

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**TINA PURDY** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 825776  
New York State Personal Income Tax under Article :  
22 of the Tax Law for the Year 2010. :

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Petitioner, Tina Purdy, 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 2010.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Marvis A. Warren, Esq., of counsel), brought a motion dated November 27, 2013, seeking an order dismissing the petition pursuant to section 3000.9(a)(ii) of the Tax Appeals Tribunal's Rules of Practice and Procedure, or in the alternative, for summary determination in favor of the Division of Taxation pursuant to section 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure, on the grounds that petitioner's protest was filed more than 90 days from the date the Notice of Deficiency was delivered to petitioner, and was therefore untimely. Petitioner's response, filed by DeLorenzo, Friedman & Associates (Nancy H. DeLorenzo, EA, of counsel), was filed by its due date of December 27, 2013, at which time the 90-day period for the issuance of this determination began. After due consideration of the affidavit and documents presented by the Division of Taxation, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

## ***ISSUES***

I. Whether the Division of Taxation's motion to dismiss should be granted for lack of subject matter jurisdiction on the basis that petitioner failed to timely file a request for conciliation conference.

II. Whether the Division of Taxation's motion for summary determination as to the timeliness issue should be granted.

## ***FINDINGS OF FACT***

1. Petitioner, Tina Purdy, filed a petition with the Division of Tax Appeals in protest of a Conciliation Order Dismissing Request, CMS No. 257667, dated May 31, 2013. The Conciliation Order explained the basis for the dismissal as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on December 12, 2012, but the request was not mailed until May 13, 2013, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

2. Included with the petition filed was a lengthy explanation of the alleged errors by the Division of Taxation (Division), and an explanation of the actions taken by petitioner since her receipt of the Division's Statement of Proposed Audit Changes (Statement) dated October 25, 2012. The Statement asserted additional personal income tax due in the amount of \$1,075.76, plus interest, for tax year 2010, and provided the following explanation, in pertinent part:

Based on the information you provided, your New York tax liability has been recomputed.

We are unable to verify the business income claimed on schedule C.

In addition, Based [sic] on available information, it appears you do not attempt to make a profit from this business. Therefore, you can deduct your business expenses only up to the amount of your business income.

If your business income is more than your business expenses for at least 3 years out of a period of 5 consecutive years, you are presumed to be in business to make a profit.

Based on a review of your previous filing history, it has been determined your business is a not-for-profit enterprise.

As a result, we have disallowed the business loss claimed.

If you have questions concerning this audit determination, please call: (518) 591-5227.

2. Petitioner's actions, as described in her petition, upon receipt of the Statement included the following:

a) She attempted to contact her tax accountant, who she claimed was nonresponsive to her request for assistance, after numerous unanswered phone calls;

b) On January 25, 2013, petitioner placed a phone call to a supervisor for the New York State Department of Taxation and Finance, Tim Marticello, at the number listed on the Statement. Petitioner's notes indicated that petitioner stated her need for assistance understanding the Statement and Mr. Marticello told petitioner that he would have the technician who issued it call her.

c) On February 1, 2013, petitioner spoke with Jessie Knapp, the technician referred to petitioner by Mr. Marticello. Petitioner discussed her business with Mr. Knapp, including some of its nuances, and he agreed to speak with others in his office and get back to her. Petitioner never received a follow-up call.

d) On February 25, 2013, petitioner hired Nancy DeLorenzo, an enrolled agent, to represent her in this matter. Ms. DeLorenzo made some phone calls that same day, and spoke with someone named Colleen from the Division. By facsimile, on February 25, 2013, Ms.

DeLorenzo submitted correspondence to the Division's Audit Division-Income/Franchise Desk-AG1 unit. The correspondence stated the following, in pertinent part:

As per our conversation with Colleen today we are faxing additional information to verify that Ms. Purdy's business was started in 2009. Her loss in 2010 was due in nature to the start of business and gaining clientele.

Attached is her 2009 DBA along with her income receipts showing income for 2010. You already have all her expense receipts.

We will await your response on this pending matter, with favorable results.

3. Additional attachments to the petition included a listing of income for 2010, sales invoices for services rendered, petitioner's business certificate dated November 19, 2009, a power of attorney for Nancy H. DeLorenzo to represent petitioner dated February 25, 2013, correspondence dated February 25, 2013, from Ms. DeLorenzo to the Division (*see* Finding of Fact 2), correspondence from the Division to petitioner dated March 4, 2013, a Request for Conciliation Conference dated April 2, 2013, and the Conciliation Order Dismissing Request dated May 31, 2013.

4. The correspondence dated March 4, 2013, sent to petitioner from the Division, identified as relating to Audit Case # X-356053928, function code CVHJ, DLN# PL1141037537, and tax year 2010, responded to information provided by petitioner. Issued by the Income/Franchise Desk Audit Bureau, the letter was not signed, and in its entirety, stated the following:

Based upon available information it does not appear you are representing your customer base and income received in its entirety. In addition, you have claimed full-year expenses on a seasonal business that is operated on a part-time basis.

Based on the factors set by the Internal Revenue Service in Publication 535, it appears the amounts claimed on schedule C are for a hobby. Therefore, you can

only claim expenses up [sic] the income received. The business loss remains disallowed.

If you wish to dispute the bill, please complete the enclosed CMS-1 and submit it to the Division of Tax Appeals.

5. Petitioner prepared Form CMS-1-MN, Request for Conciliation Conference, indicating that the “tax type involved” was petitioner’s personal business for tax year 2010. In the space that requested “a copy of the notice being protested,” petitioner listed the following notice reference numbers and date: Audit Case #X-356053928, DLN #PL1141037537 and March 4, 2013. In the section for requesting a refund, the date of the notice referred to by petitioner was October 25, 2012, and the amount of the refund requested was \$611.00. The request for conciliation conference contained a lengthy explanation of protest and was dated April 2, 2013. The bottom of the form indicates it should be completed and mailed to: “**NYS TAX DEPARTMENT, BCMS, W A HARRIMAN CAMPUS, ALBANY NY 12227**” (emphasis in original).

6. After petitioner’s receipt of the Conciliation Order dismissing her request for a conciliation conference as late filed, she filed a petition with the Division of Tax Appeals on July 15, 2013, protesting the dismissal.

7. The Division brought this motion to dismiss, or in the alternative, a motion for summary determination dated November 27, 2013, on the basis that petitioner’s protest was filed more than 90 days from the date the notice was delivered to petitioner’s last known address. Included with the Division’s motion were the following documents: i) the affirmation of Marvis A. Warren, Esq., in support of the motion; ii) a copy of the petition filed with the previously described attachments; iii) a copy of the Division’s answer; iv) the affidavit of Daniel A. Maney, a taxpayer services specialist and Manger of a unit that oversees the Case and Resource Tracking

System (CARTS); v) a copy of the certified record for presort mail dated December 12, 2012 (CMR); vi) a copy of the notice of deficiency, notice number L-038763795-1, issued to petitioner at a Hudson Falls, New York, address, dated December 12, 2012, asserting personal income tax due in the amount of \$1,075.76 plus interest, for tax year 2010; vii) the affidavit of Bruce Peltier, a supervisor in the mail room of the Division; and viii) a copy of petitioner's New York State income tax return, Form IT-201 for the year 2011, bearing the same Hudson Falls, New York address as the notice of deficiency issued to petitioner.

8. The affidavit of Daniel A. Maney, manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System Control Unit (CARTS), sets forth the Division's general practice and procedure for preparing and mailing statutory notices to taxpayers. Mr. Maney has held this position since January 2010. As part of his duties, he receives the computer-generated CMR and a batch of corresponding notices from CARTS. CARTS prepares "batches" of statutory notices and the accompanying one-page mailing cover sheet, predated with the intended date of mailing. The front of each cover sheet bears a certified control number, a bar code, the taxpayer's mailing address and the departmental return address, and taxpayer assistance information is listed on the back. CARTS also generates any enclosures referenced within the body of the notices in the batch.

The CMR, which is printed approximately 10 days prior to the batch's anticipated mailing date, lists the notices in the batch, in the order that they are generated. In accordance with the Division's general practice, this date was manually changed on the first page of the CMR to reflect the actual date of mailing. In this case, the date was changed to "12/12/12." The purpose of printing the CMR prior to the anticipated mailing date is to provide sufficient lead time for the notices to be manually reviewed and processed for postage by employees of the Division's Mail

Processing Center (the Center). 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 U.S. Postal Service (USPS) and for the CMR to be maintained in this same manner when returned to CARTS, unless otherwise ordered by Mr. Maney.

9. The 47-page CMR relevant to this matter lists 512 certified control numbers with corresponding assessment numbers, names and addresses. Each of the pages consists of eleven entries with the exception of page 15, which contains ten entries with one crossed out, and page 47, which contains seven entries. Mr. Maney states that portions of the CMR have been redacted to preserve the confidentiality of information relating to other taxpayers who are not parties to this proceeding. Page 47 of the CMR bears a December 12, 2012 postmark from the Colonie Center branch of the USPS, and the initials of a USPS employee. In addition, on page 47 of the CMR, the number "512" has been circled. Mr. Maney affirms that these markings indicate that the 512 notices listed on this CMR were mailed on December 12, 2012.

Page 38 of the CMR contains a listing that has not been redacted, indicating that a Notice of Deficiency, assigned certified control number 7104 1002 9730 1428 7028 and assessment number L-038763795, was mailed to petitioner at her Hudson Falls, New York, address listed thereon. The corresponding mailing cover sheet, submitted with the Division's motion papers, bears the same certified control number and petitioner's name and address as noted.

10. The affidavit of Bruce Peltier, a mail and supply supervisor in the Center since March 1999, describes the Center's general operations and procedures. Notices that are ready for mailing to taxpayers are received by the Center in an area designated for "Outgoing Certified Mail." A mailing cover sheet precedes each notice and is accompanied by any required enclosures. Additionally, the Center receives a CMR with each batch of statutory notices. Each

CMR, together with the associated batch of notices, is forwarded by CARTS to the Center for delivery to the USPS for mailing.

A member of Mr. Peltier's staff operates a machine that places each notice, cover sheet and any enclosures into a windowed envelope such that the address and certified number listed on the cover sheet is visible through the window. The same staff member then weighs and seals each envelope and places postage thereon. Next, a mail processing clerk verifies the first and last envelope in the batch against the information listed on the CMR and also performs a random review of up to 30 envelopes by checking the envelopes against the information listed on the CMR. After completing the review as described, the CMR and the associated sealed and stamped envelopes are delivered by a member of the Center's staff to a USPS branch located in the Albany, New York, area. An employee of the USPS affixes a postmark and/or places his or her initials or signature on the CMR, indicating receipt of the mail listed on the CMR. In addition, the Center has requested that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing this number on the CMR to indicate the number of pieces received by the USPS. Here, the first 46 pages of the CMR bear a date stamp, and page 47 of the CMR bears both a dated postmark and handwritten initials. Also as noted, consistent with the Center's request, the number "512" has been circled on page 47 of the CMR. Mr. Peltier also attested to the truth and accuracy of the copy of the 47-page CMR relevant to this matter, which contains a list of the notices issued by the Division on December 12, 2012. In sum, according to the Maney and Peltier affidavits, a copy of the subject Notice of Deficiency was mailed to petitioner on December 12, 2012.

11. Beginning on its first page, the Notice of Deficiency issued to petitioner on December 12, 2012, and submitted by the Division in support of its motion, contains the following instructions, in pertinent part:

IF YOU DISAGREE with the amount due, you have the following options:

- To request a Conciliation Conference, complete the Request for Conciliation Conference (Form CMS-1) available at [www.tax.ny.gov](http://www.tax.ny.gov) or call us at (518) 457-3280.
- To request a Petition for a Tax Appeals Hearing, complete form TA-10 available at [www.nysdta.org](http://www.nysdta.org) or call (518) 266-3000.
- Attach a photocopy of all pages of this notice to the Request for Conciliation Conference.

IF YOU DISAGREE because the amount due was already paid, complete the Payment Application Section and attach a photocopy of the front and back of your canceled check or money order (not the money order receipt).

NOTE: Any disagreement previously submitted for the Statement of Proposed Audit Changes cannot be considered a disagreement with this notice. You must file a Request for Conciliation Conference or a Petition for A Tax Appeals Hearing by 03/12/13.

\* \* \*

**If we do not receive a response to this notice by 03/12/13:**  
(Emphasis in original)

This notice will become an assessment subject to collection action.

12. Petitioner's representative, Nancy DeLorenzo, responded to the Division's motion setting forth the time line of petitioner's actions and her contact with the Division commencing with the time petitioner received the statement of proposed audit changes, a brief explanation of

petitioner's business, and a request for a hearing before the Division of Tax Appeals.

***SUMMARY OF THE PARTIES' POSITIONS***

13. The Division maintains that petitioner's protest to the notice of deficiency was filed more than 90 days from the date the notice was delivered to petitioner's last known address. Concluding it was an untimely protest, the Division asserted that the Division of Tax Appeals lacks jurisdiction to review the substantive merits of petitioner's protest of the notice issued for tax year 2010.

The Division, in the alternative, argues that summary determination as a matter of law should be granted in favor of the Division, on the basis that there are no questions of fact.

14. Petitioner asserts that she responded to the Division's notices in a timely manner, with phone calls and correspondence, and should be provided a hearing on the merits of the assessment. Petitioner also maintains that since the start-up year for petitioner's business was 2009, the year before the notice period, her business was in its infancy, and any hobby loss limitations should not be applied.

***CONCLUSIONS OF LAW***

A. The Division of Taxation has made a motion to dismiss, or alternatively, a motion for summary determination, as to the issue of the timeliness of petitioner's request for a conciliation conference. A motion to dismiss the petition may be granted, as pertinent in this matter, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9[a][ii]). 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]). Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules § 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 [1980]). Inasmuch 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 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]).

B. The Division’s motion to dismiss is denied (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013, citing *Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). The Division did not introduce any evidence with respect to the date of the issuance of the conciliation order, which, on its face, bears a date of May 31, 2013. The petition indicates that the petition was received by the Division of Tax Appeals on July 16, 2013, within 90 days after the issuance of the conciliation order (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Accordingly, the Division of Tax Appeals has subject matter jurisdiction over the issue of whether petitioner timely filed her request for a conciliation conference (Tax Law § 170(3-a)(e); § 2006(4); *see also* 20 NYCRR 3000.1[k], 3000.3[b][8]; 4000.5[c][4]), and such issue will be addressed herein.

C. Tax Law § 681(a) provides the authority for the Division to issue a notice of a deficiency of income tax to a taxpayer. This deficiency will become irrevocably fixed unless the taxpayer files a petition with the Division of Tax Appeals within 90 days from the issuance of the notice (Tax Law § 681[b]; § 689[b]). Prior to petitioning the Division of Tax Appeals for a hearing, a taxpayer may request a conciliation conference at the Division's Bureau of Conciliation and Mediation Services within 90 days of the issuance of the notice (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 4000.5[c]). If after the Conciliation Order is issued, a taxpayer remains unsatisfied, there is an additional 90 days from the issuance of such order within which to file a petition with the Division of Tax Appeals (Tax Law § 170[3-a][e]). Failure to timely file a petition or request a conciliation conference challenging the notice of deficiency bars the Division of Tax Appeals from acquiring jurisdiction over the substantive merits of the matter (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. In a case where the timeliness of a petitioner's protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 681[a]). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

The affidavits of Daniel Maney and Bruce Peltier were offered to establish the Division's mailing procedures for notices of determination, and adherence to such procedures in this case.

Mr. Maney's affidavit sets forth the Division's general practice and procedure for processing statutory notices, and Mr. Peltier's affidavit sets forth the Division's procedures for the mailing of statutory notices and the return of the CMR to the Division. The CMR relevant to the Notice of Deficiency under protest consists of 47 pages and lists 512 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, and one entry on page 15 was eliminated, resulting in 512 notices. Each statutory notice was placed in an envelope by a Division employee who delivered them to a U.S. Postal Service representative. A USPS employee affixed a postmark dated December 12, 2012 to page 47, where the total number of pieces of 512 is circled and initials are handwritten, meeting the requirements set forth by the Division's procedures.

The CMR in this matter is properly completed and as such constitutes highly probative documentary evidence of the mailing of the subject notice to the address listed and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits, together with the properly completed CMR, established that the chain of custody from the creation of the statutory notices and their preparation for mailing, to the placement of such notices in the hands of the USPS and the return of the documented CMR, proves mailing on a particular date. Taken as a whole, the Division has established the existence of mailing procedures and that the requisite procedures were followed in the present matter. Accordingly, the Division has established that it mailed a copy of the subject notice to the address listed on the CMR on December 12, 2012.

Petitioner's Hudson Falls, New York, street address as listed on the CMR and on the notice itself conforms with the address reported on petitioner's 2011 New York personal income tax return. The copy of petitioner's return submitted into evidence (a representation of the data on the e-filed return) bears no filing date, though it is possible to have been filed in 2012 prior to the issuance of the notice of deficiency. All other documents received by petitioner, in addition to those referred to and filed by petitioner concerning this matter, bear the same Hudson Falls address, i.e. the Statement of Proposed Audit Changes (dated October 25, 2012), the Request for Conciliation Conference and the petition. Furthermore, petitioner does not contend that the Hudson Falls address to which the Notice of Deficiency was sent by the Division was incorrect, nor is it alleged that she did not receive the Notice of Deficiency. The evidence taken as a whole supports the conclusion that the Division's obligation to issue the statutory notice to petitioner's "last known address," as required by Tax Law § 681(a), has been met.

E. Petitioner has set forth the time line of her contact with the Division since her receipt of the Statement of Audit Changes dated October 25, 2012, which initially included phone calls, and later included correspondence. Additionally, the Division responded to petitioner about the specifics of her case and sent her the form by which she could request a conciliation conference (*see* Finding of Fact 4). All of this took place within the 90-day period after the issuance of the notice of deficiency, which is presumed received by the proof of proper mailing (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The information contained within the notice that set forth the procedures petitioner needed to follow if she disagreed with the notice was clearly presented. In bold type the date by which petitioner needed to respond was set forth, i.e. March 12, 2013, and she was notified that the notice would become an assessment subject to collection action for a failure to respond.

It is understandable that petitioner could equate the requirement “to respond” with her calls and the February 25, 2013 correspondence mailed to the Division. It may have been confusing to petitioner, having received the Division’s letter of March 4, 2013, that the Division was supplying her with a Request for Conciliation Conference form (CMS-1), but mistakenly directing her to mail it to the Division of Tax Appeals, when the bottom of the CMS-1 form states otherwise in bold type. It is disconcerting that with only a week remaining before the statute of limitations expired on the 90-day period, that the Division’s letter did not reiterate the due date of the CMS-1 form, i.e., March 12, 2013, and likewise disturbing that since numerous employees were aware of petitioner’s objections, it was not made abundantly clear to her that her contact with the Division up to that point did not satisfy her obligation to protest the notice.

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. The notice set forth petitioner’s options (*see* Finding of Fact 11) in a clear and concise manner. Had there been an allegation and proof that the Division confused or misled petitioner at that time, 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]). Despite the fact that the Division was on notice of petitioner’s objections within the 90-day period, petitioner’s actions fall short of the method set out for requesting a timely conciliation conference (Tax Law § 170[3-a]; 20 NYCRR 4000.3), and likewise a formal hearing (Tax Law § 689[a]; 20 NYCRR 3000.3), and the 90-day period is not tolled (*see Matter of Greene Valley Liquors, Inc.*, Tax Appeals Tribunal, November 25, 1992).

F. As the Division has established that it properly mailed the subject Notice of Determination on December 12, 2012, the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law § 170[3-a][b]; § 689[b]). Petitioner's Request for Conciliation Conference was prepared on April 2, 2013 and mailed, according to the Division's records, on May 13, 2013. Although there is a disconnect between the preparation date of the request and its receipt by the Division that has not been explained, both dates fall after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law §170[3-a][b]; § 689[b]). As a result, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005). Since there are no material facts in dispute concerning the issue of timeliness, the Division's motion for summary determination is granted.

G. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law §687[a]). If the claim for refund is disallowed, petitioner may then request a conciliation conference or file a petition with the Division of Tax Appeals within 90 days of the notice of disallowance in order to contest such disallowance (Tax Law § 689[c]; §170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

H. The Division's motion to dismiss is denied. The Division's motion for summary determination is granted, and the Notice of Determination dated December 12, 2012 is sustained.

DATED: Albany, New York  
March 27, 2014

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE