

LR #4

## Amend IRC § 7701 to Provide a Definition of “Last Known Address,” and Require the IRS to Mail Duplicate Notices to Credible Alternate Addresses

### PROBLEM

The IRS informs taxpayers of important statutory rights by sending notices or letters through the United States Postal Service (USPS). For example, the IRS must send to the taxpayer’s “last known address” its notice of a proposed increase in tax liability which advises the taxpayer of the right to petition the Tax Court (the only prepayment judicial forum) for a review of that determination.<sup>1</sup> Similarly, the IRS must send to the taxpayer’s “last known address” a final notice of its intent to levy which advises of the right to a pre-levy administrative hearing (referred to as a Collection Due Process or CDP hearing) and the availability of Tax Court review of the hearing outcome.<sup>2</sup> Often, taxpayers must claim these rights within strict time limits that begin to run when the IRS *mails* the notice or letter. So long as the IRS mails the correspondence to the taxpayer’s “last known address,” a term that is not defined by statute, the letter or notice is legally effective when sent.<sup>3</sup> The time limit begins to run on that day, regardless of whether or when the taxpayer receives the correspondence.

Despite the importance of sending correspondence to a taxpayer’s last known address, the IRS defines that term with reference to mid-20th century technology. It has failed to keep up with the information age, where the IRS could readily consult available data when it learns that its own records do not reflect a taxpayer’s current address, either because mail sent there is returned as undeliverable or the IRS acquires this knowledge another way. Only some parts of the IRS react to undelivered mail by venturing beyond IRS databases and consulting other sources of information about taxpayers’ current addresses, such as motor vehicle registrations or real property records.

In view of the importance of sending mail to a taxpayer’s last known address and the availability of third-party data, the Court of Appeals for the Fifth Circuit has held the IRS accountable for doing more than looking within its own databases to identify a taxpayer’s correct address once it learns the address in its records is incorrect.<sup>4</sup> However, the IRS has not adopted the approach mandated by the Fifth Circuit. For essential notices that advise taxpayers of fundamental rights, such as the statutory notice of deficiency, it does not

<sup>1</sup> Taxpayers have the right under Internal Revenue Code (IRC) § 6213(a) to petition the Tax Court for review of a statutory notice of deficiency.

<sup>2</sup> Taxpayers have the right to an administrative hearing under IRC §§ 6320 and 6330 (the outcome of which is appealable to the Tax Court under IRC § 6330(d)) when the IRS proposes to levy or has filed a lien.

<sup>3</sup> See, e.g., IRC § 6212(b)(1), providing that “a notice of a deficiency ...if mailed to the taxpayer at his last known address, shall be sufficient;” *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 at 312 (9th Cir. 1982); (noting goal of IRC § 6212 to provide actual notice, but proper mailing to last known address is sufficient); *Rappaport v. United States*, 583 F.2d 298, 301 (7th Cir. 1978) (finding proper mailing to last known address is sufficient notice). An array of IRC provisions require the IRS to send notices to taxpayers at their “last known address.” Rev. Proc. 2010-16, 2010-19 I.R.B. 664, explaining how the IRS is informed of a change of address, identifies 20 IRC sections that require notices and documents to be sent to the taxpayer’s “last known address.”

<sup>4</sup> *Mulder v. Comm’r*, 855 F.2d 208 (5th Cir.1988); *Terrell v. Comm’r*, 625 F.3d 254 (5th Cir. 2010).

search beyond its own databases for a taxpayer’s correct address, even when it learns that that address is incorrect. By wearing these “blindens” the IRS may “deprive [taxpayers] ... of their only opportunity for a prepayment hearing to litigate their case.”<sup>5</sup> Taxpayers who can seek review by the Court of Appeals Fifth Circuit may be able to avoid this outcome, but others may not be so fortunate. Thus, similarly situated taxpayers may be treated differently as they seek to exercise their fundamental rights.

IRS or Treasury guidance could resolve this issue, but has not been forthcoming, and the disinclination to act means that taxpayers are being harmed even as we write. Given the availability of technology and the centrality of “last known address” to fundamental rights that preserve the perception (and actuality) of fairness in our tax system, the small burden of requiring reliable database investigation is more than outweighed by taxpayers’ and the government’s interest in procedural fairness. Congressional action would spur the IRS to expand the measures it takes in the 21st century to identify taxpayers’ last known addresses.

### EXAMPLE

In 2011, M filed her 2010 return and then moved without notifying the Postal Service or the IRS of her change of address. In 2012, the IRS mailed M a notice informing her that her 2010 return had been selected for audit and requesting documentation in support of the deductions she claimed. The IRS sent the notice to M’s old address, which was the address shown on her most recent return (the one for 2010), and the notice was returned to the IRS as undeliverable with no corrections marked on the address information.

The IRS searched its databases for a more recent address but did nothing further to ascertain the correct one. It sent M a second audit notice at her old address, which was also returned as undeliverable with no correcting information. Again, the IRS did not attempt to ascertain M’s correct address by looking outside its own databases. Hearing nothing from M, the IRS concluded its audit and issued a statutory notice of deficiency, proposing to assess additional tax against M and informing her she had 90 days to petition the Tax Court for review.<sup>6</sup> It sent the notice of deficiency to M at her old address, she never received it, and the IRS assessed the additional tax by default.<sup>7</sup>

If M challenges the validity of the notice of deficiency in a Tax Court proceeding, and an appeal from the Tax Court’s decision would be to the Court of Appeals for the Fifth Circuit, the Tax Court will apply the holdings in the *Mulder* and *Terrell* decisions that the notice of deficiency, and consequently the assessment, is invalid due to the IRS’s failure to try to

<sup>5</sup> *Keeton v. Comm’r*, 74 T.C. 377, 383-4.

<sup>6</sup> Under IRC § 6213(a) the IRS must generally mail a taxpayer a statutory notice before it can assess a tax deficiency.

<sup>7</sup> IRC § 6213(c) provides that if a taxpayer does not timely petition the Tax Court for review of a notice of deficiency, the IRS must assess the additional tax.

correct what it knew to be an incorrect address.<sup>8</sup> The period of limitations for assessing M’s liability for 2010 will very likely have expired; if so, the IRS will not be able to proceed, even if it is correct on the merits. In an identical case appealable to a different Court of Appeals, the Tax Court may hold that the notice of deficiency was effective when it was mailed and the assessment was therefore valid.

## RECOMMENDATION

The National Taxpayer Advocate reiterates her recommendation that Congress amend IRC § 7701 to add a definition of “last known address” that incorporates case law, including the Fifth Circuit’s holdings in the *Mulder* and *Terrell* cases, and current regulations. She also reiterates her recommendation that Congress direct the Secretary of Treasury to:

1. Develop procedures for checking third-party databases for credible alternate addresses prior to sending notices that establish legal rights and obligations (*i.e.*, Statutory Notices of Deficiency, Collection Due Process notices, notices of federal tax lien, etc.).
2. When the IRS learns that its records do not contain a taxpayer’s correct address, and the taxpayer has a credible alternate address, require the IRS to mail the notice simultaneously to the last known and credible alternate addresses (as defined by the Secretary).<sup>9</sup>

## CURRENT LAW

The IRS is required to send at least 20 notices or documents contemplated in various Internal Revenue Code provisions to a taxpayer’s last known address.<sup>10</sup> None of these provisions includes a definition of “last known address” (nor is such a definition found elsewhere in the IRC), yet several of them provide for important statutory rights that must be claimed within time limits triggered by the IRS’s mailing of the notice to the “last known address.” For example:

- IRC § 6213(a) generally requires the IRS to mail to a taxpayer a statutory notice of deficiency before it can assess a tax deficiency, and IRC § 6213(b) provides that sending the

<sup>8</sup> Pursuant to the rule in *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d* 445 F.2d 985 (10th Cir. 1971), the Tax Court will defer to a Court of Appeals decision which is squarely in point where appeal from the Tax Court decision lies to that Court of Appeal.

<sup>9</sup> National Taxpayer Advocate 2011 Annual Report to Congress 493 (Legislative Recommendation: *Enact the Recommendations of the National Taxpayer Advocate to Protect Taxpayer Rights*); National Taxpayer Advocate 2008 Annual Report to Congress 449 (Legislative Recommendation: *Mailing Duplicate Notices to Credible Alternate Addresses*).

<sup>10</sup> These include IRC §§ 982(c)(1) (formal document request for the production of foreign-based documentation); 6015(e) (notice of final determination regarding spousal relief); 6110(f)(3)(B) (notification of disclosure proceedings); 6110(f)(4)(B) (notification of disclosure proceedings); 6212(b) (notice of deficiency); 6245(b)(1) (notice of partnership adjustment for electing large partnerships); 6303(a) (notice and demand for tax); 6320(a)(2)(C) (notice and opportunity for hearing upon filing of notice of lien); 6325(f)(2)(A) (notice of revocation of certificate of release or nonattachment of a lien); 6330(a)(2)(C) (notice and opportunity for hearing before levy); 6331(d)(2)(C) (notice of intention to levy); 6332(b)(1) (copy of notice of levy with respect to a life insurance or endowment contract); 6335(a) and (b) (notices of seizure and sale); 6404(h) (notice with respect to interest abatement); 6901(g) (notice of liability in transferee cases); 7430(f)(2) (action for reasonable administrative costs); 7436 (employment status determinations); 7603(b)(1) (summons by mail to third-party record keeper); 7609(a)(2) (notice of third-party summons); and 7623(b)(4) (Whistleblower award determinations). See Rev. Proc. 2010-16, 2010-19 I.R.B. 664.

notice to the taxpayer’s last known address is sufficient. Taxpayers have 90 days after the IRS mails the notice (150 days, if the notice was addressed to a taxpayer outside the United States) to file a Tax Court petition.<sup>11</sup> If the taxpayer does not respond to a valid statutory notice of deficiency, the IRS must assess the tax and the taxpayer can no longer obtain judicial review without first paying the tax.<sup>12</sup>

- IRC § 6331(d) requires the IRS to give taxpayers 30 days notice that it intends to levy on their property; IRC § 6330 (a) requires the IRS to further notify taxpayers of their right to challenge the levy action in a CDP hearing.<sup>13</sup> Similarly, IRC § 6320 requires the IRS to notify taxpayers that it has placed a lien on their property, and of their right to challenge the lien in a CDP hearing. A taxpayer requesting a CDP hearing must do so within 30 days after the IRS mails the IRC § 6330 or § 6320 notice to the taxpayer’s last known address.<sup>14</sup> If the IRS then determines to proceed with the collection action, the taxpayer has the right to judicial review of the determination if he or she petitions the Tax Court within 30 days after the IRS mails the notice of its determination.<sup>15</sup> A taxpayer who does not respond to a valid IRC § 6330 or § 6320 notice loses not only the right to an administrative hearing, but also to pre-enforcement judicial review.
- IRC § 6015(e) provides that when the IRS mails to a taxpayer at his or her last known address its determination regarding the taxpayer’s request for innocent spouse relief, the taxpayer has 90 days to petition the Tax Court for review of that determination. A taxpayer who does not respond to a valid notice of determination under IRC § 6015(e) loses the right to prepayment judicial review of a denial of innocent spouse relief.

### Judicial interpretation of “last known address” prior to Treasury Regulation § 301.6212-2

Prior to January 2001, when a Treasury regulation<sup>16</sup> defined “last known address,” case law established basic principles. The Tax Court summarized the general rules in *Keeton v. Commissioner* as follows:

For the purposes of section 6212(b), a taxpayer’s last known address must be determined by a consideration of all relevant circumstances; it is the address which, in light of circumstances, the respondent reasonably believes the taxpayer wishes to have the respondent use in sending mail to him. *O’Brien v. Commissioner, supra* at 548; *Lifter v. Commissioner*, 59 T.C. 818, 821 (1973). Normally, a taxpayer’s “last known address” is that shown on his tax returns filed with respondent. *O’Brien*

<sup>11</sup> IRC § 6213(a). Congress rejected a bill that would have required the taxpayer to have actual notice of the proposed deficiency because of the burden it would have imposed on the Commissioner. See Revenue Act of 1924, ch. 234, sec. 274(a) 43 Stat. 253, 297, 65 Cong. Rec. 2969-70 (1924) (proposed amendment by Rep. Allen).

<sup>12</sup> IRC § 6213(c) provides that if a taxpayer does not timely petition the Tax Court for review of a notice of deficiency, the IRS must assess the additional tax.

<sup>13</sup> Sections 6330 and 6320 were added by the IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401(a), (b), 112 Stat. at 746-49. Prior to its enactment, any judicial review was only available post-collection.

<sup>14</sup> IRC § 6330(a)(2), (3), § 6320(a)(2), (3).

<sup>15</sup> IRC § 6330(d); Treas. Reg. § 301.6330-1(f); *Weber v. Comm’r*, 122 T.C. 258 (2004).

<sup>16</sup> Treas. Reg. § 301.6212-2, T.D. 8939, 66 Fed.Reg. 2817-01 (Jan. 12, 2001).

*v. Commissioner, supra* at 549; *Cohen v. United States*, 297 F.2d 760, 773 (9th Cir. 1962), cert. denied 369 U.S. 865 (1962). Respondent is required, however, to use a different address if he learns or is advised by the taxpayers that the taxpayer has changed his address. *DiViaio v. Commissioner*, 539 F.2d 231 (D.C. Cir. 1976), *revq.* an order of dismissal of this Court; *Cohen v. United States, supra* at 773; *O'Brien v. Commissioner, supra* at 549; *Alta Sierra Vista, Inc. v. Commissioner*, 62 T.C. 367, 374-375 (1974), *affd.* in an unpublished opinion 538 F.2d 334 (9th Cir. 1976). Once respondent learns that a taxpayer is residing at an address other than the one shown on the return, he must exercise reasonable care and diligence in ascertaining and mailing the notice of deficiency to the correct address. *Johnson v. Commissioner*, 611 F.2d 1015, 1021 (5th Cir. 1980), *revq.* a Memorandum Opinion of this Court; *Alta Sierra Vista, Inc. v. Commissioner, supra* at 374; *Maxfield v. Commissioner*, 153 F.2d 325, 326 (9th Cir. 1946), *revq.* an order of dismissal of this Court; *United States v. Eisenhardt*, 437 F. Supp. 247 (D. Md. 1977).

In ascertaining whether respondent has mailed a notice to a taxpayer’s “last known address” as required by section 6212, the relevant inquiry pertains to the Commissioner’s knowledge rather than what may, in fact, be the taxpayer’s most current address. *Alta Sierra Vista, Inc. v. Commissioner, supra* at 374; *Cohen v. United States, supra* at 773.<sup>17</sup>

*Keeton* concerned spouses who had been convicted of tax evasion. The IRS initiated the proceedings that culminated in their trial and conviction, and was inextricably involved in the criminal case. As a result of the convictions, the husband was incarcerated in a federal penitentiary and the wife moved, subject to the jurisdiction of federal probation authorities, to a new address near the penitentiary. The Tax Court found the IRS knew the couple no longer resided at their former address when it mailed the notice of deficiency to them there. The court held,

We will not allow respondent to come into this Court wearing blinders and deprive petitioners, in these circumstances, of their only opportunity for a prepayment hearing to litigate their case. See *Lifter v. Commissioner, supra* at 820; *Berger v. Commissioner*, 404 F.2d 668 (3d Cir. 1968), *affg.* 48 T.C. 848 (1967), cert. denied 395 U.S. 905 (1969); *Johnson v. Commissioner, supra* at 1018.<sup>18</sup>

Other cases decided before the effective date of the Treasury regulations under IRC § 6212 examined whether taxpayer communications to the IRS were sufficient to advise the IRS that the taxpayer had changed his address. In *Abeles v. Commissioner*, for example, the Tax Court reconsidered its position that IRS was entitled to rely on the address on the

<sup>17</sup> *Keeton v. Comm’r*, 74 T.C. 377, 381-2 (1980).

<sup>18</sup> *Id.* at 383-4. The court noted that in other cases in which a taxpayer was incarcerated for non-tax crimes, a notice of deficiency sent to his previous address was not mailed to a taxpayer’s “last known address.”

taxpayer’s return *for the year under audit* as showing the taxpayer’s “last known address.”<sup>19</sup> In view of advances in technology that permitted the IRS to ascertain the address shown on the taxpayer’s most recently filed return, the court announced that a taxpayer’s last known address is that shown on the most recently filed return, unless the IRS has been given clear and concise notification of a different address.<sup>20</sup>

The Tax Court also decided *Mulder v. Commissioner*, in which there was no notification from the taxpayer of a change of address, yet the IRS was aware that the address where it sent the notice of deficiency was not correct because mail previously sent to that address had been returned as undeliverable.<sup>21</sup> However, the Tax Court found the notice of deficiency was valid and dismissed the taxpayer’s petition for lack of jurisdiction. Among other things, the court found that a search of the IRS’s own databases would not have revealed a more recent address. The Court of Appeals for the Fifth Circuit reversed the Tax Court, finding that the record did not support the IRS’s claim that it had searched its own databases for a more recent address. However, whether a database search had occurred or not, the court found,

Under the circumstances of this case, given the facts that two letters posted shortly before the notice of deficiency were returned undelivered, and that the notice of deficiency was neither delivered nor returned, we are not persuaded that the IRS exercised due diligence in sending the notice to Mulder’s last known address. More should have been done. At the very least, the tax-preparer should have been contacted.<sup>22</sup>

### IRS and Treasury interpretation of “last known address”

Against this background of case law, in 1990 the IRS issued Revenue Procedure 90-18, providing guidance on how taxpayers could inform the IRS of a change of address.<sup>23</sup> The IRS described the law pertaining to “last known address,” however, as follows: “The phrase ‘last known address’ does not necessarily mean the taxpayer’s actual address but instead means the last address that *the taxpayer makes known to the Service.*” (emphasis added).<sup>24</sup>

The revenue procedure does not contain any reference to the requirement that the IRS exercise care and due diligence, the relevance of the IRS’s knowledge when it sends a notice of deficiency, or the necessity to consider all the facts and circumstances in determining a taxpayer’s “last known address.” The guidance incorporates the rule set forth in *Abeles* that a taxpayer’s “last known address” is the one shown on the most recently filed return, absent clear and concise notification of a different address. Among other things, the guidance also

<sup>19</sup> *Abeles v. Comm’r*, 91 T.C. 1019 (1988).

<sup>20</sup> *Abeles v. Comm’r*, 91 T.C. 1035 (1988).

<sup>21</sup> *Mulder v. Comm’r*, T.C. Memo. 1987-363.

<sup>22</sup> *Mulder v. Comm’r*, 855 F.2d 208 at 212 (5th Cir.1988) *rev’g and remanding* T.C. Memo. 1987-363.

<sup>23</sup> Rev. Proc. 90-18, 1990-1 C.B. 491.

<sup>24</sup> *Id.* at § 3.02.

advised taxpayers that written notification of a change of address was required and that the IRS was developing a new Form 8822, *Change of Address*, for this purpose. Notifying the USPS of a change in address would not suffice.<sup>25</sup> The guidance concluded, “[t]his revenue procedure does not require the Service to send notices to an address furnished by the taxpayer when it is determined that a taxpayer cannot actually be contacted or located at that address.”<sup>26</sup>

In January 2001, the Treasury released regulation § 301.6212-2, defining “last known address.”<sup>27</sup> The regulation, which is still in effect, allows the IRS to access USPS change-of-address information and update its records accordingly, and provides that change-of-address information a taxpayer provides to a third party is otherwise not clear and concise notification to the IRS of a different address. The relevant part of the regulation is:

**§ 301.6212-2 Definition of last known address.**

**(a) General rule.** Except as provided in paragraph (b)(2) of this section [referencing an exception for addresses obtained from USPS], 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.

**(b) Address obtained from third party—(1) In general.** Except as provided in paragraph (b)(2) of this section [referencing an exception for addresses obtained from USPS], change of address information that a taxpayer provides to a third party, such as a payor or another government agency, is not clear and concise notification of a different address for purposes of determining a last known address under this section.

Like the IRS guidance it references, the Treasury regulation does not contain any discussion of the IRS’s duty to use diligence in ascertaining a taxpayer’s last known address once it is on notice that the address in its records is no longer valid. Consequently, it neither prohibits the IRS from consulting nor requires it to consult third-party sources or mail a notice to the taxpayer at an address it obtains from a third party other than USPS. Since 2001, the IRS has recognized that, at least with respect to some correspondence returned as undeliverable, notification from USPS that an address is not correct constitutes official notification to the IRS that a taxpayer’s address has changed, but only if USPS also provided the correct

<sup>25</sup> Rev. Proc. 90-18, 1990-1 C.B. 491 § 4.02, 06..

<sup>26</sup> *Id.* at § 6.03.

<sup>27</sup> Treas. Reg. § 301.6212-2, T.D. 8939, 66 Fed. Reg. 2817-01 (Jan. 12, 2001). The regulation was preceded by a notice of public rulemaking (64 Fed. Reg. 63768, Nov. 22, 1999), but no public hearing was requested or held. Three written comments were received. The regulation applies to determine “last known address” wherever that term is used in the Code or regulations. Treas. Reg. § 301.6212-2(c).

address.<sup>28</sup> The IRS has never recognized a duty to investigate, but only to change an address to one USPS provides. The IRS Office of Chief Counsel has concluded that the IRS is under no obligation to look outside its own records for a taxpayer’s address.<sup>29</sup> The National Taxpayer Advocate’s position is that once the IRS is on notice that an address in its records is not correct, where significant taxpayer rights are at stake it should take affirmative steps to ascertain the taxpayer’s correct address if USPS has not provided one.

As a matter of internal procedure, the IRS does obtain a “potential current” address from a third party when certain notices are returned as undeliverable.<sup>30</sup> However, it does not then resend the notice to the “potential current” address, but issues another letter, referred to as the “Are You There” letter, asking the taxpayer to confirm the address, sign, and return the letter, which can take 100 days or more.<sup>31</sup> IRS field examiners, who meet with taxpayers by telephone or in person, write to taxpayers to schedule and confirm appointments.<sup>32</sup> If the taxpayer does not respond to the initial contact letter and is no longer at the address shown in IRS records, the examiner must take specific steps to locate the taxpayer and document that those steps were taken.<sup>33</sup> In addition to researching IRS databases and asset locator services and searching the Internet, the measures include contacting the taxpayer’s employer, return preparer, representative, or other third parties such as banks, brokerage houses, mortgage companies and other third party payor(s), if known. If the examiner finds the taxpayer’s correct address, the correspondence is re-addressed and re-mailed.<sup>34</sup>

### Judicial interpretation of “last known address” after the effective date of Treasury regulation § 301.6212-2

Following the issuance of the Treasury regulation, courts continued to interpret various statutes that require the IRS to send notices to a taxpayer’s “last known address.” As before the effective date of the Treasury regulation, the cases reiterated the requirement that the IRS use due diligence based on information it knew or should have known to ascertain a taxpayer’s last known address. For example, in *Downing v. Commissioner*, the Tax Court

<sup>28</sup> Rev. Proc. 90-18 was superseded by new guidance in 2001, Rev. Proc. 2001-18, 2001-8 I.R.B. 708. The 2001 guidance, in §§ 5.04 and 5.05, provided that correspondence soliciting or requiring a response by the taxpayer that is returned to the IRS with corrections marked on the taxpayer’s address information will be considered clear and concise written notification of a change of address, and described the circumstances under which taxpayers could provide clear and concise oral notification of a change of address. The 2001 guidance was superseded in 2010 by Rev. Proc. 2010-16, 2010-19 I.R.B. 664, but these provisions remained intact. The 2010 guidance also contains no reference to the IRS’s obligation to use due diligence to ascertain a taxpayer’s “last known address.”

<sup>29</sup> National Office Program Manager Technical Advice, PMTA-2008-1634 (Jan. 9, 2008).

<sup>30</sup> The Address Research (ADR) system is an IRS system that uses internal databases and Accurint (a contracted asset locator service that supplies “potential current” address information for taxpayers, upon request from the IRS) to search for potential new taxpayer addresses. Internal Revenue Manual (IRM) 5.19.7.5 (Sept. 30, 2010). However, not all notices are processed through the ADR system when mail is returned as undeliverable. For example, Automated Collection System Letter 11, which advises taxpayers of a final notice of intent to levy and their right to a hearing, is not processed through the ADR system. IRM 5.19.7.5.3 (Sept. 30, 2010).

<sup>31</sup> For a more complete description of this procedure and the problem of undelivered mail, see National Taxpayer Advocate 2010 Annual Report to Congress 221 (Most Serious Problem: *The IRS Has Not Studied or Addressed the Impact of the Large Volume of Undelivered Mail on Taxpayers*); National Taxpayer Advocate 2008 Annual Report to Congress 449 (Legislative Recommendation: *Mailing Duplicate Notices to Credible Alternate Addresses*).

<sup>32</sup> IRM 4.10.2.7.3 (Aug. 1, 2007).

<sup>33</sup> IRM 4.10.2.7.2.2 (Apr. 2, 2010).

<sup>34</sup> IRM 4.10.2.7.2.1 (Apr. 2, 2010).

held that a Form 2848, *Power of Attorney*, received after the most recently filed return had been filed but before it had been processed, was sufficient to provide clear and concise notification of a change of address.<sup>35</sup> A notice of determination sent to the address on the taxpayer’s return was invalid because it was not sent to the “last known address” as required by IRC § 6330, which by then cross-referenced Treasury regulation § 301.6212-2. The court reiterated:

The relevant question is not whether the IRS received the change of address notification before or after the last-filed return was processed. Rather, “what is of significance is what respondent knew at the time the \*\*\* 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.” *Abeles v. Commissioner*, 91 T.C. 1019, 1035 (1988). If the IRS has become aware of a change of address, it may not rely on the address listed on the last-filed return but must exercise “reasonable diligence in ascertaining the taxpayer’s correct address.”<sup>36</sup>

However, just as it had in *Mulder*, the Tax Court decided that the IRS was not obliged to take further action beyond consulting its own databases when mail sent to the address shown on a taxpayer’s most recently filed return was returned as undeliverable. In *Terrell v. Commissioner*, the IRS sent the taxpayer a final notice of determination denying her request for relief under IRC § 6015.<sup>37</sup> The IRS sent the notice to the address the taxpayer used on Form 8858, *Request for Innocent Spouse Relief*, but because the taxpayer had moved after requesting relief, the notice was returned as undeliverable. Two previous pieces of correspondence sent to that address had also been returned as undeliverable. However, after the IRS sent the final notice of determination, but before it was returned as undeliverable, the taxpayer filed a return showing her current address. The IRS resent the final notice of determination, which the taxpayer then received. The taxpayer petitioned the Tax Court within 90 days of the date the final notice of determination had been sent the second time, but beyond 90 days after the date it was sent the first time. The IRS argued that the court lacked jurisdiction over the claim because the taxpayer had not timely filed her petition.

The Tax Court found the IRS had exercised due diligence in determining the taxpayer’s last known address when it sent the notice of determination the first time, but just as it had in the *Mulder* case, the Court of Appeals for the Fifth Circuit reversed the Tax Court’s decision in *Terrell*.<sup>38</sup> Finding that the IRS did nothing to ascertain the taxpayer’s correct address

<sup>35</sup> *Downing v. Comm’r*, T.C. Memo. 2007-291. The most recent IRS guidance, Rev. Proc. 2010-16, 2010-19 I.R.B. 664, §5.04(4) provides that a Form 2848, *Power of Attorney*, will not be used to update the taxpayer’s address of record.

<sup>36</sup> *Id.*, slip op. at 20.

<sup>37</sup> T.C. Docket No. 15894-07 (July 30, 2009) (order dismissing for lack of jurisdiction). Under IRC § 6015(e)(1)(A)(ii), a taxpayer may petition the Tax Court for review of the IRS’s denial of innocent spouse relief if he or she does so within 90 days after the IRS sends a notice of determination to the taxpayer’s “last known address.”

<sup>38</sup> *Terrell v. Comm’r*, 625 F.3d 254 (5th Cir. 2010), *rev’g and remanding* T.C. Docket No. 15894-07 (July 30, 2009) (order dismissing for lack of jurisdiction).

Amend IRC § 7701 to Provide a Definition of “Last Known Address,”  
and Require the IRS to Mail Duplicate Notices to Credible Alternate Addresses

LR #4

once it knew the address in its records was incorrect, the court held that the IRS did not exercise reasonable diligence and the notice of determination was null and void the first time it was sent. However, it was legally effective to commence the 90-day period for petitioning the Tax Court the second time it was sent and finally received by the taxpayer. Because the taxpayer filed her petition within the statutory period, the Tax Court had jurisdiction to hear her claim.

### REASONS FOR CHANGE

The Code provides no statutory definition of “last known address,” and the Treasury regulation definition does not completely reflect the case law as it existed before its effective date, nor developments since then. The recommendation would relieve the burden on taxpayers who do not receive notifications of important statutory rights, and the clarification would reduce the risk to the government that an ineffective notice of deficiency will later bar it from assessing or collecting tax that would otherwise be due. The change would apply to taxpayers for whom the IRS has been placed on notice — either because USPS has returned correspondence as undeliverable or by some other means — that the address has changed. As the Court of Appeals for the Fifth Circuit held, once the IRS is on notice, it has a duty to investigate. In the 21st century, that duty extends beyond investigating its own databases. Given the availability of technology and the centrality of “last known address” to fundamental rights that preserve the perception (and actuality) of fairness in our tax system, the small burden of requiring reliable database investigation is more than outweighed by taxpayers’ and the government’s interest in procedural fairness. The recommendation would also avert a potential conflict among the Courts of Appeal and help ensure that similarly situated taxpayers receive similar treatment.

### EXPLANATION OF RECOMMENDATION

IRC § 7701 contains definitions of terms that appear throughout the Code and would be the logical section in which to include a definition of “last known address.” The new definition would incorporate and update key concepts from Treasury Regulation § 301.6212-2, and would reflect case law, including the Fifth Circuit’s holdings in the *Mulder* and *Terrell* cases. Thus, the definition would clarify that the IRS must use due diligence to ascertain a taxpayer’s correct address once it is on notice that the address its files is no longer valid. Due diligence in these circumstances requires the IRS to look beyond its own databases to ascertain the taxpayer’s correct address. Because the IRS needs guidance that will allow it to meet its obligations, Congress would direct the Secretary of Treasury to

1. Develop procedures for checking third-party databases for credible alternate addresses whenever mail is returned as undeliverable, and prior to sending notices that establish legal rights and obligations (*i.e.*, Statutory Notices of Deficiency, Collection Due Process notices, notices of federal tax lien, etc.) when the IRS is aware that its records do not reflect the taxpayer’s current address; and

Amend IRC § 7701 to Provide a Definition of “Last Known Address,”  
and Require the IRS to Mail Duplicate Notices to Credible Alternate Addresses

LR #4

2. When the taxpayer has a credible alternate address, require the IRS to mail the notice simultaneously to the last known and credible alternate addresses (as defined by the Secretary).