

No. 19-2229

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAMIAN K. and SHAYLA A. GREGORY,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE ORDER OF
THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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GLOSSARY

Code or I.R.C.	Internal Revenue Code (26 U.S.C.)
Commissioner-Appellee	Commissioner of Internal Revenue
CPA-POA	Michael J. Chaffee
IRM	Internal Revenue Manual
IRS	Internal Revenue Service
NCOA	National Change of Address
Rev. Proc.	Revenue Procedure
Secretary	Secretary of Treasury
Taxpayers-Appellants	Damian K. and Shayla A. Gregory
Treas. Reg.	Treasury Regulation (26 C.F.R.)
USPS	United States Postal Service

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**ON APPEAL FROM THE ORDER OF
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BRIEF FOR THE APPELLEE

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

On October 13, 2016, the Commissioner sent a joint notice of deficiency, pursuant to I.R.C. 6212(a), by certified mail to Damian K. and Shayla A. Gregory (taxpayers) determining deficiencies and additions to tax for their 2013 and 2014 tax years. (JA 94.)¹ The notice was mailed to 7 Surry Court, Jersey City, New Jersey 07305-5504 (“Jersey City address”). (*Id.*) Where, as here, a notice of deficiency is

¹ “JA” references are to the parties’ joint appendix.

mailed to an address within the United States, a taxpayer has 90-days after the mailing of the notice in which to file a petition in the Tax Court challenging the deficiency. I.R.C. § 6213(a). On January 23, 2017, 102 days after the mailing of the deficiency, the Tax Court received and filed taxpayers' petition for redetermination. (JA 1.) As discussed in detail herein, the petition was filed too late to invoke the Tax Court's subject matter jurisdiction. *See Garrett v. Commissioner*, __ F. App'x __, 2019 WL 6896695, at **1-2 (3d Cir. 2019).

On March 14, 2019, the Tax Court (Judge Ronald L. Buch), pursuant to its opinion, reported at 152 T.C. No. 2, 2019 WL 1222736, entered an order of dismissal for lack of jurisdiction. (JA 230-311.) I.R.C. § 6213(a). That order was a final appealable order that disposed of all claims of all parties. *See* I.R.C. § 7459(d). On May 28, 2019, within 90 days of the order of dismissal, taxpayers filed a notice of appeal. (JA 34-35.) Taxpayers' appeal is timely pursuant to I.R.C. § 7483 and Fed. R. App. P. 13(a). This Court's jurisdiction rests on I.R.C. § 7482(a)(1).

STATEMENT OF THE ISSUE

Whether the Tax Court correctly found that taxpayers failed to give the IRS “clear and concise notification” that they changed their “last known address” from the Jersey City address shown on their 2014 return, and, accordingly, because the notice of deficiency was mailed to that address, correctly held that the notice of deficiency was valid and that it lacked jurisdiction under I.R.C. § 6213(a) over their untimely petition.

STATEMENT OF RELATED CASES AND PROCEEDINGS

No appeal in (or from) the same civil action has been before this or any other appellate court. We are not aware of any case pending in this or any other court that will directly affect this Court's decision in this case.

STATEMENT OF THE CASE

On October 13, 2016, the Commissioner sent taxpayers a joint notice of deficiency for their 2013 and 2014 tax years to the Jersey City address they had used on their most recently filed 2014 Federal income tax return. (JA 61.) On January 23, 2017, 102 days later, the Tax Court received and filed taxpayers’ petition challenging the notice of deficiency. (JA 1.) The Commissioner moved to dismiss for lack of

jurisdiction because the petition was not timely filed within 90 days of the notice of deficiency. (JA 39-43; 88-92, 194-216.) The Commissioner argued that the IRS had properly mailed the notice of deficiency to taxpayers' last known address, as required by I.R.C. § 6212(b), and that they had failed to provide "clear and concise notification" to the IRS that their address had changed. (JA 212-13; *see* JA 40, 89-90.)

Taxpayers opposed the motion (JA 45-60, 74-82, 86-87, 128-134, 216-227), and cross-moved to dismiss their petition (JA 187-88, 228-29).

They alleged that they had not received the notice of deficiency and that, subsequent to filing their 2014 return, their CPA had provided the IRS with clear and concise notice of a new address by filing two IRS forms (even though the forms and instructions specified that they cannot be used to change a taxpayer's address). Taxpayers argued that, because the IRS failed to send the deficiency notice to the new address, the notice was invalid and the Tax Court lacked jurisdiction over their petition. (JA 187-88, 221-26.)

The Tax Court determined that taxpayers failed to provide the IRS with clear and concise notice of an address change, and, consequently, that the IRS had properly mailed a valid notice of

deficiency to their last known address. (JA 27-32.) The court entered an order granting the Commissioner's motion, denying taxpayers' motion, and dismissing the case for lack of jurisdiction. (JA 231.)

A. Taxpayers' 2014 Federal income tax return

Taxpayers' 2014 income tax return, which was prepared by their CPA, Michael J. Chaffee, and e-filed on October 15, 2015, reported their address as 7 Surry Court, Jersey City, New Jersey. (JA 90, 109, 135, 174; *see* JA 22, 25.) At the trial below, Mr. Chaffee testified that this was a mistake. (JA 174.) Four months earlier, before the 2014 return was filed, taxpayers had moved from their Jersey City address to 11 Insley Avenue, Rutherford, New Jersey 07070-1811 ("Rutherford address"). (JA 135, ¶4; JA 162.) Taxpayers, however, did not notify the IRS of their new address by submitting an IRS Form 8822 (Change of Address). (JA 180.) There also is no indication that taxpayers notified the United States Postal Service ("USPS") of any address change, which would have been retained in its National Change of Address ("NCOA") database and which the IRS could access.² (*See* JA 208, 217-28.) *See*

² The USPS web-page instructs patrons to change their address either on-line or by submitting USPS Form 3575 at their local post

Treas. Reg. 301.6212-2(b)(2); *see also*

https://en.wikipedia.org/wiki/National_Change_Of_Address.

On November 24, 2015, six weeks after he filed taxpayers' 2014 return, Mr. Chaffee sent to the IRS a Form 2848 (Power of Attorney and Declaration of Representative) for each taxpayer to IRS Revenue Agent Lauren Buzzelli, who was then auditing taxpayers' 2013 return.

(JA 130, 135-41.) Mr. Chaffee identified his address as 120 Loder Circle, Suite 100, Lansing, MI 48911-3724 ("Lansing address").

(JA 138, 140, 172.) The Forms 2848 listed taxpayers' address as the Rutherford address. (JA 138.) The top of the Form 2848 provides a "Caution" that the "Form 2848 will not be honored for any purpose other than representation before the IRS." (*Id.*) Also, the instructions to Form 2848 warned that "[a]ddress information provided on Form 2848 will not change your last known address with the IRS. To change your last known address, use Form 8822 Change of Address, for your home address" (See <https://www.irs.gov/pub/irs-prior/i2848-2014.pdf>; JA 27.)

office. See <https://www.usa.gov/post-office>. The web-page also instructs patrons to change their address with the IRS. *Id.*

On April 18, 2016, Mr. Chaffee e-filed with the IRS a Form 4868 (Application for Automatic Extension of Time to File U.S. Individual Income Tax Return) to extend the deadline for filing taxpayers' 2015 income tax return. (JA 136-37, 152, 185.) The form identified taxpayers' address as the Rutherford address. (JA 152.) The instructions to the Form 4868 advised that "If you changed your mailing address after you filed your last return, you should use Form 8822, Change of Address, to notify the IRS of the change. Showing a new address on Form 4868 will not update your record." (*See <https://www.irs.gov/pub/irs-prior/f4868--2015.pdf>; JA 27-28.*)

On April 21, 2016, the Revenue Agent sent taxpayers a notice to their Jersey City address that their 2014 return was also selected for examination, and, on May 16, 2016, she requested that Mr. Chaffee provide additional substantiation for the deductions that taxpayers had claimed for both 2013 and 2014. (JA 3, 17, 172.)

B. The notice of deficiency and taxpayers' petition to the Tax Court

On October 13, 2016, the IRS sent by certified mail a joint notice of deficiency to taxpayers' Jersey City address determining deficiencies for the 2013 and 2014 years of \$58,167 and \$46,639, respectively. (JA

93-104; *see* JA 168.) On the same date, the Commissioner also sent a copy of the deficiency notice to Mr. Chaffee at his Lansing address. (JA 98, 127, 178, 213-24.) The deficiencies principally resulted from the Commissioner's disallowance of taxpayers' claimed business deductions of \$233,150 for 2013 and \$206,301 for 2014 for lack of substantiation. (JA 101-04.) The notice also determined that taxpayers were liable for accuracy-related penalties of \$11,633.40 for 2013 and \$9,327.80 for 2014, pursuant to I.R.C. § 6662. (JA 97, 100.) The notice advised taxpayers that they had 90 days to file a timely petition in the Tax Court and it stated that the last day to file a petition was January 11, 2017. (JA 94.) On November 11, 2016, the USPS marked the notice "Return to Sender/Unclaimed/Unable to Forward." (JA 105, 107-08; *see* JA 22.)

In the interim, on October 18, 2016, five days after the notice of deficiency was sent, Mr. Chaffee filed taxpayers' 2015 return, which used their Rutherford address. (JA 90, 132, 137; JA 153; *see* JA 22.)

On January 17, 2017, 96-days after the notice of deficiency was mailed, taxpayers became aware of it and they mailed a petition to the Tax Court contesting the deficiency determination. (JA 1-18; *see* JA 22.)

Taxpayers claimed that the “IRS capriciously and without warning or cause issued a notice of deficiency” that disallowed their claimed deductions. (JA 2.) The Tax Court received and filed their petition on January 23, 2017. (JA 1.)

C. The dispositive motions

The Commissioner moved to dismiss taxpayers’ petition for lack of jurisdiction because it was not timely filed within 90 days after the notice of deficiency. (JA 39-43; 88-92; *see* JA 194-216.) The Commissioner argued that the deficiency notice was properly sent to taxpayers’ last known address because the Jersey City address was used on their most recently filed 2014 return and they had not provided the IRS with “clear and concise notification” of a different address. (JA 41, 90, 197-213; *see* JA 212-13.)

Taxpayers opposed the Commissioner’s motion. They argued that the Tax Court lacked jurisdiction over their petition because the deficiency notice was not sent to their last known address and they had not received it. (JA 57-59, 74-82, 86-87, 128-134; *see* JA 187, 216-227.) Taxpayers asserted that they had rebutted the presumption that the Jersey City address was their last known address because they had

given the IRS “clear and concise notification” of their Rutherford address on Forms 2848 on November 24, 2015 (JA 129-332, 138, 140, 221-23), and Form 4868 on April 18, 2016 (JA 131, 141, 222).

D. The Tax Court hearing on March 19, 2017

At the hearing on the cross-motions (JA 156-93), the Tax Court, *sua sponte*, raised the question of “whether the IRS is correct to rely on Revenue Procedure 2010-16 [applicable to the 2013 and 2014 tax years]; and whether that revenue procedure – how much deference the Court owes to that revenue procedure, in light of its previous case law.” (JA 191; *see* JA 169.) The court directed the parties to address that question in supplemental filings. (JA 155, 191.)

The sole witness at the hearing was Mr. Chaffee. He admitted that he “did not” file an IRS change-of-address Form 8822 with the IRS. (JA 180.) Mr. Chaffee also admitted that he did not “prepare or instruct [taxpayers] to prepare a signed, written statement with their full name, their old address, their new address, their Social Security number, and . . . have them mail it to the address where they filed their last tax return.” (JA 181; *see* JA 183.) Mr. Chaffee testified that “well before” October 13, 2016, he told the Revenue Agent about taxpayers’ “address

update.” (JA 184-85.) Despite testifying that he kept contemporaneous written notes of all of his meetings with revenue agents, Mr. Chaffee stated that he “d[id]n’t have that with [him]” at the hearing. (JA 186.)

E. The parties’ supplemental pleadings

In order to address the Tax Court’s question of deference to Rev. Proc. 2010-16, 2010-19 I.R.B. 664, the Commissioner asserted that in 2001, the Secretary promulgated Treas. Reg. § 301.6212-2, which, consistent with existing case law, defines last known address as the one “that appears on the taxpayer’s most recently filed and properly processed Federal tax return, unless the [IRS] is given clear and concise notification of a different address.’” (JA 197-200.)

The Commissioner argued that the regulation provides that “[f]urther 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.” (JA 201-03; *see* Rev. Proc. 90-18, 1990-1-C.B. 491, amplified and superseded by Rev. Proc. 2001-18, § 5.01(4), 2001-8 I.R.B. 708, superseded by Rev. Proc. 2010-16, § 5.01(4), 2010-19 I.R.B. 664). The Commissioner asserted

that the applicable “procedures” in Rev. Proc. 2010-16, § 5.01(4) (effective June 1, 2010) specify that the definition of return “does not include applications of extension of time to file a return.” (JA 202.) The Commissioner noted that the revenue procedure further provides that “a new address listed on Form 4868, Application for Automatic Extension of time to File . . . Return, will not be used by the [IRS] to update the taxpayer’s address of record.” (JA 202; *see also* Rev. Proc. 90-18 and 2001-18, § 5.01(4).) And the Commissioner noted that Rev. Proc. 2010-16 added a provision providing that a Form 2848, Power of Attorney, “will not be used by the [IRS] to update the taxpayer’s address of record.” (JA 202.) Accordingly, the Commissioner argued that the Tax Court was not bound by its earlier decisions indicating that a Form 2848 was sufficient notice of an address change, because they involved tax years preceding Treas. Reg. § 301.6212-2. (JA 203-07, citing, *inter alia*, *Hunter v. Commissioner*, T.C. Memo. 2004-81, 2004 WL 564839.)

The Commissioner argued that the Tax Court should give Rev. Proc. 2010-16 the deference articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and *United States v. Mead Corp.*, 533 U.S. 218 (2001),

and conclude that its definition of clear and concise notice of a change of address is persuasive because its authority specifically derives from Treas. Reg. § 301.6212-2. (JA 204-05, 211) The Commissioner asserted that the revenue procedure's exclusion of Forms 2848 and 4868 to change a taxpayer's address was reasonable because those forms have other specific purposes, and the IRS has otherwise provided specific and reasonable guidance in its procedures and on its website as to how taxpayers can easily change their address. (JA 205-08.) The Commissioner additionally observed that Treas. Reg. § 301.6212-2(b)(1) specifically provides that an address obtained from third parties does not constitute clear and concise notification. (JA 208.)

In sum, the Commissioner argued that neither Form 2848 nor Form 4868 provided the IRS with clear and concise notice that taxpayers had changed their address from the Jersey City address used on their 2014 return. (JA 201-13.) Because the notice of deficiency was properly mailed to taxpayers' last known address, the Commissioner argued that it was valid even though taxpayers had not received it, and, accordingly, that the Tax Court lacked jurisdiction over their untimely petition. (JA 209-10.)

In response, taxpayers did not contest the Commissioner's argument that Treas. Reg. § 301.6212 and Rev. Proc. 2010-16, § 5.01(4) were entitled to deference. (See JA 216-26.) Instead, they argued their "right not to be deprived of property without Due Process of Law . . . [wa]s the issue before the Court." (JA 217-19.) Taxpayers argued that the IRS failed, as required by Treas. Reg. § 301.6212-2(b)(3), to exercise "reasonable care and diligence" ascertaining their correct address given that the certified mailing of the deficiency notice to the Jersey City address was returned as unclaimed, and Mr. Chaffee had submitted Forms 2848 and 4868 using the Rutherford address. (JA 221-24, 226.)

Taxpayers argued that the Commissioner's reliance on Rev. Pro. 2016-16, § 5.01(4) to argue that the term "return" does not include applications for extensions of time to file a return or powers of attorney was "inapposite" because it "did not involve a Revenue Agent assigned to examine the taxpayer's tax returns, who acquired personal knowledge of the taxpayer's new address." (JA 224-25.) In addition, taxpayers argued that the revenue procedure was "at variance" with the Tax Court's decision in *Hunter*. (JA 224.) Finally, they argued that Rev. Proc. 2010-16 was a "self-serving pronouncement" which "cannot

possibly overcome the Due Process Clause of the Fifth Amendment to the United States Constitution, or judicial precedent.” (JA 225.)

Taxpayers concluded that the deficiency notice was invalid because it was not mailed to their last known address, and, therefore it did not trigger the 90-day period to file a Tax Court petition. (JA 226.)

Thereafter, taxpayers filed a “motion to dismiss notice of deficiency” on the ground that the notice of deficiency was not mailed to their last known address such that it “violates [I.R.C.] Section 6212(b)(1), and the Due Process Clause . . .” (JA 228.)

F. The Tax Court’s opinion and order of dismissal

The Tax Court granted the Commissioner’s motion to dismiss. (JA 19-33.) The court held, citing Treas. Reg. § 301.6212-2(a), that a taxpayer’s last known address is “the address that appears on the taxpayer’s most recently filed and properly processed Federal tax return, unless the . . . IRS is given clear and concise notification of a different address.” (JA 24.) The court observed that “[n]ot every document submitted to the Commissioner is a return” for purposes of giving the IRS clear and concise notification of a different address. (JA 25.) The court determined that taxpayers’ most recently filed and

properly processed return before the Commissioner mailed the deficiency notice was their 2014 return showing their Jersey City address. (JA 25.) The court held that neither Form 2848 nor Form 4868 constituted a return because they did “not provide any data necessary for calculation” of their tax liability. (JA 25-26.) Further, the court held that Rev. Proc. 2010-16, “explicitly states . . . that Forms 2848 and 4868 [we]re not” returns. (JA 26.)

The Tax Court rejected taxpayers’ argument that they had given the IRS clear and concise notice of a different address by submitting Forms 2848 and 4868 because those forms and/or their instructions, expressly warned them that they could not be used to update their address. (JA 27.) Moreover, the court noted that the instructions to Form 4868 specifically advised taxpayer that if they “changed [their] mailing address after you filed your last return, you should use Form 8822, Change of Address, to notify the IRS of the change.” (JA 27-28.) The Tax Court observed that its “conclusion based on the plain text of the forms and instructions [wa]s consistent with the Commissioner’s guidance” in Rev. Proc. 2010-16, which was “explicit that Form 2848 and 4868 are not clear and concise notice.” (JA 28.) Thus, the court did

not rest its decision on any doctrine of judicial deference. It reached its conclusion based on the Forms 2868 and 4868, and their instructions, and simply observed that its conclusion was consistent with the guidance set forth in the revenue procedure. The court determined that because the forms do not purport to inform the IRS of a change to a taxpayer's address, and they do not contain a taxpayer's old address, they are not clear and concise notification of an address change.

(JA 29.)

The Tax Court held that its older cases, such as *Hunter*, addressing an earlier version of Form 2848, did “not help” taxpayers for several reasons. First, the court noted that *Hunter* was decided prior to the effective date of the Treasury Regulation. (JA 29.) Second, the court observed that Rev. Proc. 2001-18, which was applicable in *Hunter*, had not yet been superseded by Rev. Proc. 2010-16. (JA 30.) Third, and “most notably,” the court found that the caution on the Forms 2848 that “expressly state that they will not be honored for any purpose other than representation before the IRS” was not present in the earlier Form 2848 at issue in *Hunter* and the instructions to that earlier form were silent regarding a taxpayer's last known address. (JA 30-31.)

Accordingly, the court concluded that that the assumptions in *Hunter* were “no longer reasonable” because “[s]ince 2004 the Commissioner has issued clear guidance informing taxpayers of what actions will and will not change their last known address.” (JA 29.)

Further, the Tax Court distinguished this Court’s decision in *Expanding Envelope & Folder Corp. v. Shotz*, 385 F.2d 402 (3d Cir. 1967), which held that the taxpayers had changed their last known address to that of their power-of-attorney, on the ground that that case involved an “even older version of Form 2848” than was at issue in *Hunter*. That earlier form, like the form in *Hunter*, “did not explicitly disavow its use as a change of address form.” (JA 31.)

In sum, the Tax Court determined that taxpayers “did not provide the Commissioner with clear and concise notification of a different address,” and that “the Jersey City address used on their most recently filed and properly processed return was their last known address.” (JA 32.) Accordingly, the court held that the Commissioner sent a valid notice of deficiency to that address, and that it lacked jurisdiction over taxpayer’s untimely petition. (JA 32.) The court entered an order of

dismissal granting the Commissioner's motion, denying taxpayers' motion, and dismissing the case for lack of jurisdiction. (JA 230-31.)

SUMMARY OF ARGUMENT

The Tax Court correctly held that it lacked deficiency jurisdiction under I.R.C. § 6213(a) because taxpayers failed to file a timely petition. When the IRS determines a deficiency in tax, it must send a notice of deficiency before it attempts to assess or collect the tax. Under I.R.C. § 6212(b), a notice of deficiency is valid if it is sent to a taxpayer's "last known address," even if a taxpayer does not receive it. Courts repeatedly have held that if a notice has been properly mailed to a taxpayer's last known address, but is returned by the USPS as unclaimed or undeliverable, there is no obligation on the part of the IRS to investigate where the taxpayer might be. Consistent with existing case law, the IRS, in 2001, promulgated Treas. Reg. § 301.6212-2(a) to provide that a taxpayer's last known address is the address reported on his most recently filed tax return unless the taxpayer thereafter has given the IRS "clear and concise" notice of a new address in accordance with IRS procedures. The applicable IRS procedure here, Rev. Proc. 2010-16 specifies numerous and simple methods by which taxpayers

can provide notice of a change of address. It further explicitly provides that neither a Form 2868 nor 4868 can be used to change a taxpayer's address. Those forms and their instructions likewise explicitly caution taxpayers that they cannot be used to change their address.

In this case, the Tax Court found that the taxpayers had failed to give clear and concise notice to the IRS that their address had changed. The court rested its decision on the Form 2848, which provides a "caution" to taxpayers that that form "will not be honored for any purpose other than representation before the IRS," and to the instructions for Form 2868 and 4868, both of which explicitly state that those forms are insufficient to notify the IRS of a change of address. The Tax Court's decision is well supported by the record, and should not be disturbed as clearly erroneous.

The Tax Court's order of dismissal is correct and should be affirmed.

ARGUMENT

The Tax Court correctly determined that taxpayers failed to give the IRS “clear and concise notification” that they had changed their last known address and correctly held that the notice of deficiency was valid and that it lacked jurisdiction under I.R.C. § 6213(a) over their untimely petition

Statement of the standard or scope of review

The Tax Court’s dismissal of taxpayers’ petition for lack of jurisdiction is reviewable de novo. *See Garrett v. Commissioner*, No. 19-1743, 2019 WL 6896695, at *1, n.3 (3d Cir. 2019) (citing, *Sunoco, Inc. v. Commissioner*, 663 F.3d 181, 185 (3d Cir. 2011)). The Tax Court’s factual finding that the Commissioner properly mailed the notice of deficiency to taxpayers’ last known address will be reversed only if clearly erroneous. *Berger v. Commissioner*, 404 F.2d 668, 672 (3d Cir. 1968); *Williams v. Commissioner*, 935 F.2d 1066, 1068 (9th Cir. 1991); *Follum v. Commissioner*, 128 F.3d 118, 119 (2d Cir. 1997).

A. I.R.C. § 6212 requires that a notice of deficiency be sent to a taxpayer’s last known address, which is the address used on the most recently filed return unless the taxpayer gives the IRS clear and concise notice of an address change

The Tax Court is a court of limited jurisdiction, and its power depends upon express statutory authority. *Freytag v. Commissioner*,

501 U.S. 868, 870-71 (1991); *Sunoco*, 663 F.3d at 187. Section 6213(a) of the Code grants the Tax Court jurisdiction to redetermine a deficiency in tax determined by the IRS. The Tax Court's jurisdiction is predicated upon the issuance by the IRS of a notice of deficiency pursuant to I.R.C. § 6212(a) and the filing by the taxpayer of a timely petition for redetermination within 90 days of the mailing date of the notice of deficiency (or 150 days if the notice is addressed to a taxpayer outside the United States). See *Garrett*, 2019 WL 6896695, at *1; *Asad v. Commissioner*, 751 F. App'x 339, 340 (3d Cir. 2018); *Clarkson v. Commissioner*, 664 F. App'x 265, 266 n.3 (3d Cir. 2016) (citing *Edwards v. Commissioner*, 791 F.3d 1, 5 (D.C. Cir. 2015)).

The mailing of a proper notice of deficiency is a matter of vital importance to both the IRS and taxpayers. If the IRS fails to properly (and timely) mail a deficiency notice, it is barred from thereafter assessing and collecting the deficiencies. See *Galluzzo v. Commissioner*, 564 F. App'x 656, 659 (3d Cir. 2014); *Holof v. Commissioner*, 872 F.2d 50, 53 (3d Cir. 1989); *Cropper v. Commissioner*, 826 F.3d 1280, 1285 (10th Cir. 2016); *Edwards*, 791 F.3d at 6. If a proper and timely notice of deficiency is mailed, the notice gives the taxpayer the opportunity to

file a petition in the Tax Court and to challenge the IRS's tax determination before paying any portion of the tax. A taxpayer who misses the 90-day deadline for filing a petition, however, still has a remedy. He may obtain judicial review of the Commissioner's determination by paying the deficiency, filing a timely administrative claim for refund, and, if the Secretary denies the claim or fails to act upon it within 6 months, suing for a refund in the appropriate federal district court or in the United States Court of Federal Claims. *See* I.R.C. §§ 6511, 6532 & 7422; 28 U.S.C. §§ 1346(a)(1), 1491(a)(1); *see also Berger*, 404 F.2d at 674; *Follum*, 128 F.3d at 120.

Section 6212(b) provides that a notice of a deficiency, "if mailed to the taxpayer at his last known address, shall be sufficient" for purposes of I.R.C. § 6212(a). *See Delman v. Commissioner*, 384 F.2d 929, 931 (3d Cir. 1967); *United States v. Ahrens*, 530 F.2d 781, 784 (8th Cir. 1976). Thus, a notice of deficiency is valid, even if the taxpayer does not receive it, if it is properly mailed to the taxpayer's last known address. *See Clarkson v. Commissioner*, 664 F. App'x 265, 266 (3d Cir. 2016); *Robinson v. United States*, 920 F.2d 1157, 1158 (3d Cir. 1990); *Berger*, 404 F.2d at 672-73; *Gyorgy v. Commissioner*, 779 F.3d 466, 473 (7th Cir.

2015); *Cropper*, 826 F.3d at 1283. The last-known-address rule gives the IRS a “ ‘safe harbor’ by permitting constructive notice where, for instance, the taxpayer has failed to inform the [IRS] of a change of address. Congress was concerned that requiring actual notice in such cases would impose an almost impossible burden on the IRS to keep track of every taxpayer’s whereabouts.” *Gyorgy*, 779 F.3d at 473 (citation and quotations omitted); see *Garrett*, 2019 WL 6896695, at *2. As a result, if a notice has been properly mailed, but is returned by the USPS as unclaimed or undeliverable, there is no obligation on the part of the IRS to investigate where the taxpayer might be or to send a second notice. See *Gille v. United States*, 33 F.3d 46, 48 (10th Cir. 1994); *Eschweiler v. United States*, 946 F.2d 45, 49-50 (7th Cir. 1991); *King v. Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988).

Section 6213 does not define “last known address.” *Gyorgy*, 779 F.3d at 474; *Pomeroy v. United States*, 864 F.2d 1191, 1194 (5th Cir. 1989) (citations omitted). The courts have determined that “last known address” refers to the address where the Commissioner “reasonably believes” the taxpayer wished to be reached at the time the notice of deficiency was sent. *Delman*, 384 F.2d at 931-32; see *Gyorgy*, 779 F.3d

at 474; *United States v. Navolio*, 334 F. App'x 204, 208 (11th Cir. 2009); *Ward v. Commissioner*, 907 F.2d 517, 521 (5th Cir. 1990); *Tadros v. Commissioner*, 763 F.2d 89, 91 (2d Cir. 1985) (quoting *United States v. Ahrens*, 530 F.2d 781, 785 (8th Cir. 1976)). The reasonableness of the Commissioner's belief as to what is the taxpayer's last known address focuses on the information available to the IRS at the time it issued the notice. *Gyorgy*, 779 F.3d at 475; *Follum*, 128 F.3d at 119; *Eschweiler*, 946 F.2d at 48; *Ward*, 907 F.2d at 521; *see also Armstrong v. Commissioner*, 15 F.3d 970, 975 (10th Cir. 1994) (citations omitted).

The courts presume that the IRS used reasonable diligence if the notice is mailed to the address contained on the taxpayer's most recently filed tax return, unless the taxpayer provided "clear and concise" notice to the IRS of an address change. *Pomeroy*, 864 F.2d at, 1194 (citations omitted); *King*, 857 F.2d at 681; *Tadros*, 763 F.2d at 91; *McPartlin v. Commissioner*, 653 F.2d 1185, 1189 (7th Cir. 1981); *Alta Sierra Vista, Inc. v. Commissioner*, 62 T.C. 367, 374 (1974) (IRS "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), *aff'd*,

538 F.2d 334 (9th Cir. 1976); *Abeles v. Commissioner*, 91 T.C. 1019, 1035 (1988) (same), IRS *acq.*, 1989-2 C.B. 1, 1989 WL 1109330 (Dec. 31, 1989); *see also* Rev. Proc. 90-18, 1990-1 C.B. 491 (IRS adopted the *Abeles* rule.)

The taxpayer has the responsibility of providing the IRS with a clear and concise notification of any change in address. *United States v. Navolio*, 334 F. App'x 204, 208 (11th Cir. 2009); *Ward*, 907 F.2d at 521 (quoting *Pomeroy*, 864 F.2d at 1194); *King*, 857 F.2d at 681; *Tadros*, 763 F.2d at 91; *see also Gyorgy*, 779 F.3d at 474; Treas. Reg. § 301.6212-2(a), (b)(2). The failure to file a timely petition is a fatal jurisdictional defect. Where, as here, the petition is untimely, this Court has held that the case must be dismissed for lack of jurisdiction. *Garrett*, 2019 WL 6896695, at **1-2; *see Armstrong*, 15 F.3d at 973 n.2; *Correia v. Commissioner*, 58 F.3d 468, 469 (9th Cir. 1995); *Petrulis v. Commissioner*, 938 F.2d 78, 79 (7th Cir. 1991); *Redman v. Commissioner*, 820 F.2d 209, 210 n.1 (6th Cir. 1987).

B. Treas. Reg. § 301.6212-2(a), Rev. Proc. 2010-16, the IRS website, and the Forms 2868 and 4868 provide clear guidance to taxpayers as to how to change a taxpayer’s address of record

Consistent with the case law’s definition of last known address, the Commissioner, pursuant to his authority under I.R.C. § 7805(a), promulgated Treas. Reg. § 301.6212-2(a), effective January 29, 2001. *See also* 66 Fed. Reg. 2817 (Jan. 12, 2001) (notice of final rule making). The regulation, entitled “Definition of last known address,” provides in relevant part:

(a) General rule. Except as provided in paragraph (b)(2) of this section, a taxpayer’s 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. 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 [in Rev. Proc 2010-16].

See Gyorgy, 779 F.3d at 476 (“pre-2001 judicial definition of ‘last known address’ is consistent with § 301.6212-2”).³

³ In *Gyorgy*, the Court noted that *Gyorgy* did not argue that Treas. Reg. § 301.6212-2 exceeded the Secretary’s authority to “prescribe all needful rules and regulations for the enforcement of [the Code],” or that

The text of Treas. Reg. § 301.6212-1(a) specifically incorporates the “procedures subsequently prescribed by the Commissioner,” which are set forth in Rev. Proc. 2010-16, 2010-1 I.R.B. 664.⁴ Rev. Proc. 2010-16 was published May 10, 2010 in I.R.B 2010-19. Rev. Proc. 2010-16, § 5.04 dictates multiple easy ways that a taxpayer can give the IRS “clear and concise notification” of a change of address. The IRS’s webpage on “How do I notify the IRS my address has changed” summarizes these methods. See <https://www.irs.gov/faqs/irs-procedures/address-changes>.

The revenue procedure and the IRS’s website provide, first, that taxpayers can mail a signed written statement to the IRS that

(i) informs the IRS that the taxpayer wishes the address of record

it was “otherwise invalid.” 779 F.3d at 476. Accordingly, the Seventh Circuit “accept[ed] the regulation as controlling under *Chevron*.” *Id.*

⁴ Treas. Reg. § 601.601(d)(2)(vi) provides that revenue procedures are “Statements of procedure which affect the rights or duties of taxpayers or other members of the public under the Code and related statutes will be published in the [Internal Revenue] Bulletin . . . [and] usually reflect the contents of internal management documents, but, where appropriate, they are also published to announce practices and procedures for guidance of the public.” Rev. Proc. 2010-16 is applicable to numerous other notices and other documents that are required to be sent to a taxpayer’s last known address. Rev. Proc. 2010-16, § 3.02.

changed to a new address, and (ii) contains their full name, old address, and social security number. *Id.*, § 5.04(1)(a). In instances where a joint return is filed, this information must be included for both taxpayers.

Id. Second, in response to correspondence from the IRS that “solicits or requires a response by the taxpayer,” a taxpayer can mark corrections to his address and return such correspondence to the IRS. *Id.*,

5.04(1)(b). Third, a taxpayer can change his address using Form 8822, Change of Address. *Id.*, 5.04(1)(c); *see Gyorgy*, 779 F.3d at 475. Fourth,

a taxpayer can change his address by submitting the new address through one of the secure applications found on the IRS’s website,

located at *www.irs.gov*. *Id.*, § 5.04(2)(a)-(c). Fifth, in limited

circumstances, a taxpayer can give the IRS oral notification of an address change. *Id.*, § 5.04(3). Further, taxpayers are instructed to

notify the USPS of their new address from which the IRS will

automatically update their taxpayer’s address based on the USPS’s

National Change of Address database. *Id.*, § 4.05; *see Gyorgy*, 779 F.3d

at 475-76; *see also https://www.irs.gov/taxtopics/tc157*. And, as noted

above at pp. 5-6, n.2, p. 28, the USPS’s web-page separately instructs

postal patrons to change their address with the IRS. *See*

https://www.usa.gov/post-office.

In addition to setting forth the multiple (simple) ways in which a taxpayer can notify the IRS of an address change, the revenue procedure, at § 5.01(4), specifically cautions that a power of attorney form and an application for extension of time to file a return “will not be used to update” a taxpayer’s address of record:

[T]he term “return” does not include applications for extension of time to file a return or powers of attorney. Thus, for example, a new address listed on Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, 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.

See Rev. Proc. 90-18, § 5.01(4) (Form 4868); Rev. Proc. 2001-18, § 5.01(4) (same).

The Treasury regulation, the revenue procedure, and the IRS’s website all provide ample notice to taxpayers that neither a power of attorney form nor an application for extension of time are sufficient to notify the IRS of a change of address. But the IRS went beyond these sources in its attempt to provide information to taxpayers.

The version of the Form 2848 for the years at issue here, explicitly “Caution[s]” users that it will “not be honored for any purpose other than representation before the IRS.” <https://www.irs.gov/pub/irs-prior/i2848--2014.pdf>. And the instructions to that Form state that “Address information provided on Form 2848 will not change your last known address with the IRS. To change your last known address, use Form 8822 for your home address and Form 8822-B to change your business address.” See <https://www.irs.gov/pub/irs-prior/i2848--2014.pdf>. Likewise, the instructions to Form 4868 for the years at issue state that “If you changed your mailing address after you filed your last return, you should use Form 8822, Change of Address, to notify the IRS of the change. Showing a new address on Form 4868 will not update your record.” <https://www.irs.gov/pub/irs-prior/f4868--pdf>. See also *Mertens Law of Federal Income Taxation* § 49C:14, Change of Address. Cf. *Gyorgy*, 779 F.3d at 476 (“Other than information in the NCOA database, however, a new address obtained from a payer or another third party does not count as clear and concise notification”).

The efforts to which the IRS has gone to inform taxpayers how they may change their address of record are reasonable. The IRS

administers a tax system with hundreds of millions of taxpayers, including individuals, corporations, partnerships, trusts, and estates that are required to report income, employment, and excise taxes. Although the IRS may be faulted at times for not providing clear guidance to taxpayers, that is hardly the case here. The last known address issue has given rise to frequent and expensive litigation over many decades, and the guidance set forth in the revenue procedure, the IRS's website, and the relevant IRS forms and instructions should be viewed as a reasonable effort to alleviate some of the uncertainties that have arisen in this area. The IRS has made it easy to notify it of a change in address, and the guidance it has provided will avoid many of the problems that have arisen. Just to give an example, it is not infrequent that a taxpayer will file two or more power of attorney forms, which increases the risk of a typographical error resulting in an incorrect address for the taxpayer. And even where a single power of attorney form has been filed showing a different address, the IRS will not be informed whether that address is a new permanent residence or whether the old address is no longer to be used. *See, Tadros v. Commissioner*, 763 F.2d at 92. After all, it is not all that unusual for a

taxpayer to relocate to a different area for a temporary job. In the end, it is vitally important to both taxpayers and the IRS that the IRS know the address to which taxpayers want tax notices to be sent. The IRS's guidance is a reasonable effort to achieve that end.

C. The Tax Court did not clearly err in finding that the taxpayers failed to give the IRS clear and concise notice of a change of address

Given the efforts to which the IRS has gone to inform taxpayers of what they must do to change their address of record, it can hardly be said that the Tax Court clearly erred when it held that the notice of deficiency in this case was sent to the taxpayers' last known address. *See Berger*, 404 F.2d at 672; *Johnson v. Commissioner*, 611 F.2d 1015, 1019 (5th Cir. 1980 (standard of review is whether Tax Court's last known address finding "was clearly erroneous under the facts and circumstances of this case"). Because of the explicit caution on Form 2848, and the warnings in the instructions to both Form 2848 and Form 4868, the Tax Court found that the taxpayers "did not give the Commissioner clear and concise notice of a different address" by filing those forms. (JA 27.) That finding is supported by the record. And this is especially so when the IRS's efforts in providing guidance are

juxtaposed against the carelessness with which the taxpayers and their power of attorney proceeded.

To begin with, Mr. Chaffee has acknowledged that he made a mistake when he placed the taxpayers' Jersey City address on the 2014 tax return that he prepared. And, apparently, the taxpayers failed to correct that mistake when they reviewed the return (as they should have done before it was filed). It is also apparent that neither the taxpayers nor Mr. Chaffee reviewed the Treasury regulation, the revenue procedure, or the IRS's website to confirm how they should notify the IRS of an address change. When Mr. Chaffee and the taxpayers signed the power of attorney forms, they ignored the caution (on the form itself) that Form 2848 will not be honored for any purpose other than representation before the IRS, and they also ignored the proviso in the instructions to that form that "address information provided on Form 2848 will not change your last known address with the IRS." They ignored the similar caution in the instructions to Form 4868 when they applied for an extension to file their 2015 return, to wit, the proviso that "showing a new address on Form 4868 will not update your record." If Mr. Chaffee or the taxpayers had heeded any of

these warnings, they might have made further inquiries, such as checking the IRS's website.

In sum, the Tax Court's finding that the taxpayers failed to give clear and concise notice of a change in address is well supported by the record and should be disturbed as clearly erroneous.

D. The cases upon which the taxpayers rely do not show that the Tax Court's decision was incorrect

Despite the numerous cases, including this Court's decision in *Berger, supra*, holding that the Tax Court's last-known-address finding is reviewable for clear error, the taxpayers here are apparently of the view that this Court should conclude, as a matter of law, that an address shown on a Form 2848 or Form 4868 is sufficient to constitute clear and concise notice of an address change. Indeed, that is how they framed the primary issue in their brief. (Br. 10; *see also* Br. 30-37.) But whether the notice of deficiency was sent to a taxpayer's last known address, and whether a taxpayer has given the IRS clear and concise notice of a change in address, has always turned on the facts and circumstances of each case.

The first case that taxpayers cite in support of their view that this is a question of law is this Court's decision in *Expanding Envelope &*

Folder Corp. v. Shotz, 385 F.2d 402 (3d Cir. 1967). Prior to the issuance of the deficiency notices in that case, taxpayers had filed with the IRS power of attorney forms on which they had directed that “all” correspondence addressed to them should be sent to their designated attorneys. *Id.* at 403. The IRS thereafter sent the deficiency notices to the taxpayers in care of their attorneys. *Id.* at 404. This Court rejected taxpayers’ argument that the notices were not sent to their last known address, holding that “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.

Expanding Envelope does not dictate the answer here. In contrast with that case, the power of attorney form in this case explicitly informed the taxpayers that it may be used for no purpose other than representation before the IRS. If there had been a similar caution on the form in *Expanding Envelope*, this Court might well have reached a different result in that case. In any event, the Tax Court below correctly distinguished *Expanding Envelope* when it observed that the

then-applicable power-of-attorney form and/or its instructions “did not expressly disavow its use as a change of address form.” (JA 31-32.)

The Fifth Circuit’s decision in *Johnson v. Commissioner*, upon which the taxpayers rely (Br. 31-32), is distinguishable for the same reason – the power of attorney form in that case did not provide notice that it could not be used to change the taxpayer’s address of record. The Fifth Circuit’s opinion has relevance here, however, insofar as it emphasized that its decision was “narrowly limited to the peculiar facts and circumstances of this case and is not meant as authority for requiring the Commissioner to adopt new procedures for sending statutory notices of deficiency.” 611 F.2d at 1021. The *Johnson* opinion should not be read as establishing a bright-line rule that a power of attorney form is always and everywhere sufficient to provide clear and concise notice of an address change.

The taxpayers’ reliance (Br. 32-34) on two Tax Court memorandum decisions is also unavailing. *See Hunter v. Commissioner*, T.C. Memo. 2004-81, and *Downing v. Commissioner*, T.C. Memo. 2007-29, 2007 WL 415139. In both of those cases, the Tax Court accepted a power of attorney form as sufficient notice of a change

in address. But the forms in those cases did not advise taxpayers that they were insufficient for that purpose. As a consequence, the court in *Hunter* observed that the taxpayer there had reasonably assumed that the address shown on the power of attorney form was sufficient. But, the Tax Court said in this case (JA 30), the assumption made by the court in *Hunter* is no longer reasonable in light of the IRS’s “clear guidance informing taxpayers of what actions will and will not change their last known address.”

There is no merit to taxpayers’ argument (Br. 34) that the creation of the Centralized Authorization File in the 1980s and Practitioner Priority Service (“PPS”) in 2002 required the IRS “to check addresses shown for taxpayers” on the power of attorney forms. These systems, as taxpayers indicate (Br. 34-35), were designed to identify taxpayer’s representatives and their scope of authorization to be represented, not to change a taxpayer’s address. *See generally*, Saltzman, *IRS Practice and Procedure*, ¶1.08[3][a][i] (2019); 1 Rep. Audited Taxpayer § 2:98, Robert E. McKenzie (2019). And taxpayers’ suggestion that it is “disingenuous” for the Commissioner to argue that the address on their Forms 2848 was not their last known address, because Mr. Chaffee, on

January 17, 2017, had telephoned the PPS, is likewise without merit.

(Br. 34-36.) Taxpayers argue that, at the time of that call the PPS employee “[p]resumably” would have updated taxpayer’s address.”

(Br. 36.) But, at the time of any such telephone call, the notice of deficiency had already been sent to taxpayers three months earlier, on October 18, 2016. (JA 80.)⁵

Taxpayers’ discussion of various procedures in the Internal Revenue Manual that they speculate may have been followed by PPS personnel is irrelevant. (Br. 35-36.) *See United States v. McKee*, 192 F.3d 535, 540 (6th Cir. 1999) (“[T]he [Internal Revenue] Manual was generally created for the agency’s own internal administration, and not for the protection of taxpayers.”); *Marks v. Commissioner*, 947 F.2d 983, 986 n.1 (D.C. Cir. 1991) (“It is well-settled . . . that the provisions

⁵ In any event, contrary to taxpayers’ claim (Br. 13-14, 35), their citations to the record do not show that Mr. Chaffee testified that “on January 17, 2017, he called the [PPS] phone number” (JA 170, 178). Rather, this allegation came from the argument portion of taxpayers’ supplement to their objection to the Commissioner’s motion to dismiss. (JA 78-80.) Further, to the extent that Mr. Chaffee sought to testify as to what an IRS employee told him during that conversation, the Commissioner indicated that it was hearsay. (JA 178.) As summarized by the Tax Court, Mr. Chaffee’s testimony merely showed that “[he] had called somebody at the IRS and had been told that October 18th was the date on the Notice of Deficiency.” (JA 168, 178.)

of the [M]anual are directory rather than mandatory, are not codified regulations, and clearly do not have the force and effect of law.”)

Accordingly, taxpayers’ argument that the IRS “should simply reprogram its computers or revise its internal instructions, if it needs to” simply ignores the undisputed facts that they failed to utilize any of the numerous simple methods available to them to change their address after Mr. Chaffee admittedly created the problem by failing to identify their correct address on their 2014 return.

E. Questions of judicial deference under *Chevron*, *Auer/Kisor* and *Skidmore* are not presented by this case

The taxpayers identify the second issue on appeal (Br. 10) as whether Rev. Proc. 2010-16 is entitled to judicial deference, and they devote the final 17 pages of their brief to arguing that it is not. But whether the revenue procedure is entitled to deference has no bearing on this case. To be sure, the Tax Court below ordered supplemental briefing on the issue, but the court did not so much as mention

deference in its opinion, much less whether the revenue procedure is entitled to deference under *Chevron*, *Auer/Kisor*, or *Skidmore*.⁶

Although the Tax Court in its opinion recited the principles set forth in the revenue procedure (as we have in this brief), it is readily apparent that the court's decision did not turn on any "deference" given to the revenue procedure. The court concluded (JA 27-28) that the taxpayers had not given the IRS clear and concise notice of a change in address because the Forms 2848 and 4868, together with the instructions to those forms, stated that they could not be used to change a taxpayer's address of record. The court explicitly stated (JA 28) that this conclusion was "based on the plain text of the forms and instructions." The court then it observed (*id.*) that its conclusion "is consistent with the Commissioner's guidance." Observing that a

⁶ For what it's worth, the Commissioner argued in his supplemental brief that the revenue procedure is entitled to deference under *Skidmore*. Thus, even if the issue of deference is legitimately presented by this appeal, the Supreme Court's decisions in *Chevron*, *Auer*, and *Kisor* are beside the point.

decision is “consistent” with principles set forth in a revenue procedure is a far cry from giving “deference” to the revenue procedure.

In conclusion, the Tax Court correctly determined that taxpayers failed to provide the IRS with clear and concise notice that they had changed their address from the Jersey City address on their most recently filed and properly processed return. Accordingly, the Tax Court correctly held that the notice of deficiency was valid because the IRS properly sent it to taxpayers’ last known address, and, therefore, correctly dismissed taxpayers’ untimely petition for lack of jurisdiction under I.R.C. § 6213(a).

CONCLUSION

The order of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rule 28.3(d), it is hereby certified that, because the attorneys on this brief represent the Federal Government, the requirement that at least one attorney must be a member of the Bar of this Court is waived.

/s/ JANET A. BRADLEY
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Attorney for Commissioner of Internal Revenue

Dated: January 21, 2020