

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| DELROY AND DILYS BROOKS | : | DETERMINATION DTA NO. 821355 |
| for Redetermination of a Deficiency or for | : | |
| Refund of New York State and New York City | : | |
| Personal Income Taxes Under Article 22 | : | |
| of the Tax Law and the New York City | : | |
| Administrative Code for the Year 2002. | : | |

Petitioner, Delroy and Dilys Brooks, 26014 Via Oro, Loma Linda, California 92354, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2002.

The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion received on April 16, 2007 seeking dismissal of the petition or, in the alternative, summary determination in the above referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i);(b). Petitioners, appearing by Emily Ndelela, CPA, had 30 days, or until May 16, 2007, to respond to the motion but did not do so, and the 90-day period for issuance of this determination commenced on May 16, 2007. After due consideration of the documents and arguments presented, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners' request for a conciliation conference to challenge a notice of deficiency was filed in a timely manner.

FINDINGS OF FACT

1. The Bureau of Conciliation and Mediation Services ("BCMS") of the Division of Taxation ("Division") received from petitioners, Delroy and Dilys Brooks, husband and wife, a Request for Conciliation Conference ("Request"). This Request identifies petitioners by name, lists their "current address" as 26014 Via Oro, Loma Linda, California 92354-3849, and lists the "address on notice/assessment" as 1665 Hickory Creek Dr. 1, Baroda, Michigan 49101-9337. The Request references Document Number 83854608 and Assessment ID Number L-026604278-2, indicates petitioners' disagreement with the referenced assessment, and requests a conciliation conference. The Request is signed by petitioners' representative and is hand-dated June 16, 2006.

2. The assessment challenged by the Request is a statutory Notice of Deficiency addressed to petitioners at 1665 Hickory Creek Dr. 1, Baroda, Michigan 49101-9337, bearing Document Number 83854608 and Assessment ID L-026604278-2. This Notice is dated February 6, 2006, and asserts New York State and New York City personal income tax due from petitioners for the year 2002 in the aggregate amount of \$1,266.44, plus interest. The Notice provides, in its explanation and instructions section, that to protest the Notice a Request for Conciliation Conference or a Petition for a Tax Appeals Hearing must be filed by May 7, 2006.

3. By a Conciliation Order Dismissing Request (CMS No. 214615) dated July 7, 2006, BCMS advised petitioners that their request for a conciliation conference was denied. Specifically, the Order advised that the Notice was issued on February 6, 2006, but that the

Request was not mailed until June 16, 2006, thus leaving the request untimely since it was mailed more than 90 days after the issuance of the Notice.

4. On October 2, 2006, petitioners challenged this denial by filing a petition with the Division of Tax Appeals. The petition includes an “Explanation for late requested [sic] late conciliation conference,” stating that the Notice dated February 6, 2006 was mailed to petitioners’ former home in Michigan, but was not forwarded to petitioners who had moved to and were, at the time, living in California. The petition states that petitioners did receive from the Division a notice dated June 1, 2006, contacted the Division thereafter and, in turn, received from the Division a duplicate copy of the February 6, 2006 Notice. According to the petition, the duplicate copy was mailed on June 9, 2006 and was received by petitioners on June 13, 2006. A copy of the notice dated June 1, 2006, as referenced in the petition, reveals the same to be a Notice and Demand for Payment of Tax Due which is addressed to petitioners at 1665 Hickory Creek Dr. 1, Baroda, Michigan 49101-9337.

5. Notices of deficiency, such as the one at issue herein, are computer-generated by the Division’s Computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record (“CMR”). The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other (fan-folded) before and after acceptance of the notices by the USPS through return of the CMR to the CARTS Control Unit.

6. Each computer-generated notice of deficiency is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the columnar heading “Certified No.” The next columnar heading, entitled “Reference

No.,” lists the assessment number assigned to each notice listed on the CMR. The third columnar heading, entitled “Name of Addressee, Street and P.O. Address,” lists the names and addresses of the taxpayers to whom the notices are being issued. The remaining columns list the postage and fee amounts for the notices being mailed. The CMR also lists an initial date (the date of its printing) in its upper left corner, set forth in numbers listing the particular year, ordinal day of the year and military time of day when such CMR is produced which, in this case, was “20060271700.” The date of printing listed on the CMR falls approximately 10 days earlier than the anticipated mailing date for the notices, with such period provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR in this case was manually changed at the time of mailing by Division personnel to February 6, 2006, in order to conform to the actual date of mailing.

7. The certified control number assigned to each notice, as appearing on the CMR, also appears on the front of a separate one-page “Mailing Cover Sheet” (Form DTF-997) that is generated by CARTS for each notice. Each Mailing Cover Sheet also bears, on its front, a bar code, the taxpayer’s mailing address and a return address for the Division. The reverse side of each such Mailing Cover Sheet carries taxpayer assistance information. CARTS also generates any enclosures referenced within the body of each notice. Ultimately, each notice, accompanied by its Mailing Cover Sheet and any appropriate enclosures, is a discrete unit with the batch of notices, with the mailing cover sheet being the first sheet in such unit.

8. After a notice of deficiency is placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staff member in the Mail Processing Center operates a machine which places each notice and the associated documents, as a unit, into a

windowed envelope so that the addresses and certified number from the Mailing Cover Sheet show through the windows of the envelope. That staff member then weighs and seals each envelope and affixes “postage” and “fee” amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and also performs a random review of up to 30 pieces of certified mail by checking the letters against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the United States Postal Service (“USPS”) located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or initials, or both, to the CMR.

9. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control unit.

10. In the instant case, the CMR is a 27-page computer-generated document entitled “Certified Record for Presort Mail-Assessments Receivable.” All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. The CMR lists 293 certified control numbers. Each such certified control number was assigned to an item of mail listed on the 27 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts. Each of the pages of the

CMR contain eleven entries, with the exception of the last page (page “27”) which contains seven entries.¹

11. Information regarding the Notice of Deficiency issued to petitioners was contained on page 26 of the CMR and lists Certified No. 7104 1002 9730 1143 1912, Reference No. L 026604278, and “Brooks - Delroy, 1665 Hickory Creek Dr. 1, Baroda, MI 49101-9337” as the addressee. The Certified Number and the Reference Number match the Certified Mailing Number and the Assessment ID Number set forth on the Mailing Cover Sheet and the Notice of Deficiency at issue herein. The CMR lists only the name of Delroy Brooks since it is the Division’s standard procedure for the CMR to contain only the name of the “primary taxpayer” associated with a statutory notice. Thus, when a husband and wife file a joint personal income tax return, whereon the husband’s social security number is listed in the place designated for the primary taxpayer, only the husband’s name will appear on the CMR.

12. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated February 6, 2006, and the initials of the postal employee verifying receipt of the items. The last page of the CMR contains a preprinted entry of “293” corresponding to the heading “Total Pieces and Amounts.” Appearing beneath this preprinted entry and corresponding to the heading “Total Pieces Received At Post Office” is the handwritten number “293” followed by the initials of the Postal Service employee accepting receipt of the items. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the hand writing of the number “293” indicate that all 293 pieces listed on the CMR were received at the post office.

¹ The names, addresses and other identifying information with regard to taxpayers other than petitioner have been redacted from the CMR so as to preserve the confidentiality of the information relating to such other taxpayers.

13. In the ordinary course of business, the CMR is returned to the Division's CARTS unit, and the Division generally does not request, demand or retain return receipts from certified or registered mail.

14. The facts set forth above in Findings of Fact "5" through "13" were established through the affidavits of Patricia Finn Sears and James Steven Vanderzee. Ms. Sears is employed as a Supervisor in the Division's CARTS Control Unit. Ms. Sears's duties included supervising the processing of notices of deficiency. Mr. Vanderzee is employed as a Mail and Supply Supervisor in the Division's Mail Processing Center. Mr. Vanderzee's duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

15. The address on the subject Notice of Deficiency was the same as the address given on petitioners' Form IT-203 ("New York State Nonresident and Part-Year Resident Income Tax Return") as filed with the Division for the year 2002. This return, dated November 1, 2004 was the last return filed by petitioners pursuant to Tax Law Article 22 and the New York City Administrative Code prior to the issuance of the subject Notice of Deficiency.

16. Petitioners' only communication in this matter subsequent to the filing of their petition has been a November 2, 2006 letter by petitioners' representative seeking permission to appear on petitioners' behalf in this forum (which permission was granted by letter of the Tax Appeals Tribunal dated November 28, 2006), and an April 23, 2007 letter responding to a Notice to Schedule a Hearing, in which a hearing date of August 14, 2007 was requested. Petitioners did not respond to this motion and its claim that the Request was not timely filed, nor have petitioners offered any arguments or evidence to support a claim that they filed any protest against the Notice at issue within the requisite period of time, i.e., 90 days after its issuance.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioners offered no arguments or evidence to counter the Division's motion regarding the issue of the timeliness of petitioners' protest, and petitioners are therefore deemed to have conceded that no question of fact requiring a hearing on such issue exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Specifically, since petitioners presented no evidence to contest the facts alleged in the Sears and Vanderzee affidavits, those facts may, as a consequence, be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 681(a) authorizes the Commissioner of Taxation to issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined. Said section further provides that the notice "shall be mailed by certified or registered mail to the taxpayer at his last known address."

D. In order to challenge a notice of deficiency, a petition for an administrative hearing must be filed with the Division of Tax Appeals within 90 days after the issuance of the notice (Tax Law § 689[b]). Alternatively, Tax Law § 170(3-a)(a) allows a taxpayer to file a request for a conciliation conference with the Division's BCMS following the issuance of a notice of deficiency so long as the time to petition for a hearing in respect of such notice has not elapsed.

Pursuant to these provisions, then, petitioners had 90 days from the issuance of the subject notice to file a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals.

E. Where a taxpayer fails to file either a timely request for a conciliation conference or a petition contesting a Notice of Deficiency, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). There is no claim that a petition was filed at any time within 90 days after issuance of the Notice in this case. The only issue presented, then, is whether petitioners' Request was filed within 90 days after the issuance (mailing) of the Notice of Deficiency.

F. It is the mailing date of the statutory notice which triggers the 90-day period within which a protest must be filed. Where, as here, a taxpayer files a request, but the timeliness of the request is at issue, the Division bears the burden of proving proper mailing of the statutory notice (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A statutory notice is mailed when it is delivered to the custody of the USPS (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a notice of deficiency is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, that notice is valid and petitioner bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990) The mailing evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard

procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. Vanderzee, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices. Furthermore, the Division has offered adequate proof to establish the fact that the particular notice at issue was actually mailed to petitioners on February 6, 2006, the date appearing on the CMR. The affidavits generally describe the various stages of producing and mailing notices and, in addition, attest to the authenticity and accuracy of the copy of the notice and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Sears and Vanderzee affidavits were followed with respect to the notice issued to petitioners. Petitioner Delroy Brooks's name and petitioners' last known address at the time of mailing, as well as the Assessment ID number on the face of the Notice in issue, appear on the CMR, which bears a USPS date stamp of February 6, 2006.² There are 293 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "293," that 293 items were received for mailing. In short, the Division established that it mailed the Notice of Deficiency to petitioners by certified mail on February 6, 2006 (*see, Matter of Auto Parts Center, Tax Appeals Tribunal, February 9, 1995*). In turn, in order to be considered timely, any protest against the Notice had to have been filed within 90 days thereafter, or by May 7, 2006.

² The absence of petitioner Dilys Brooks's name from the CMR was adequately explained (*see* Finding of Fact "11").

H. Conciliation Order No. 214615 denied petitioners' request for a conciliation conference on the basis that the request was not filed within 90 days after the issuance of the Notice. In this case the Request, dated as signed on June 16, 2006, was filed in response to the duplicate Notice admittedly received by petitioners on June 13, 2006. Petitioners did not respond to the subject motion or otherwise provide any documents or other evidence to establish that any protest occurred within the requisite 90-day time period. Since the Request was not timely filed (i.e., within 90 days after February 6, 2006), the same was untimely and there is no jurisdiction to proceed with this matter.

I. The petition of Delroy and Dilys Brooks is hereby dismissed.³

DATED: Troy, New York
July 19, 2007

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

³ Petitioners are not entirely without recourse in this matter. That is, petitioners may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 689[c]). Upon its denial, petitioners may then proceed with a timely petition for a hearing to contest the refund denial.