

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**DANE E. CLAYTON** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 827488  
Personal Income Tax under Article 22 of the Tax Law :  
for the Years 2012, 2013 and 2014. :

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Petitioner, Dane E. Clayton, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2012, 2013 and 2014.

On March 11, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). In response to a request for additional time, the parties were granted until May 26, 2016 to respond to the proposed dismissal. On May 24, 2016, petitioner, appearing pro se, submitted correspondence in opposition to dismissal. On April 21, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Alejandro Taylor, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on May 26, 2016. After due consideration of the documents submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Notice of Deficiency, Notice No. L-043618254-5.

II. Whether the Division of Tax Appeals has jurisdiction to consider the petition with regard to Notice of Deficiency, Notice No. L-040187688-7, which was petitioned previously, resulting in a decision issued by the Tax Appeals Tribunal (*Matter of Clayton*, Tax Appeals Tribunal, January 28, 2016).

III. Whether the Division of Tax Appeals has jurisdiction to consider the petition with regard to Notice of Deficiency, Notice No. L-041876613-4, which was petitioned previously and is currently pending before an administrative law judge in the Division of Tax Appeals (DTA No. 826568).

### ***FINDINGS OF FACT***

1. On February 18, 2016, petitioner, Dane E. Clayton, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Notice and Demand, number L-043618254-5, dated February 5, 2016, and notices of deficiency numbers L-041876613-4 and L-040187688-7. The notices of deficiency were not attached to the petition.

2. On March 11, 2016, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent states, in part, that:

“the protest of a statutory notice that has been issued to a taxpayer under Article 22 of the Tax Law is commenced by the timely filing of a petition with the Division of Tax Appeals . . . . Such petition must include a copy of the statutory notice under protest . . . . With respect to Article 22 of the Tax Law, this requirement will be satisfied by the petitioner’s provision of a copy of either a notice of deficiency or refund denial . . . . In addition, Tax Law § 173-a(2) specifically provides, inter alia, that a taxpayer is not entitled to a hearing before the Division of Tax Appeals with respect to the issuance of a notice and demand.

The petition in this matter appears to have been filed in protest of three assessments (L-040187688-7, L-041876613-4, and L-043618254-5). For Assessment No. L-040187688-7, this assessment has been petitioned previously and a decision has been issued by the Tax Appeals Tribunal (*see Matter of Clayton*, Tax Appeals Tribunal, January 28, 2016). For Assessment No. L-041876613-4, this assessment has been petitioned previously and is currently

pending before an administrative law judge in the Division of Tax Appeals, (DTA NO. 826568). Assessment No. L-043618254-5 is a Notice and Demand for Payment of Tax Due. This notice is insufficient to confer jurisdiction upon the Division of Tax Appeals since no hearing rights exist to protest a Notice and Demand.”

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted, among other documents, (i) an affidavit of Alejandro Taylor, a senior attorney employed in the Office of Counsel of the Division, April 19, 2016; (ii) an affidavit, dated April 14, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked October 21, 2015; (iv) an affidavit, dated April 15, 2016, of Bruce Peltier, a mail and supply supervisor in the Division’s mail room; (v) a copy of a Notice of Deficiency, number L-043618254-5, dated October 21, 2015;<sup>1</sup> and (vi) a copy of petitioner’s e-filed resident income tax return for the year 2014, filed on March 10, 2015, which lists a Brooklyn, New York, address for petitioner, which is the same address as that listed on the subject notice, number L-043618254-5. The 2014 return was the last return filed with the Division by petitioner before said notice was issued.

4. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division’s Case and Resource Tracking System (CARTS) and the Division’s past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of

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<sup>1</sup> Notice of Deficiency number L-043618254-5 was the underlying statutory notice upon which the notice and demand bearing the same assessment number, which was attached to the petition, was based.

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 and last pages of the CMR in the present case to the actual mailing date of "10/21/15." In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," 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 P.O. Address."

6. The CMR in the present matter consists of 1,902 pages and lists 20,913 certified control numbers, along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 1,902, which contains 2 entries. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated October 21, 2015 to each page of the CMR, wrote the number "20,913" on page 1,902 next to the heading "Total Pieces Received

at Post Office” and initialed or signed page 1,902. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 20,913.

7. Page 716 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0624 0390 and reference number L-043618254 was mailed to “CLAYTON-DANE E” at the Brooklyn, New York, address listed on the subject Notice of Deficiency. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit “B,” bears this certified control number and the name “CLAYTON-DANE E” and address as noted.

8. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the mail room’s general operations and procedures. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier confirms that 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 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 initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed or signed page 1,902 and affixed a postmark dated October 21, 2015 to each page of the CMR. The Mail Processing 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

CMR. Here, the USPS employee complied with this request by writing the number “20,913” on the last page next to the heading “Total Pieces Received at Post Office.”

9. According to the Peltier affidavit, copies of the subject notice were mailed to petitioner on October 21, 2015, as claimed, to the Brooklyn, New York, address indicated on the subject notice. Mr. Peltier notes that the name of petitioner and his address would have been displayed in the window of the envelope containing the statutory notice.

10. The Division’s Notice of Deficiency No. L-040187688-7 was sustained by a decision of the Tax Appeals Tribunal (*see Matter of Clayton*, Tax Appeals Tribunal, January 28, 2016). No Article 78 proceeding was filed regarding this matter.<sup>2</sup>

11. The Division’s Notice of Deficiency No. L-041876613-4 was petitioned previously and is currently pending before an administrative law judge in the Division of Tax Appeals (DTA No. 826568).<sup>3</sup>

### ***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).

B. Where, as here, the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order

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<sup>2</sup> Pursuant to State Administrative Procedure Act § 306(4), “[o]fficial notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency.” A court may take judicial notice of its own prior proceedings (*Matter of Kolovinas*, Tax Appeals Tribunal, December 28, 1990; *see e.g. Matter of A.R.*, 309 AD2d 1153 [2003]; CPLR 4511). Hence, official notice is taken of the decision in *Matter of Clayton* (Tax Appeals Tribunal, January 28, 2016).

<sup>3</sup> Pursuant to State Administrative Procedure Act § 306(4), official notice is taken of the pending proceeding for DTA No. 826568 (*see Matter of Kolovinas; Matter of A.R.*).

because a properly mailed notice or conciliation order 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). 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 (*see 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). Where a notice of deficiency has been properly mailed, Tax Law § 681(a) does not require actual receipt by the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

C. The 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 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.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has met its burden of establishing proper mailing of Notice of Deficiency No. L-043618254-5. Specifically, the Division was required to mail the statutory notice to petitioner at his last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices, the Division has offered adequate proof to establish the fact that the notice at issue was actually mailed to petitioner at his last known address by certified mail on October 21, 2015, the date appearing on the CMR. The affidavits described the various stages of producing and mailing notices and attested to the authenticity and

accuracy of the copies of the notice and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Nagengast and Peltier affidavits were followed with respect to the notice issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the notice, appear on the CMR, which bears a USPS date stamp of October 21, 2015. There are 20,913 certified mail control numbers listed on the CMR, and the USPS employee who initialed or signed the CMR indicated, by writing the number "20,913" to right of the line stating "Total Pieces Received at Post Office," that the post office received 20,913 items for mailing. In short, the Division established that it mailed Notice of Deficiency No. L-043618254-5 to petitioner by certified mail on October 21, 2015 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

Additionally, the Division established that the notice was mailed to petitioner's last known address, being the same address as that reported on petitioner's 2014 resident income tax return, which was the last return filed with the Division before the subject notice was issued.

E. A 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, Notice of Deficiency No. L-043618254-5 was properly mailed when it was delivered into the custody of the USPS on October 21, 2015, and it is this date that commenced the 90-day period within which a protest had to have been filed. Petitioner's protest was not filed until February 18, 2016. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest with regard to Notice of Deficiency No. L-043618254-5 (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. This determination, made pursuant to the Notice of Intent to Dismiss Petition and the evidence and arguments submitted by the parties, is the equivalent of an order in favor of the Division on a motion for summary determination for failure to timely file a petition, and precludes petitioner from having a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, such a motion “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. . . .”

Petitioner submitted no evidence that the petition was filed within the time frame required, i.e., within 90 days from the date the statutory notice was issued. Moreover, petitioner has failed to challenge the Division’s proof of mailing of Notice of Deficiency No. L-043618254-5 with any evidence. The proper mailing of a statutory notice, as in the present matter, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002) and petitioner has failed to present any evidence to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

G. Without a timely filed petition, this agency does not have the jurisdiction to entertain the substantive issues presented in the petition with regard to Notice of Deficiency No. L-043618254-5. Therefore, it must be concluded that petitioner has failed to meet his burden of proof.

H. With regard to petitioner’s protest of notice numbers L-040187688-7, L-041876613-4, as noted in Findings of Fact 10 and 11, petitioner previously filed petitions with regard to these notices and both were the subject of separate adjudications. The Division’s Notice of Deficiency No. L-040187688-7 was sustained by a decision of the Tax Appeals Tribunal (*see Matter of*

*Clayton*, Tax Appeals Tribunal, January 28, 2016) and no Article 78 proceeding was filed regarding this matter. The Division's Notice of Deficiency No. L-041876613-4 was petitioned previously and is currently pending before an administrative law judge in the Division of Tax Appeals (DTA NO. 826568). Petitioner cannot herein relitigate the validity of these notices, which have been the subject of prior proceedings (*see Matter of Kyte*, Tax Appeals Tribunal, October 9, 2014; *Matter of American Home Assurance Co.*, Tax Appeals Tribunal, August 8, 2002).

I. The petition of Dane E. Clayton is dismissed.

DATED: Albany, New York  
August 18, 2016

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Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE