

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ALAN AND KAREN BRESLOW</b>	:	<b>DETERMINATION</b>
for Redetermination of Deficiencies or for Refund of	:	<b>DTA NO. 825688</b>
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 2008 and 2009.	:	

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Petitioners, Alan and Karen Breslow, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2008 and 2009.

On December 3, 2013, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion seeking an order dismissing the petition or summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(ii) and 3000.9(b), respectively, of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on January 2, 2014, the due date for petitioners' response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction over the petition filed in this matter.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner Karen Breslow<sup>1</sup> Notice of Deficiency L-038288401-7, dated September 4, 2012, which asserted a deficiency of personal income tax for the year 2008 in the amount of \$5,037.00, plus interest and penalty. The Division issued a second Notice of Deficiency, assessment number L-038288402-6, to petitioner Karen Breslow dated September 4, 2012, which asserted a deficiency of personal income tax for the year 2009 in the amount of \$2,110.00, plus interest and penalty.

2. On May 22, 2013, the Division of Tax Appeals received a petition challenging the foregoing notices. The petition was dated May 12, 2013 and bore a U.S. Postal Service (USPS) postmark of May 15, 2013.

3. To show proof of proper mailing of the notices dated September 4, 2012, the Division provided, among other documents, the following: (i) an affidavit, dated November 6, 2013, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated November 5, 2013, of Daniel A. Maney, manager of the Division's Refunds, Deposits, Overpayments and Control Unit, that includes the Case and Resource Tracking System (CARTS), (iii) pages 1, 565 and 2,075 of a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked September 4, 2012, (iv) a copy of the petition, (v) an affidavit, dated November 6, 2013, of Heidi Corina, a legal assistant in the Division's Office of Counsel, (vi) two USPS Requests for Delivery Information/Return Receipt after Mailing, form 3811-A, and (vii) two USPS responses thereto.

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<sup>1</sup>Petitioner Alan Breslow's name appears herein by virtue of having filed a joint petition with his wife. Unless otherwise specified or required by context, references to "petitioner" shall mean petitioner Karen Breslow.

4. The affidavit of Daniel A. Maney describes certain facets of the Division's general practice and procedure for the processing of notices of deficiency. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page of the CMR in the present case to the actual mailing date of "9/4/12." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

5. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address."

6. The CMR relevant to the present matter consists of 2,075 pages and lists certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated September 4, 2012 to each of

the three pages of the CMR provided, handwrote and circled “2,075” on page 2,075 of the CMR and initialed the same page.

7. Page 565 of the CMR indicates that two notices of deficiency, assigned certified control numbers 7104 1002 9730 1289 5607 and 7104 1002 9730 1289 5614 and assessment numbers L-038288401 and L-038288402, respectively, were mailed to petitioner at her New City, New York, address listed thereon. The corresponding mailing cover sheet, submitted with the Division’s motion papers, bears these certified control numbers and petitioner’s name and address as noted.

8. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division’s Mail Processing Center (Center), describes the Center’s general operations and procedures. The Center receives the notices and places them in an “Outgoing Certified Mail” area. A mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. Here, as noted, each of the three pages provided of the CMR contain such postmarks. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number

on the last page of the CMR. Here, the USPS wrote and circled the total number of pages received.

9. Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares USPS Form 3811-A. Form 3811-A is used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

10. Attached to Ms. Corina's affidavit are two copies of the Form 3811-A, which were requested for petitioner. These forms request information regarding pieces of mail bearing certified control numbers 7104 1002 9730 1289 5607 and 7104 1002 9730 1289 5614 addressed to "Breslow-Karen L." at her New City, New York, address. Also attached to Ms. Corina's affidavit are the Postal Service's responses to the Form 3811-A requests on USPS letterhead dated August 13, 2013. The letter regarding certified control number 7104 1002 9730 1289 5607 states in part: "The delivery record shows that this item was delivered on September 15, 2012 at 10:36 am in NEW CITY, NY 10956." The letter also contains a scanned image of the signature of the recipient similar to that of petitioner as appears on the petition. The address of the recipient is shown as "30 James St, New City, NY 10956." The letter regarding certified control number 7104 1002 9730 1289 5614 states in part: "The delivery record shows that this item was delivered on September 15, 2012 at 10:36 am in NEW CITY, NY 10956." The letter also contains a scanned image of the recipient's signature similar to that of petitioner's as it appears on the petition. The address of the recipient is shown as "30 James St, New City, NY 10956."

**CONCLUSIONS OF LAW**

A. 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). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Malpica; see also Matter of Ruggerite, Inc. v. State Tax Commission*, 64 NY2d 688, 485 NYS2d 517 [1984]).

B. The affidavits of two Division employees, Daniel A. Maney and Bruce Peltier, provide adequate proof of the Division's standard mailing procedure for the mailing of statutory notices by certified mail. The affidavits generally describe the various stages of producing and mailing notices. However, on the last page of the CMR, the number of pieces received has been circled and the number of pieces indicated as received has been handwritten by a USPS employee. However, only 3 of the 2,075 pages of the CMR were submitted in evidence. The presence of the USPS postmark on the three pages of the CMR is insufficient to show that the

items of mail listed were actually delivered to the USPS. Prior cases of the Tax Appeals Tribunal establish that the presence of a USPS postmark on a selected page of a longer certified mail record is not sufficient to prove that an item listed on that page was delivered to the USPS on the postmark date. In *Matter of Roland* (Tax Appeals Tribunal, February 22, 1996), a USPS postmark appeared on each page of the certified mail record, including the page bearing the subject taxpayer's name and address. Nonetheless, the Division's proof was found inadequate to prove that the item of mail addressed to the taxpayer was actually delivered to the USPS. Delivery of a particular item listed in the certified mail record is proven when an employee of the USPS acknowledges receipt of the items listed by circling the total number of pieces received or writing the total number of pieces received, as requested by the Mail Processing Center. A USPS date stamp alone placed on one or more pages of the certified mail record is not sufficient (*see Matter of Cal-al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998, *see also Matter of Roland; Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995). Therefore, it is concluded that the Division has not met its burden of establishing proper mailing of the notices.

C. In the present matter, however, the Division does not seek to establish the date of issuance of the statutory notices, but rather the date of receipt of the notices by the taxpayer. Under such circumstances, that is, where the date of mailing is not established, the 90-day period for filing a petition or request for conciliation conference commences with the date of actual notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]).

D. Here, the record shows that petitioner received actual notice of the subject notices of deficiency on September 15, 2012. Specifically, the Maney and Peltier affidavits establish the Division's standard mailing procedure, including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheets as well as the CMRs, and the inclusion of such mailing cover sheets along with the notices in the windowed envelopes for mailing. A review of the mailing cover sheets related to the notices mailed to petitioner confirms that the control numbers listed thereon are consistent with the control numbers listed on the CMRs and the USPS responses to the Division's requests for delivery information. The documentation provided to the Division by the USPS shows that articles of mail bearing such certified control numbers were delivered to petitioner's address on September 15, 2012. Petitioner thus received actual notice of the subject notices of deficiency on that date.

E. Petitioners' petition was filed on May 15, 2013, well beyond 90 days from the date of actual notice. The request was therefore untimely filed (*see Matter of Hyatt Equities, LLC*; *see also* Tax Law § 689[b]; § 170[3-a][b]). Consequently, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioners' protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

F. The Division's motion is granted, and the petition of Alan and Karen Breslow is hereby dismissed.

DATED: Albany, New York  
March 6, 2014

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE