

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

MARILYN S. KWOLEK,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 560-11.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
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	)	

**ORDER OF DISMISSAL FOR LACK OF JURISDICTION**

This case was assigned to this division of the Court to rule on the Commissioner’s motion to dismiss for lack of jurisdiction. We placed the motion on the June 2012 San Francisco, California trial calendar for an evidentiary hearing. In his motion, the Commissioner asks us to dismiss Dr. Kwolek’s petition for a redetermination of her deficiencies for the 1999-2004 tax years. Kwolek opposes the motion on the grounds that the Commissioner never sent her a proper statutory notice of deficiency to her last known address.

The motion was especially difficult because the Commissioner lost the administrative files containing the hard copy of the notice issued to Kwolek for the relevant tax years, though he did have a scanned copy that showed a total tax liability in excess of \$4 million. The Commissioner also provided a certified mail list as proof that the notice was sent by certified mail on April 13, 2010 to the last address Kwolek listed on her most recent tax return. And he also provided the USPS Certified Mail Track and Confirm notice that states that the USPS failed to deliver the notice to Kwolek on April 15, 2010, and instead returned it on May 5, 2010 because she never collected her mail.

The Commissioner's motion may be dispositive because, if the notice was properly sent, then the 90-day period for filing a petition with our Court expired July 12, 2010. *See* § 6213(a). Kwolek's petition was filed January 6, 2011--a date well outside the 90-day window under section 6213(a). Our jurisdiction requires the issuance of a valid notice of deficiency and a timely filed petition. *Clough v. Commissioner*, 119 T.C. 183, 186-87 (2002). And we will not dismiss a petition as untimely until the Commissioner first establishes that he mailed a valid notice of deficiency to the taxpayer and second, the date of the mailing. *Stein v. Commissioner*, 60 T.C.M. (CCH) 211, 213 (1990).

No particular form is required for a valid notice of deficiency. *Scar v. Commissioner*, 814 F.2d 1363, 1367 (9th Cir. 1987). A notice of deficiency that identifies the amounts of deficiencies and the years involved satisfies all the requirements of a valid notice of deficiency. *Campbell v. Commissioner*, 90 T.C. 110, 115 (1988). Failure to comply with internal procedures does not invalidate a notice of deficiency, as these procedures are not mandatory. *Stone v. Commissioner*, 76 T.C.M. (CCH) 371, 375 (1998); *Urban v. Commissioner*, 964 F.2d 888, 890 (9th Cir. 1992).

The notice of deficiency is valid – even if the taxpayer never receives it – if it was sent to the taxpayer's last known address. § 6212(b)(1). Kwolek first argues that her last known address was the address of her “fiduciary.” And we have indeed held that a notice of deficiency is invalid if it was not mailed to the fiduciary's address on file. *Stein*, 60 T.C.M. (CCH) at 215. But did Kwolek have a fiduciary on file? We find she did not. Kwolek maintained a Power of Attorney (POA) throughout the relevant tax years, but this does not mean that her POA was her fiduciary. Her form includes only boilerplate language that authorizes her attorney to “receive and inspect confidential tax information and to perform any and all acts that [he] can perform with respect to the tax matters” – including the authority to sign agreements, consents, or other documents. But this authority goes no farther. For example, her representative did not have the authority to receive the taxpayer's refund checks or the power to sign “certain” returns. *See Oak Center v. Commissioner*, 60 T.C.M. (CCH) 1438 (1990) (citing sections 6903 and 7701(a)(6) for the proposition that “a person upon whom authority is conferred by a power of attorney is not in a fiduciary relationship”).

The address of a taxpayer's attorney can still be the last known address of a taxpayer if Form 2848 (designating the POA) directs that all original notices and written communications be sent to the taxpayer at the attorney's address. *Reddock*

*v. Commissioner*, 72 T.C. 21, 24 (1979). The problem for Kwolek here is that her form doesn't say that. We therefore conclude that the the Commissioner was entitled to mail the notice to Kwolek directly and not to her representative designated on Form 2848. *See Payne v. Commissioner*, 63 T.C.M. (CCH) 1778, 1781 (1992).

To take advantage of this, the Commissioner did need to send the notice to Kwolek at her last known address. So what was her last known address as of April 13, 2010, when the notice is dated? The usual answer is that it is the address shown on the most recent return available to the IRS agent when he issued the notice – provided it could be computer generated using the taxpayer's ID number. *United States v. Zolla*, 724 F.2d 808, 810 (9th Cir. 1984), *cert. denied* 469 U.S. 830 (1984); *Abeles v. Commissioner*, 91 T.C. 1019, 1035 (1988); sec. 301.6212-2(a), *Proced. and Admin. Regs.* Kwolek's 2009 return does state that her address is on San Ramon Valley Blvd. in Danville, California. But that return was filed late and received by the IRS only on February 16, 2011 – after the notice had gone out. The IRS received Kwolek's 2008 return, however, on October 19, 2009. We find this to be the most recent return on file at the time the notice was sent, and the address on this return is on Hilferd Way in Danville. This is also the address that Kwolek put on the majority of the POAs as well. And it is the address on the notice of deficiency.

That leaves only the question of whether the Commissioner actually mailed the notice to this address. The IRS has the burden of proving by competent and persuasive evidence that it did so – and this especially includes proof that the IRS properly delivered the notice to the Postal Service for mailing. *Coleman v. Commissioner*, 94 T.C. 82, 90 (1990); *Pietanza v. Commissioner*, 92 T.C. 729, 740 (1989); *August v. Commissioner*, 54 T.C. 1535, 1536 (1970). There is good caselaw that says such evidence may include a properly completed USPS Form 3877. *Coleman*, 94 T.C. at 90. A properly completed Form 3877 is often sufficient proof of mailing all by itself. *Zolla*, 724 F.2d at 810. Indeed, exact compliance with the Form 3877 mailing procedures raises a presumption of “official regularity” in favor of the Commissioner. *Id.* But if the Form 3877 is defective, this presumption is lost and the Commissioner must instead come forward with proof of timely mailing using other evidence.

Kwolek argues that the Commissioner's certified-mail list is incomplete and defective in that it fails to include a USPS employee's initials or signature, does not identify how many pieces of mail were received by the Postal Service, is not written on US Postal Services Form 3877, and leaves blank the section which

should include the postmaster's identification, initials, and the date. *See Cataldo v. Commissioner*, 60 T.C. 522 (1973), *aff'd per curiam* 499 F.2d 550 (2d Cir. 1974); *Wheat v. Commissioner*, 63 T.C.M. (CCH) 2955, 2957 (1992) (failure to have the postal clerk initial and indicate how many pieces of mail were received); *Bobbs v. Commissioner*, 90 T.C.M. (CCH) 524, 526 (2005) (no indication of the number of items received or a signature by a USPS employee). The proffered form isn't even the usual USPS Form 3877. This might not be fatal to the IRS's attempt to get a presumption of official regularity, *see Clough*, 119 T.C. at 185, n. 3; *Bobbs*, 90 T.C.M. (CCH) at 526; *Stein*, 60 T.C.M. (CCH) at 213. But the form in this case has too many things wrong with it. While it indicates the "total number of pieces listed by sender" as "1," it does not indicate how many pieces were received at the Post Office. It has a stamp that has the date and location of the Post Office – which the Commissioner argues shows the postmaster's involvement – but it does not contain that information on the form itself in the specified location. We agree with the taxpayer here: This looks like nothing other than an IRS internal note with a Post Office stamp on it.

The Commissioner isn't done, though. He next argues that his evidence of routine mailing procedures, the captured image of the notice of deficiency, the certified-mail list, and the USPS track-and-confirm notice, together establish that the notice was sent on April 13, 2010. With this we agree. While we find that the form does not comply with Form 3877 requirements, we do find that the "certified mailing list" provided by the Commissioner is evidence of the fact and date that the notice was mailed. We also accept the track-and-confirm notice as an official record of the USPS, *Boulton v. Commissioner*, 101 T.C.M. (CCH) 1031, 1034 (2011), and as evidence of the matters stated on the document. That track-and-confirm notice states that the notice arrived in Danville, California on April 14, 2010 and was left for delivery on April 15, 2010. It also states that USPS returned the unclaimed notice to the IRS on May 5, 2010.

Without relying on presumptions, we find by a preponderance of the evidence that there was a notice of deficiency, and that it was mailed to Kwolek's last known address on April 13, 2010. We hold again, as we did earlier this year, that a taxpayer may not hold open the 90-day window to file her petition in Tax Court simply by refusing to pick up her mail. *See Onyango v. Commissioner*, 142 T.C. 24 (2014) (holding that a taxpayer's refusal to receive certified mail barred him from challenging his receipt of the underlying notices of deficiency). Therefore, it is

ORDERED that respondent's April 6, 2011 motion to dismiss for lack of jurisdiction is granted.

**(Signed) Mark V. Holmes  
Judge**

ENTERED: **DEC 31 2014**