

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MOLAIN D. GILMORE</b>	:	<b>DETERMINATION</b>
		<b>DTA NO. 850070</b>
for Redetermination of Deficiencies or for Refund of New	:	
York State Personal Income Taxes under Article 22 of the	:	
Tax Law for the Periods Ended June 30, 2013,	:	
September 30, 2015, and December 31, 2015.	:	

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Petitioner, Molain D. Gilmore, filed a petition for a redetermination of deficiencies or for refund of New York State personal income taxes under article 22 of the Tax Law for the periods June 30, 2013, September 30, 2015, and December 31, 2015.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), filed a motion on August 17, 2023, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the motion by September 18, 2023, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, 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 notices of deficiency.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of notices of deficiency, dated September 18, 2014, August 23, 2016, and September 1, 2016, and bearing assessment identification numbers L-041868751, L-045410306, and L-045410305, respectively (notices). The notices were addressed to petitioner, Molain D. Gilmore, at an address in Schenectady, New York.

2. On December 21, 2021, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices.

3. On January 14, 2022, BCMS issued a conciliation order dismissing request (conciliation order), CMS No. 000334847, to petitioner. The conciliation order determined that petitioner's protest of the notices was untimely and stated, in part, that:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on 8/23/16, 9/1/2016 & 9/18/2014, but the request was not mailed until 12/21/2021, or in excess of 90 days, the request is late filed.”

4. On February 16, 2022, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

5. To show proof of proper mailing of the notices, the Division, by affirmation of Peter B. Ostwald, Esq., dated August 9, 2023, submitted the following with its motion papers: (i) three affidavits, dated August 7, 2023, of Marianna Denier, a Principal Administrative Analyst and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) three “Certified Record for Presort Mail - Assessments Receivable” (CMR), postmarked September 18, 2014, August 23, 2016, and September 1, 2016, respectively; (iii) three affidavits, dated August 8, 2023, of Susan Ramundo, a manager in the Division's mail room; (iv) copies of the notices, dated September 18, 2014, August 23, 2016, and September 1, 2016, mailed to petitioner

with the associated mailing cover sheets; (v) a copy of the conciliation order issued to petitioner on January 14, 2022; and (vi) a copy of petitioner's form IT-201, New York State resident income tax return for the year 2013 (2013 return), filed on July 21, 2014, and a copy of petitioner's form IT-201, New York State resident income tax return for the year 2014 (2014 return), filed on April 14, 2015, both of which list the same address for petitioner as was listed on the notices. The 2013 return was the last return filed with the Division by petitioner before the notice dated September 18, 2014 was issued. The 2014 return was the last return filed with the Division by petitioner before the notices dated August 23, 2016 and September 1, 2016 were issued.

6. The affidavits of Marianna Denier, who has been in her current position since August of 2022, and has worked as a supervisor in MAPS since October of 2004, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier is the Director of MAPS, which is responsible for the receipt and storage of CMRs. She is familiar with the Division's Case and Resource Tracking System (CARTS) as well as 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 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, these dates were manually changed on the first and last page of the CMRs in the present case to the actual mailing dates of "9/18/14," "8/23/16," and "9/1/16," for the CMRs postmarked September 18, 2014, August 23, 2016, and September 1, 2016, respectively. In addition, as described by Ms. Denier, generally all pages of the CMR are banded together when the documents are delivered into the 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.

7. 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."

*The September 18, 2014 CMR*

8. The CMR in the present matter, postmarked September 18, 2014, consists of 7 pages and lists 72 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 7, which contains 6 entries. Ms. Denier 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 September 18, 2014, to each page of the CMR, wrote the number "72" on page 7, next to the heading "Total Pieces Received at Post Office," and initialed or signed page 7.

9. Page 6 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0280 1885 and assessment ID number L-041868751 was mailed to petitioner at the Schenectady, New York, address listed on the notice. The corresponding mailing cover

sheet, attached to the Denier affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Susan Ramundo describes the mail room’s general operations and procedures. Ms. Ramundo has been a manager in the mail room since 2017 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Ramundo 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 of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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. The mail room 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.

11. Each of the 7 pages of the CMR attached to the Denier affidavit as exhibit “A” contains a USPS postmark of September 18, 2014. On page 7, corresponding to “Total Pieces and Amounts,” is the preprinted number 72 and next to “Total Pieces Received at Post Office,” the USPS employee wrote the number “72,” wrote his or her initials or a signature, and affixed a postmark. According to Ms. Ramundo, the affixation of the postmarks and the USPS

employee's initials or signature indicate that all of the 72 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on September 18, 2014.

12. According to both the Denier and Ramundo affidavits, copies of the notice were mailed to petitioner on September 18, 2014, as claimed.

*The August 23, 2016 CMR*

13. The CMR in the present matter, postmarked August 23, 2016, consists of 26 pages and lists 283 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 26, which contains 8 entries. Ms. Denier 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 August 23, 2016, to each page of the CMR, wrote the number "283" on page 26, next to the heading "Total Pieces Received at Post Office," and initialed or signed page 26.

14. Page 24 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0024 7555 and assessment ID number L-045410306 was mailed to petitioner at the Schenectady, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

15. The affidavit of Susan Ramundo describes the mail room's general operations and procedures. Ms. Ramundo has been a manager in the mail room since 2017 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Ramundo 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 of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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. The mail room 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.

16. Each of the 26 pages of the CMR attached to the Denier affidavit as exhibit “A” contains a USPS postmark of August 23, 2016. On page 26, corresponding to “Total Pieces and Amounts,” is the preprinted number 283 and next to “Total Pieces Received at Post Office,” the USPS employee wrote the number “283” wrote his or her initials or a signature, and affixed a postmark. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee’s initials or signature indicate that all of the 283 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on August 23, 2016.

17. According to both the Denier and Ramundo affidavits, copies of the notice were mailed to petitioner on August 23, 2016, as claimed.

*The September 1, 2016 CMR*

18. The CMR in the present matter, postmarked September 1, 2016, consists of 14 pages and lists 144 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 14,

which contains 1 entry. Ms. Denier 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 September 1, 2016, to each page of the CMR, wrote the number “144” on page 14, next to the heading “Total Pieces Received at Post Office,” and initialed or signed page 14.

19. Page 12 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0028 0835 and assessment ID number L-045410305 was mailed to petitioner at the Schenectady, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

20. The affidavit of Susan Ramundo describes the mail room’s general operations and procedures. Ms. Ramundo has been a manager in the mail room since 2017 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Ramundo 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 of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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. The mail room 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.

21. Each of the 14 pages of the CMR attached to the Denier affidavit as exhibit “A” contains a USPS postmark of September 1, 2016. On page 14, corresponding to “Total Pieces and Amounts,” is the preprinted number 144 and next to “Total Pieces Received at Post Office,” the USPS employee wrote the number “144,” wrote his or her initials or a signature, and affixed a postmark. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee’s initials or signature indicate that all of the 144 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on September 1, 2016.

22. According to both the Denier and Ramundo affidavits, copies of the notice were mailed to petitioner on September 1, 2016, as claimed.

23. Petitioner did not respond to the motion.

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

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Tax Appeals Tribunal’s 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 filed within 90 days of the conciliation order (*see* finding of fact 4), 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 determination shall address the instant motion as such.

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 [1968]; *Museums at Stony Brook v Village 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 [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 [1st Dept 1992], citing *Zuckerman*, 49 NY2d at 562).

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 the date of mailing of such notice (*see* Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “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 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 request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating both the fact and date of the mailing of the notices to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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).

F. Petitioner did not respond to the Division's motion. As such, petitioner is properly deemed to have conceded that no question of fact requiring a hearing exists (*John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dep 1984], *appeal dismissed* 62 NY2d 942 [1984]; *Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]). Furthermore, as petitioner has presented no evidence to rebut the facts alleged in the Denier and Ramundo affidavits and supporting documents, the facts alleged therein are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d at 449, citing *Kuehne & Nagel*, 36 NY2d at 544).

G. The Division has offered proof sufficient to establish the mailing of the notices to petitioner's last known address on September 18, 2014, August 23, 2016, and September 1, 2016. The CMRs have been properly completed and therefore constitute 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 sheets and CMRs conform with the address listed on petitioner's 2013 and 2014 returns, which satisfies the "last known address" requirement.

H. It is thus concluded that the Division properly mailed the notices on September 18, 2014, August 23, 2016, and September 1, 2016, and 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 those respective dates (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]).

Petitioner's request for a conciliation conference was filed on December 21, 2021. This date falls well after the 90-day period of limitations for the filing of such a request. Consequently, the request was untimely filed and was properly dismissed by the January 14, 2022, conciliation order issued by BCMS.

I. The Division of Taxation's motion for summary determination is granted, the petition of Molain D. Gilmore is denied, and the January 14, 2022 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York  
November 16, 2023

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE