

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ANTHONY NEVE</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 825754</b>
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law and New York City Personal Income	:	
Tax pursuant to the Administrative Code of the City	:	
of New York for the Year 2007.	:	

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Petitioner, Anthony Neve, 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 and New York City personal income tax pursuant to the Administrative Code of the City of New York for the year 2007.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Robert J. Tompkins, Esq., of counsel), brought a motion dated December 12, 2013 seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the Division of Taxation's motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination..

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination..

***FINDINGS OF FACT***

1. Petitioner, Anthony Neve, filed a Request for Conciliation Conference (Request) with the Bureau of Conciliation and Mediation Services (“BCMS”) of the Division of Taxation (Division). The Request was filed in protest of a Notice of Deficiency dated December 7, 2012, bearing assessment number L-038585838-1 and asserting tax due for the year 2007 in the amount of \$30,013.00, plus penalty and interest. The envelope in which the Request was filed bears a United States Postal Service (USPS) postmark dated April 2, 2013 and is date stamped as received by BCMS on April 4, 2013.

2. On April 19, 2013, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. Referencing notice number L-038585838, the Order determined that petitioner’s protest was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on December 7, 2012, but the request was not mailed until April 2, 2013, or in excess of 90 days, the request is late filed.

3. Petitioner challenged this dismissal by filing a petition with the Division of Tax Appeals. The petition is dated as signed by petitioner on July 8, 2013, and the envelope in which the petition was mailed bears a USPS postmark dated July 12, 2013. The envelope and petition in turn are date stamped as received by the Division of Tax Appeals on July 15, 2013. There is no dispute that the petition was filed within 90 days after the April 19, 2013 issuance of the Order and constitutes a timely challenge thereto.

4. In support of its motion and to prove mailing of the Notice of Determination under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated December 13, 2013, of Robert J. Tompkins, Esq.; (ii) an affidavit, dated December 3, 2013, of Daniel A. Maney, manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (iii) an affidavit, dated December 4, 2013, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked December 7, 2012; and (v) a copy of petitioner's Resident Income Tax Return (Form IT-201) for the year 2011, the last return filed by petitioner before the Notice of Determination dated December 7, 2012, reporting the same Brooklyn, New York address for petitioner as that listed on said notice.

5. The affidavit of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units since January 2010, sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR, using the year, the numeric ordinal day of the year and military time of day. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "12/7/12."<sup>1</sup> It is also the Division's general practice that all pages of

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<sup>1</sup> In his affidavit, Mr. Maney states that "[i]n the upper left hand corner of Page 1 of the certified mail record, the date the notices were mailed was handwritten by personnel in the Department's Mail Processing Center." In fact, the handwritten date of mailing appears in the upper *right* corner on the pages attached to the Maney affidavit.

the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (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.

6. 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 "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 P.O. Address."

7. The CMR relevant to the Notice of Deficiency under protest consists of 25 pages and lists 264 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes eleven such entries with the exception of page 15, which contains ten such entries (one of the original such certified control numbers and the assessment number, name and address corresponding thereto has been crossed out), and page 25, which contains no such individual assessment entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated December 7, 2012 to each page of the CMR and also wrote his or her initials on the last page thereof.

8. Page 13 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 1427 4585 and assessment number L-038585838, was to be mailed to

petitioner at the Brooklyn, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

9. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." The 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. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the 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 or initials on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed page 25 and affixed a postmark dated December 7, 2012 to each page of the CMR. 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 employee complied with this request by crossing out the preprinted number 264, as appearing next to the heading "Total Pieces and Amounts," and thereafter both hand writing and circling the number "263" on the last page next to the heading "Total Pieces Received at Post Office." This change was made to reflect that one piece of certified mail (the last such piece of mail identified but crossed out on page 15 of the CMR [*see* Finding of Fact 7]) had been "pulled" from that particular run. A piece of mail may be pulled for any number of reasons

including, but not limited to, a discrepancy in a name or address. Any piece of mail so pulled is segregated from the remaining group of statutory notices for correction and issuance at another time.

10. The piece of mail pulled from this run had been assigned a certified control number (7104 1002 9730 1427 4899) and a line has been drawn through the entry for this item to indicate that it was pulled from the run. This deletion is reflected in the change to the total pieces received at the Post Office as noted above, and there is no such line drawn or other mark on or near the CMR listing pertaining to petitioner.

11. According to the Peltier affidavit, a copy of the subject Notice of Deficiency was mailed to petitioner on December 7, 2012, as claimed.

12. The facts set forth above in Findings of Fact 5 through 11 were, as noted, established through the affidavits of Daniel A. Maney and Bruce Peltier, as well as the documentary evidence presented by the Division. Mr. Maney's affidavit avers that he is and was fully familiar with the Division's present and past office procedures concerning the generation and processing of notices of deficiency for shipment to the Division's Mail Processing Center. Mr. Peltier's affidavit avers that he has been a supervisor in the Division's mail room since 1999 and that he is currently a principal mail and supply supervisor and is fully familiar with the operations and procedures of the mailing of notices.

#### ***SUMMARY OF PETITIONER'S POSITION***

13. Petitioner did not respond to the Division's motion. In a letter dated July 8, 2013 and attached to the petition filed in this matter, petitioner maintains that he lived in Manalapan, New Jersey, for the entire year 2007, had no New York source income for that year and filed a New

Jersey income tax return. There is no claim or evidence that petitioner advised the Division at any time of a change of his address to New Jersey for the year 2007.

### ***CONCLUSIONS OF LAW***

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). As the petition in this matter was timely filed (*see* Finding of Fact 3), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This order shall address the instant motion as such. Given the timely petition, the Division's motion to dismiss under section 3000.9(a) of the Rules is improperly brought.

B. A motion for summary determination "shall 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" (20 NYCRR 3000.9[b][1]).

C. Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of*

*Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1<sup>st</sup> Dept 1992] *citing Zuckerman*). As detailed hereafter, there are no material or triable issues of fact presented and the Division is entitled to summary determination in its favor.

D. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law § 681). Alternatively, a taxpayer may contest a notice of deficiency by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation services “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see, e.g., Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper

mailing by certified or registered mail to petitioner's last known address (Tax Law § 681; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

F. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's last known address on December 7, 2012. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of Deweese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's 2011 Resident Income Tax Return, which satisfies the "last known address" requirement. In this regard, there is no allegation or evidence that petitioner at any time or in any manner informed the Division of a change of address for the year 2007. The notice was thus properly mailed to petitioner on December 7, 2012, and it was incumbent upon petitioner to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter.

G. The documents in the record establish that petitioner's Request was mailed on April 2, 2013, and this date falls beyond the 90-day period. Consequently, the Request was untimely and

the same was properly dismissed by the April 19, 2013 Order issued by BCMS. Petitioner has offered no claim or evidence to meet his burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired (Tax Law § 689[e]).

H. The Division's motion for summary determination is hereby granted, the April 19, 2013 Order dismissing petitioner's Request is sustained and the petition is denied.

DATED: Albany, New York  
April 3, 2014

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE