STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LIKE A PRAYER TRUST	:	ORDER DTA NO. 823506
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2004.	:	

Petitioner, Like A Prayer Trust, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2004.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, dated March 5, 2010, on the ground that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition was untimely filed. The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents dated March 29, 2010 in support of the proposed dismissal. Petitioner, appearing by Kostelanetz & Fink, LLP (Megan L. Brackney, Esq., of counsel), submitted a response by its due date of April 6, 2010 in opposition to the proposed dismissal. The 90-day period to issue this order thus commenced on April 6, 2010. Based upon the pleadings in this matter and the affidavits and documents submitted by both the Division of Taxation and petitioner, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. Petitioner filed a petition dated February 18, 2010, which was received by the Division of Tax Appeals on February 22, 2010. The petition asserts certain errors on the part of the Division of Taxation (Division) specifically related to the merits of the taxation of the trust and the Notice of Deficiency issued to petitioner dated September 29, 2008, assessing tax due in the amount of $4,263,951.00 plus penalty and interest, for a total of $6,964,892.03.

2. In reviewing the petition, the Petition Intake Unit of the Division of Tax Appeals determined that the petition appeared to have been filed late and notified petitioner of its finding by a Notice of Intent to Dismiss dated March 5, 2010. The notice advised petitioner that the petition was filed on February 19, 2010, its date of mailing, which appeared to be more than 500 days after the issuance of the Notice of Deficiency dated September 29, 2008.

3. The Division included in its response, dated March 29, 2010, in support of the proposed dismissal, a copy of the petition filed with the Division of Tax Appeals bearing a Fed Ex shipping date of February 19, 2010 and proof of mailing of the Notice of Deficiency on September 29, 2008. The Division's proof of mailing consisted of (i) an affidavit James Steven VanDerZee, the principal mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit of Patricia Finn Sears, the Supervisor of the Refunds, Deposits, Overpayments and Control Units; (iii) an affidavit of Estelle Diamond, a keyboard specialist in the Division's Clerical Support Unit; (iv) a one-page Certified Mail Record (CMR); (v) a copy of the Notice of Deficiency dated September 29, 2008 for Assessment L-030697989-8

issued to petitioner; and (v) a copy of petitioner's fiduciary income tax return, Form IT-205, for tax year 2005, signed and dated October 12, 2006.

4. The affidavit of Ms. Sears sets forth the Division's general practice and procedure for processing statutory notices prior to their shipment to the Division's mail processing center. Based upon her review of the affidavit of Estelle Diamond, another Division employee (whose affidavit is described herein), the CMR and the Notice of Deficiency, Ms. Sears concluded that in some cases notices are pulled for manual review, and in this case the notice issued to petitioner was pulled and sent to the Division for review and preparation of the CMR. Subsequently, the CMR was returned to the Clerical Support Unit of the Division with a postmark affixed, showing the date of mailing, the number of pieces received at the Post Office and the Postal Service representative's initials or signature.

5. The affidavit of James Steven VanDerZee, the mail and supply supervisor, describes the operations and procedures followed by the mail processing center. After the statutory notices are placed in an "Outgoing Certified Mail" basket, a member of Mr. VanDerZee's staff weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to a branch of the United States Postal Service (USPS) in Albany, New York. A postal employee affixes a postmark and also may place his or her initials or signature on the certified mail record indicating receipt by the post office. Here, the postal employee affixed a postmark to the certified mail record, initialed the CMR, and wrote in the total number of pieces of certified mail received. This CMR indicates that a total of two pieces of mail were delivered to the USPS. Based upon Mr. VanDerZee's review of the affidavits of Ms. Sears and Ms. Diamond, the CMR

and the Notice of Deficiency, he concluded that one piece of certified mail addressed to Like A Prayer Trust at the same address listed on the Notice of Deficiency was delivered to the USPS in Albany, New York, on September 29, 2008.

6. The affidavit of Estelle Diamond, a keyboard specialist in the Division's Clerical Support Unit, explained how certain notices were pulled for manual review, generally to verify a taxpayer's mailing address, and a clerk in that unit would thereafter manually prepare the CMR for that notice. In addition, the clerk would assign a certified control number to the Notice of Deficiency listed on the CMR. Each page of the CMR would contain a space to record the total number of pieces listed by the sender, the total number of pieces received at the post office, and the name of the receiving postal employee.

According to Ms. Diamond, in this case, the CMR for the Notice of Deficiency mailed to petitioner consisted of one page and the first listing on the page was the one which corresponded to the notice in issue. The second listing on the CMR was redacted. Certified No. 7104 1002 9730 0859 6976 was used for the notice mailed to petitioner, the mailing address was the same as that which appeared on the notice and the CMR bore the same Assessment ID number as the notice in the column marked "remarks" on the CMR. Ms. Diamond concluded that the procedures followed in this case were the normal and regular procedures of the Division for such mailings.

7. Attached to the petition filed in this matter with the Division of Tax Appeals on February 19, 2010, was correspondence from the Division's Income/Franchise Field Audit Bureau, Nassau District Office, dated September 11, 2008, along with the Statement of Audit Changes. The correspondence stated:

> An audit of the New York State tax returns for the tax period and articles noted above [22, 30 and 30A] has resulted in an increase to the tax liability in the amount of $6,948,227.00. The enclosed schedules reflect the details of the proposed audit adjustments.
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> * * *
>
> If you disagree with the findings and would like the opportunity to discuss them in greater detail, please contact the auditor by 09/17/2008. A this time, you may submit evidence to substantiate your position. If penalties have been imposed, you may request waiver of those which you believe and are able to establish that reasonable cause exists for abatement.
>
> Not responding to this letter will result in the issuance of a statutory notice of deficiency. This deficiency will become a statutory assessment unless a request for a conciliation conference or a petition for a Tax Appeals hearing is filed within 90 days.

8. The Statement of Audit Changes indicated that the assessment was based upon tax on fiduciary income, plus penalties and interest, which resulted from a capital gain of $55,375,982.00. The statement also bore the following information:

> The trust failed to respond to the audit letters. The trust has failed also to show that it qualified as a split interest trust. Hence, it is treated as a taxable entity and the capital gain it reported for 2004 is is [*sic*] taxable to New York.

9. In response to the Notice of Intent to Dismiss Petition, petitioner submitted correspondence setting forth petitioner's position as follows:

> After issuance of the notice of deficiency, the Department reopened the audit and suspended all collection activity. The Trust responded to the Department's audit letters and produced numerous documents. On December 2, 2009, the auditor issued a second notice advising the Trust that the 'assessment...is sustained,' and providing [*sic*] the following new explanation for the assessment: '[T]he Trust failed to make distribution as required by the trust deed, and to name a qualified charity. Proper books and records were not submitted to verify the utilization of funds.'
>
> * * *
>
> The Trust timely filed the Petition challenging the Department's December 2, 2009 notice well within the ninety-day period provided by New York Tax Law § 2006[4].

10. The December 2, 2009 letter from the Division's Income/Franchise Field Audit Bureau, Nassau District Office, from which petitioner measured the commencement of the 90-day period in which to file its petition, stated the following, in pertinent part:

> Based on the information submitted, we have concluded that Trust failed to comply with the Trust deed and rules relating to charitable reminder [*sic*] trusts. Specifically, the Trust failed to make distributions as required by the trust deed, and to name a qualified charity. Proper books and records were not submitted to verify the utilization of funds. The Trust is deemed to be a taxable entity. As a result, the assessment #L-03069789-8 issued for the year 2004 is sustained.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a Notice of Deficiency (Tax Law § 681[b]; § 689[b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (***Matter of Voelker***, Tax Appeals Tribunal, August 31, 2006, ***confirmed*** 50 AD3d 1187, 854 NYS2d 593 [2008]).

B. Where, as here, the timeliness of a taxpayer's petition following the issuance of a statutory notice is in question, the initial inquiry focuses on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (***id.***). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (***see Matter of Accardo***, Tax Appeals Tribunal, August 12, 1993). When a notice is found to have been properly mailed by the

Division to a petitioner's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990).

C. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory 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***; ***Matter of Novar TV & Air Conditioner Sales & Serv.***).

In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Patricia Finn Sears, James Steven VanDerZee and Estelle Diamond, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency.

The Division also presented sufficient documentary proof, i.e., the respective CMR, to establish that the subject Notice of Deficiency was mailed as addressed to petitioner on the date claimed. Specifically, with respect to the notice in issue, the CMR lists a certified control number with petitioner's name and address, and bears a date stamp of September 29, 2008. Additionally, a postal employee entered "2," as the total number of pieces received at the post office and added his or her initials to the CMR to indicate receipt by the post office of all pieces of mail listed thereon.

D. The Division has established that the Notice of Deficiency dated September 29, 2008 was mailed to petitioner at the address given on its 2005 New York State Fiduciary Income Tax Return, signed and dated October 12, 2006 by the fiduciary of the trust. This was the last return filed by petitioner prior to the date of issuance of the September 29, 2008 notice. Here, the

Division's response in support of the proposed dismissal of the alleged untimely petition included adequate documentary evidence, which established that the notice in this case was properly mailed to petitioner at the correct address on September 29, 2008. Accordingly, the Division has established that it mailed the subject notice as claimed on that date.

E. A statutory notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (***Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, November 25, 1992). In this case, the notice was properly mailed when it was delivered into the custody of the USPS on September 29, 2008, and it is this date which triggered the 90-day period within which a protest had to have been filed (***id***), unless something acted to toll the statute. Petitioner asserts that on two grounds it has preserved its prepayment opportunity to challenge the Division's conclusions in this case.

Petitioner maintains that the correspondence from the Division dated December 2, 2009, (issued after the Division revisited the merits of petitioner's assessment), acts in an equivalent manner to the original statutory notice since it qualifies as "any written notice" pursuant to Tax Law § 2008(1). Filing its petition as measured from the December 2, 2009 correspondence, petitioner argues it was timely filed. Tax Law § 2008(1) states as follows:

> All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.

Before a determination can be made as to whether the December 2, 2009 correspondence acts as a statutory notice, from which arose the right of petitioner to file a petition, we must first

identify the result of the issuance of the original statutory notice dated September 29, 2008. It has already been established that the Division followed proper procedures to mail the notice, and in fact it was mailed as purported on September 29, 2008. This is not disputed by petitioner. After the 90-day time period for filing the petition ran, the assessment became fixed and irrevocable. The Division made this outcome clear in its instructive letter of September 11, 2008, along with statements regarding the failures of the trust that resulted in the taxation of the capital gain. Petitioner did not submit any evidence that the Division influenced or instructed petitioner not to file a petition within the original 90-day period. The record supports that the Division did not mislead or confuse petitioner with competing instructions at the time of the issuance of the original notice. Had there been an allegation and proof that the Division confused or misled petitioner, it may have served to prohibit the Division from denying the timeliness of petitioner's protest (***see Matter of Eastern Tier,*** Tax Appeals Tribunal, December 6, 1990 [where a taxpayer essentially relied on confusing letters from the Division to its detriment, and the Tribunal appropriately applied principles of estoppel to prevent the manifest injustice of denial of its right to a conciliation conference]; ***Matter of Harry's Exxon Serv. Station*****,** Tax Appeals Tribunal, December 6, 1988 [taxpayer is entitled to rely on a Division letter stating that the sales tax audit was concluded and no sales tax was due]). In this case, however, no equitable relief is warranted. There was nothing that acted to toll the statute of limitations once the assessment was fixed. Thus, the original Notice of Deficiency dated September 29, 2008 started the running of the 90-day statute of limitations from which petitioner was required to protest.

Petitioner makes an alternative argument that the December 2, 2009 letter revived the 90-day deadline for filing a petition challenging the September 29, 2008 notice. The time between the statutory notice and the December 2, 2009 letter represented a courtesy extended to

the taxpayer long after the original notice became an assessment, in order to review documentation submitted by petitioner. Such action did not act to toll the statute of limitations, or replace the original notice, but simply gave petitioner an additional opportunity to address the taxation merits. With the original notice remaining the operative document for the statutory 90-day deadline, it becomes unnecessary to determine whether the December 2, 2009 correspondence would qualify as "any written notice" pursuant to Tax Law § 2008(1), or to address the legal issue of what constitutes an informal request for a hearing and whether such request is sufficient for timeliness purposes. The December 2nd correspondence neither revived nor replaced the original notice. If petitioner is arguing that its tax liability was not finally and irrevocably fixed by its failure to timely protest the original notice because the Division subsequently revisited the merits of petitioner's case, this argument is also rejected. The Division's review of the underlying assessment took place long after the 90-day period of time to apply for a hearing had expired, at which time the assessment became final. To allow a hearing on the basis of subsequent correspondence, would render the 90-day time limit for requesting a hearing meaningless and would discourage the Division from undertaking any further review of a taxpayer's liability once such liability is established (***see Matter of Pavlak,*** Tax Appeals Tribunal, February 12, 1998). Unfortunately, as a matter of law, there is no jurisdiction to address the merits of petitioner's protest (***Matter of Sak Smoke Shop***).

F. Petitioner may not be without some remedy, since it may pay the tax and file a claim for a refund (Tax Law § 687). If the refund claim is disallowed, petitioner may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 689[c]).

G. The petition of Like A Prayer Trust is hereby dismissed .

DATED:Troy, New York
July 1, 2010

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE