.S.C. § 6212(a). The statute states that the SNOD is sufficient if it is "mailed to the taxpayer at his last known address." 26 U.S.C. § 6212 (b). The statute does not define the term "last known address."

Treasury regulation 26 C.F.R. § 301.6212-2 provides the Treasury Department's interpretation of the term "last known address." This regulation is in turn used by the IRS to determine the last known address of taxpayers to whom it wants to send a SNOD. The regulation provides that, with exceptions for updated addresses obtained from the United States Postal Service, the Last Known Address "is the address that appears on the taxpayer's most recently filed and properly processed Federal tax return, *unless*, the Internal Revenue Service (IRS) is given *clear and concise notification* of a different address." §301-6212-2(a) [emphasis added].

The regulation does not define "clear and concise notification," but rather redirects to Revenue Procedure 90-18 "or in procedures subsequently prescribed by the Commissioner." §301-6212-2(a). Revenue Procedure 90-18 and its successor, Revenue Procedure 2001- 18 excluded Form 4868 from the definition of return and from the definition of "clear and concise notification" but did not

exclude Form 2848 from either. However, the most recent guidance, Revenue Procedure 2010-16, states that "…a new address listed on Form 4868, or on a Form 2848, Power of Attorney and Declaration of Representative, will not be used by the Service to update the taxpayer's address of record." Rev. Proc. 2010-16 § 5.01(4) The revenue procedure later states that "clear and concise written notification is a written statement signed by the taxpayer and mailed to an appropriate Service address informing the service that the taxpayer wishes the address of record changed to a new address….this notification must contain the taxpayer's full name and old address as well as the taxpayer's social security number, individual taxpayer identification number, or employer identification number and….must be specific as to a change of address." Rev. Proc. 2010-16 § 5.04(1)(a).

The Gregorys do not dispute that the Forms 2848 and 4868 which they submitted in October and November 2015 respectively do not fit into Revenue Procedure 2010-16's definition of either a return or of "clear and concise notification." Rather they submit that the Revenue Procedure's definition narrowing the scope of what constitutes last known address is at odds with reasonable prior interpretations by the courts and practices by the IRS. It is therefore not entitled to deference under either the *Chevron* nor *Auer* framework of judicial deference to agency interpretation, and it is not persuasive under *Skidmore*.

B. Revenue Procedure 2010-16 is Not Entitled to *Chevron*-deference

Agency rules qualify for *Chevron* level deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *U.S. v. Meade Corp.*, 533 U.S. 218, 226-27 (2001). Rules carrying the force of law are "legislative rules," because they "impose new duties upon the regulated party" and must therefore must be promulgated in accordance with the Administration Procedure Act. *Chao v. Rothermal*, 327 F.3d 223, 228 (3d Cir. 2003).

An IRS revenue procedure is not a rule created through Notice and Comment Rulemaking under the APA. *See* 5. U.S.C. § 553. Rather, revenue procedures are defined by Treasury regulations as "a statement of procedures that affects the rights or duties of taxpayers or other members of the public under the Code and related statues or information that, although not necessarily affecting the rights and duties of the public should be a matter of public knowledge." 26 C.F.R. § 601-601(d)(2)(i)(b). They are not, therefore, "legislative rules" with the "force and effect of law" as, by their very definition, they serve to inform with public without necessarily affecting the rights and duties of the public at large. *See Perez v. Mortgage Bankers Assoc.*, 135 S.Ct. 1199, 1204 (2015).

Instead, revenue procedures are meant to be mere interpretive rules, not subject to Notice & Comment rulemaking under the APA. Interpretive rules merely "advise the public of the agency's construction of the statutes and rules which it administers." *Azar v. Allina Health Servs.*, 139 S.Ct. 1804. (2019). Furthermore, as a revenue procedure's purpose is merely as a statement of procedures, it is more akin to "[a]gency statements contained in opinion letters, policy statements, agency manuals, and enforcement guidelines lack the force of law and 'do not warrant *Chevron* -style deference." *See Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 155 (3d Cir. 2004), *quoting Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

In practice, however, Revenue Procedure 2010-16 purports to create a rule with the "force and effect of law," by strictly limiting the definition of last known address so that taxpayers who fail to comply with its rigid interpretation risk losing their right to receive a SNOD and thereby their right to enter the Tax Court. Because the 90 day deadline to petition the Tax Court after issuance of the SNOD represents the taxpayer's only opportunity for judicial review before the IRS' assessment of the proposed additional tax liabilities, non-receipt of the SNOD has catastrophic consequences for the taxpayer. *See* §6213(a).

By limiting the number of taxpayers that will receive their SNODs in time to petition the Tax Court under the 90-day deadline present in §6213(a), the restricted

scope of what counts as last known address also serves to proscribe the Tax Court's jurisdiction. *Hunter*, T.C. Memo at *2 ("Our jurisdiction to redetermine deficiencies exists only when the Commissioner issues a notice of deficiency and a taxpayer timely files a petition to redetermine that deficiency.") It is, in effect, an impermissible agency attempt to re-write jurisdictional rules for judicial review. *See Smith v. Berryhill*, 139 S.Ct, 1765, 1778 (2019) ("The scope of review, meanwhile, is hardly the kind of question that the Court presumes that Congress implicitly delegated to an Agency.") Giving Revenue Procedure 2010-16 the deference owed to true legislative rules would therefore allow the IRS to create laws by fiat, bypassing the safeguards in the APA. *See Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 186 (3d Cir. 2000) ("To grant Chevron deference to informal agency interpretations would unduly validate the results of an informal process.")

The Department of the Treasury itself categorizes revenue procedures as "Subregulatory Guidance Documents," whose purpose is "to provide taxpayers the certainty required to make informed decisions about their tax obligations." U.S. Dep't of Treasury, Policy Statement on the Tax Regulatory Process (2019), https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process.pdf . It concedes that "[s]uch guidance cannot and should not, however, be used to modify existing legislative rules or create new legislative

rules." *Id.* As a result, the Treasury Department has made it policy that the IRS "will not seek judicial deference under *Auer* or *Chevron*, to interpretations set forth only in subregulatory guidance." *Id*.

C. Revenue Procedure 2010-16 is Not Entitled to *Auer* – deference.

Even without the Treasury Department's policy of not seeking *Auer* or *Chevron* deference, Revenue Procedure 2010-16 is still not due deference under *Auer* as an agency interpretation of its own regulation. Although the term "clear and concise notification" appears first in the agency regulation § 301.6212(a), and not in the language of the statute, 6212(a), referring to current and future revenue procedures for a definition of "clear and concise" is not "a reasonable interpretation of the regulations it has put in force" because, worse than being "plainly erroneous," it is in effect an open-ended blank check to the agency to keep shifting the definition and requirements without warning. *See Fedex Corp. v. Holowecki*, 552 U.S. 389, 397 (2008).

By leaving open the possibility that a future revenue procedure can, suddenly and without warning, pronounce new definitions of last known address, the IRS undermines "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires." *Christopher vs. SmithKline Beechum Corp.*, 567 U.S. 142, 156 (2012). Furthermore, there is the presumption that an agency can interpret its own rules is rebuttable when it fails to

anticipate changes, for example, or when a lot of time has passed between the issuance of the rule and it interpretation, especially if that interpretation is different from what has come before. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2412 (2019). This should be especially true in matters governed by technology.

Under *Kisor*, *Auer*- deference is only appropriate when a 5-prong threshold test is met. Courts should look to (1) whether there is a genuine ambiguity in the regulation, (2) whether the agency construction is reasonable, (3) what is the "character and context" of the agency interpretation, (4) whether the interpretation is within the agency's substantive expertise, and (5) whether the interpretation reflects the agency's "fair and considered judgment." *Id.* at 2415-18. Revenue Procedure 2010-16 does not pass this threshold test.

That Revenue-Procedure 2010-16 does not meet the 5-prong *Kisor*-threshold can be shown by contrasting it with the Federal Reserve Board Staff Interpretation that this Court recently found did deserve *Auer*-deference after an analysis under *Kisor*. *See Wolfington v. Reconstructive Orthopaedic Assocs.*, 935 F.3d 187 (3d. Cir 2019). In *Wolfington*, the Plaintiff alleged that a medical center had entered into a consumer finance agreement with him which would subject the medical office to the disclosure requirements under Regulation Z, which interprets provisions in the Truth in Lending Act. *Id.* at 192-193. Under Regulation Z, the parties must have entered into a "written agreement' for the requirements to apply.

Id. at 195. The term "written agreement" is further defined in a Federal Reserve Board Staff Interpretation, which this Court analyzed under *Kisor's* five factors.

First, the *Wolfington* Court found that the term "written agreement" was genuinely ambiguous because it cannot be interpreted without looking to state law and to contract principles, and so "[i]n light of those conflicting principles—the plain text of the regulation and the background of state law—the term "written agreement" is ambiguous." *Id.* at 205. In the instant case, however, there are no conflicting principles of interpretation, the interpretation is straightforward. Clear and concise notice simply means the taxpayer informed the IRS of their new address. In holding that a taxpayer putting his address on a Form 2848 was clear and concise notification of an address, the Tax Court stated in *Hunter*, a case decided three years after Treasury Regulation §301.6212(a) went into effect, that the fact that the IRS requests taxpayer address information on a Form 2848 "is not mere surplusage" and implies that the IRS "will actually incorporate information used on the form into its databases." *Hunter*, T.C. Memo at *4.

Second, the Court in *Wolfington* found the Federal Reserve Staff Interpretation reasonable because it resolved the genuine ambiguity between the regulation and applicable state law. *Id.* at 205-206. Again, in the instant case, there is no such ambiguity to resolve. The Form 2848 and Form 4868 the Gregorys submitted were by all reasonable interpretations clear and concise notice to the IRS

that their address had changed. To hold otherwise in deference to the revenue procedure's definition would allow the IRS to ignore what it obviously knows and thereby penalize taxpayers "because the tax collector neglects to tell his right hand what his left hand is doing." *Crum* 635 F2d at 900.

Third, the *Wolfington* Court found that the Federal Reserve Staff Interpretation met *Kisor*'s "character and context" prong because it *was published in the Federal Register*, and because the interpretation was re-affirmed after the agency made amendments to Regulation Z and was adopted by another agency, the Consumer Financial Protection Bureau. *Wolfington,* 935 F.3d at 206. In contrast, a revenue procedure is not published in the Federal Register, does not "modify existing legislative rules or create new legislative rules" (*See* Treasury Department Policy Statement, *supra*), and can be changed without notice at any time. Revenue Procedure 2010-16, in particular, also fails to follow court prior decisions and administrative pronouncements without providing any reasoning for why it does so.

Fourth, the *Wolfington* Court found the Federal Reserve Board Staff Interpretation to be within the agencies' substantive expertise. *Wolfington,* 935 F.3d at 206. That finding makes sense in dealing with the Federal Reserve Board's definition of what constitutes a written agreement for purposes of extending consumer financing and reconciling that definition with state contract laws. The

revenue procedure at issue here is not about a substantive area of tax law, but rather about how the IRS learns where someone moved. There is nothing substantive at issue. The IRS' interpretation in the revenue procedure is therefore more about what it finds convenient for itself rather than about conforming to the spirit of the law or in upholding taxpayers' right under the law.

Finally, this Court found that the Federal Reserve Board Staff Interpretation in *Wolfington* reflected the agency's "fair and considered judgment" because it had been enforced by two agencies over a forty year period. *Id.* In contrast, Revenue Procedure 2010-16 appeared nine years after the most recent promulgation of the Treasury Regulation, defied decades of tax court interpretation and agency practice, and has been in effect for just nine years. Furthermore, it can be unilaterally changed at any time without any notice requirements to taxpayers. It therefore carries no weight under this factor.

In short, it was simply not within the IRS' proper authority to so narrow the definition of last known address as to exclude taxpayers who had notified the IRS of their most recent address through forms 2848 nor 4868 from receiving and exercising the rights contained in the SNOD. The revenue procedure does not meet the *Kisor* threshold and therefore is not entitled to *Auer*-deference.

D. Revenue Procedure 2010-16 is Not Persuasive under *Skidmore.*

There remains the possibility Revenue Procedure 2010-16 is persuasive according to the reasonableness of the agency's interpretation under *Skidmore*. *See U.S. v. Meade Corp.*, 533 US 218 (2001). The interpretation would be "entitled to respect only to the extent it has the power to persuade." *Gonzalez v. Or.*, 546 U.S. 243, 256 (2006). The weight given to the agency interpretation under *Skidmore* is dependent on the agency's "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140.

Several courts have suggested that revenue procedures in general are not even entitled to *Skidmore* review in the first place. Courts have denied that a revenue procedure is entitled to *Skidmore* review when it "sets forth no reasoning in support of its conclusion." *Exxon Mobil Corp. & Affiliated Cos. v. Comm'r*, 689 F.3d 191, 200 (2d Cir. 2012), *see also Corbalis v. Comm'r*, 142 T.C. 46, 54 (2014). Without publicly available reasoning for the agency's decision, *Skidmore* review becomes impaired because the assessment of the agency's thoroughness and valid reasoning is vital to assigning the "weight" to be given the agency's judgment. *See Hagans v. Comm'r of Soc. Sec*, 694 F.3d 287, 304 (3d Cir. 2012). This is especially true where, without explanation, a revenue procedure seeks to roll back prior case law and administrative pronouncements.

Revenue Procedure 2010-16 does not contain a preamble explaining the IRS reasoning and, because it is not a legislative rule, it is not accompanied by a public history of Notice and Comment. We are left to guess as to its logic. As the United States Court of Appeals for the Federal Circuit pointed out in declining to grant deference to a revenue procedure under *Skidmore,* the Revenue Procedure it was reviewing (Rev. Proc. 99-43), contained "no analysis of text or legislative history or any other relevant interpretive guidance." *Fed. Nat'l Mortg. Assoc. v. U.S.*, 379 F.3d. 1303, 1309 (Fed. Cir. 2004) (rejecting the IRS argument that revenue procedures are entitled to *Chevron* deference because they are promulgated with a comparable degree of formality to regulations). In that case, the revenue procedure was not found persuasive under *Skidmore* because it set forth no reasoning in support of its conclusion. *Id*. If there is no logic for its rules set forth in the revenue procedure, then the IRS has presented no reasoning that might have the power to persuade and further analysis under *Skidmore* is made impractical.

However, even if the respect to agency action under *Skidmore* review is granted to Revenue Procedure 2010-16, the revenue procedure still fails to be persuasive. The most important considerations in applying Skidmore are "whether the agency's interpretation is consistent and contemporaneous with other pronouncements of the agency and whether it is reasonable given the language and purpose of the Act." *Hagans* 694 F.3d at 304 (citations omitted). Revenue

Procedure 2010-16 should fail *Skidmore* review because it was not contemporaneous with the statute it purports to interpret and because it is an unreasonable implementation of the statute itself given not only prior case law but also continued advances in computer technology.

1. Revenue Procedure 2010-16 was not contemporaneous with the statute

This Court views *Skidmore* deference as a sliding scale test. *Hagans* 694 F.3d at 304. More deference is granted under that sliding scale test "when the agency's interpretation is 'issued contemporaneous[ly] with a statute."*Id., quoting Madison v. Res. For Human Dev.*, 233 F.3d 175, 187 (3d Cir. 2000). The statute at issue, § 6212(a) of the Internal Revenue Code, became effective in 1926. Pub. L. No. 20, ch. 27, § 281(d). Revenue Procedure 2010-16 later became effective on June 1, 2010. Rev. Proc. 2010-16, 2010-19 I.R.B. 664 (2010). An 84-year gap cannot be said to be a contemporaneous interpretation.

Furthermore, the IRS cannot now try to provide post-hoc reasoning for the Revenue Procedure 2010-16. The point of *Skidmore* review is to grant limited respect to the policy analysis that was already made public at the time of promulgation. *See Skidmore v. Swift,* 323 U.S. 134, 140 (1944). "In applying the *Skidmore* test, the Supreme Court has noted that agency interpretations issued contemporaneous with a statute are entitled to greater deference." *Madison*, 233

F.3d at 187. It is therefore no argument that Revenue Procedure 2010-16 simply flows from the open-ended language in § 301.6212-2 referring to future procedures. That interpretation itself is unreasonable as it would leave the IRS a blank check to continually revise the manner in which taxpayers must report changes of address.

Other circuit courts have similarly observed that a lack of "settled agency interpretations of long vintage" supporting revenue procedures, particularly when those procedures were not "highly contemporaneous" with the regulation, weighed against granting deference to them. *Fed. Nat'l Mortg. Assoc. v. U.S.*, 379 F.3d at 1307, *see also Exxon Mobil Corp. & Affiliated Cos.* 689 F.3d at 200-201 (agreeing with other circuits that an IRS interpretation is particularly unreliable when it is a post-enactment explanation).

Additionally, Revenue Procedure 2010-16 conflicts with its broader allowance of last known address in the two revenue procedures which did not exclude the use of Form 2848. The IRS has also been inconsistent over the years, when, even at times when computing technology was still primitive, arguing that a Form 2848 was valid notification of last known address when the facts suited its claims. *See, e.g. Rizzo v. Davis,* 43 AFTR 2d 985 (W.D.Pa. 1979). Therefore, Revenue Procedure 2010-16 is inconsistent, which, according to this court, "militate[s] against affording deference." *Mercy Catholic Med. Ctr. v. Thompson,*

380 F.3d 142, 155 (3d Cir. 2004), *see also Mazza v. Sec'y of Dep't of Health & Human Servs.*, 903 F.2d 953, 959 (3d Cir. 1990) (Courts do not accept a revision in administrative interpretation when it "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute"). As discussed in Section I, *supra*, Revenue Procedure 2010-16 is also inconsistent with prior case law, in that it limits, rather than expands, the inclusion of avenues by which taxpayers can provide notice of their last known address, despite the increasing benefits of technology provides in finding and using this information.

2. Revenue Procedure 2010-16 is not reasonable, given the language and purpose of the statute

Revenue Procedure 2010-16 provides no reasoning for its decision to exclude POAs or Forms 4868 as a means of communicating last known address. Not only is there no reasoning in the text of the procedure, there is no reasoning to support it that is publicly available at all. If there is no reasoning provided, it cannot be said to have provided persuasive reasoning. As the First Circuit observed, the validity of an agency's reasoning turns on "whether the agency has consulted appropriate sources, employed sensible heuristic tools, and adequately substantiated its ultimate conclusion." *Doe v. Leavitt*, 552 F.3d 75, 82 (1st Cir. 2009). Here, the IRS provided no rationale for the change promulgated in the

revenue procedure, neither in the procedure itself nor in any other public forum. No reasoning is by definition not persuasive or thoroughly considered reasoning.

Furthermore, reasoned policy analysis leads to the opposite conclusion. It is reasonable that the IRS should take on the minimal burden of using a search engine to search for forms with updated addresses, before sending a SNOD. With modern computing, this should be expedient, and discrepancies can be addressed at low cost by sending notice to more than one address.

There is also an element of unfair surprise in Revenue Procedure 2010-16. There is also a "long-standing rule of statutory construction" applied to the revenue procedure, that doubt should be resolved "against the government and in favor of the taxpayer." *Fed. Nat'l Mortg. Assoc. v. U.S.*, 379 F.3d at 1307 (quotations omitted). If there is any doubt as to the reasonableness of interpretation, the rule of construction in favor of the taxpayer should apply to this case. As this Court has observed, "an interpretation that is arguably unreasonable is not sufficiently persuasive to warrant *Skidmore* deference." *George Harms Const. Co. v. Chao*, 371 F.3d. 156, 162 (3d Cir. 2004). The lay taxpayer cannot be expected to have mastery over tax law and IRS procedure as the IRS does.

The taxpayer's lack of expertise relative to the IRS, and the ability of the IRS to cheaply and effectively preempt the problem by running a simple computer

search, coupled with the IRS' complete lack of reasoning provided, makes the IRS' position unpersuasive and therefore undeserving of judicial deference.

CONCLUSION

For the reasons stated above, this Court should reverse the Tax Court and dismiss the Tax Court case for lack of jurisdiction on the ground that the SNOD was invalid.

Respectfully submitted,

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COMBINED CERTIFICATIONS OF COMPLIANCE

1. All counsel for Appellant are members of the bar of the United States Court of Appeals for the Third Circuit.

2. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 11,895 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

3. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

4. A copy of this brief and Volumes I & II or the Appendix, were hereby served upon Janet Bradley, counsel for Appellee, Internal Revenue Service, by electronic service using the Court's ECF service on November 20, 2019.

5. Pursuant to Third Circuit Local Appellate Rule 31.1(c), the text of the electronic brief is identical to the text in the paper copies.

6. Pursuant to Third Circuit Local Appellate Rule 31.1(c), a virus detection program was run on the electronic version of this brief, and its attachments, using Symantec Endpoint Protection Cloud, version

22.11.2.7, and using Kaspersky Virus Desk, and that no virus was detected.

I hereby certify that all of the above is true and accurate.

Dated: November 20, 2019

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