

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JEMAL OULD DAHI &amp; AMINETOU MAHAM</b>	:	ORDER
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 2012.	:	DTA NO. 827568

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Petitioners, Jemal Ould Dahi and Aminetou Maham, 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 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Alejandro E. G. Taylor, Esq., of counsel), brought a motion dated July 22, 2016 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) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing pro se, did not respond to the Division of Taxation's motion. Based upon the motion papers, the affidavit and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following order.

***ISSUE***

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

***FINDINGS OF FACT***

1. Petitioners, Jemal Ould Dahi and Aminetou Maham, 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 April 28, 2014, bearing assessment number L-040822183, for tax in the amount of \$6,872.52, plus interest, for the year 2012. The Request was date stamped as received by BCMS on December 28, 2015.

2. On January 15, 2016, BCMS issued a Conciliation Order Request (Order) to petitioners. Referencing notice number L-040822183, the Order determined that petitioners' protest was untimely and stated, in part:

“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 April 28, 2014, but the request was not mailed until December 23, 2015, or in excess of 90 days, the request is late filed.”

3. Petitioners challenged this dismissal by filing a petition with the Division of Tax Appeals. The petition was dated and signed by petitioners on April 7, 2016, and the envelope in which the petition was mailed bears a United States Postal Service postmark dated April 8, 2016. The envelope and petition are in turn date stamped as received by the Division of Tax Appeals on April 11, 2016. There is no dispute that the petition was filed within 90 days after the January 15, 2016 issuance of the Order and constitutes a timely challenge thereto.

4. In support of its motion and to prove mailing of the Notice of Deficiency under protest, the Division submitted, among other documents, an affidavit, dated July 22, 2016, of Alejandro

E. G. Taylor, Esq. and a “Certified Record for Presort Mail - Assessments Receivable” postmarked April 28, 2014.

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

A. The Division brought 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, 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 petitioners’ request for conciliation conference.

B. 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 facts 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]).

C. 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 of the subject statutory notice to petitioners’ last known address (Tax Law § 681[a]; *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*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).”

D. Here, the motion for summary determination must be denied because the Division has not established a standard procedure for issuing the subject notice to petitioners. Specifically, the Division's introduction of the "Certified Record for Presort Mail - Assessments Receivable" falls woefully short of establishing a standard procedure for issuing the subject notice to petitioners in this case.

E. The Division of Taxation's motion for summary determination is denied and this matter shall proceed to hearing in due course.

DATED: Albany, New York  
October 27, 2016

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE