

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DAVID AND KAREN FORLANO</b>	:	<b>ORDER</b>
	:	DTA NO. 851146
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 2021.	:	

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Petitioner, David and Karen Forlano, 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 2021.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Amy Seidenstock, Esq., of counsel), brought a motion on January 8, 2025, seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing by Anthony J. Perrone, CPA, did not respond to the Division of Taxation's motion by February 7, 2025, which date commenced the 90-day period for the issuance of this order.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, 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. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioners' protest of a notice of deficiency for tax year 2021, dated March 15, 2024, bearing assessment identification number L-059260747 (notice). The notice was addressed to petitioners, David and Karen Forlano, at an address in Southampton, New York.

2. Petitioners filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice by way of facsimile on July 23, 2024.

3. On August 9, 2024, BCMS issued a conciliation order dismissing request, CMS No. 000363769 (conciliation order), to petitioners. The conciliation order determined that petitioners' protest of the notice 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 was issued on March 13, 2024,<sup>1</sup> but the request was not received until July 23, 2024, or in excess of 90 days, the request is late filed.”

4. On August 13, 2024, petitioners 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 notice, the Division, by a document purporting to be an affirmation of Amy Seidenstock, Esq., an attorney employed in the Division's Office of Counsel, dated January 6, 2025,<sup>2</sup> submitted the following with its motion papers: (i) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS), sworn to on November 19, 2024;

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<sup>1</sup> The conciliation order's reference to the notice being issued on March 13, 2024, appears to be a typographical error. The error is deemed immaterial.

<sup>2</sup> The language contained in the purported affirmation submitted by Ms. Seidenstock does not comply with the requirements of Civil Practice Law and Rules (CPLR) 2106.

(ii) a copy of pages 1, 17 and 27 of a “CERTIFIED RECORD FOR - DTF-962-F-E - Not of Def Follow Up DTF-963-E- Notice of Determination” (CMR), postmarked March 15, 2024; (iii) a copy of the notice with the associated mailing cover sheet addressed to petitioners; (iv) an affidavit of Justin Lombardo, a manager of the Division’s mail room, sworn to on November 19, 2024; (v) an affidavit of Beth Levy, a Legal Assistant 1 in the Division’s Office of Counsel, sworn to on November 18, 2024; (vi) a request for delivery information/return receipt (United States Postal Service [USPS] form 3811-A) and the USPS response to such request; (vii) a copy of petitioners’ request for conciliation conference and the conciliation order issued by BCMS on August 9, 2024; and (viii) a copy of petitioners’ electronically filed form IT-201, New York State resident income tax return, for tax year 2022 (2022 return), dated March 3, 2023, listing the same Southampton, New York address for petitioners as was listed on the notice.

6. Ms. Denier has served as the Director of MAPS since July 2022. Prior to that, she was a supervisor in MAPS since October 2004. She is also a Principal Administrative Analyst and has held that position since August 2022. Prior to this position, Ms. Denier was a Supervisor of Administrative Analysis from July 2019 through August 2022. In performing her duties, Ms. Denier has used the Division’s electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of deficiency. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Denier is familiar with the Division’s past and present procedures as they relate to statutory notices. Ms. Denier’s affidavit sets forth the Division’s general practices and procedures for generating and issuing statutory notices.

7. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for

each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address on the front, and taxpayer assistance information on the back.

CARTS also generates any enclosures referenced in the statutory notice. Each notice, with its accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

8. Each batch of statutory notices is accompanied by a CMR. The CMR lists each notice in the order it is generated in the batch. The certified control numbers are listed on the CMR under the heading "CERTIFIED NO." The statutory notice 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." Each CMR and associated batch of statutory notices are forwarded to the mail room together. All pages of the CMR are banded together when the documents are delivered to the Division's mail room and remain so when returned to the Division after mailing. 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.

9. The CMR for the batch of statutory notices to be issued on March 15, 2024, including the notice addressed to petitioners herein, allegedly consisted of 27 cut sheet pages. The Division included with its submission only page "1" (the first page of the CMR), page "17" (the page of the CMR on which information pertaining to petitioners appears) and page "27" (the last page of the CMR). Each of these three pages includes in its upper left corner an initial date that is approximately 10 days in advance of the anticipated mailing date. Appearing in the upper right corner of pages 1 and 27 is the handwritten date "3/15/24." Following the Division's general practice, this date was manually changed to ensure that the date on the CMR conformed

with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. Pages 1, 17 and 27 of the CMR include a USPS postmark, dated March 15, 2024. Ms. Denier noted that portions of the CMR that were attached to her affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

10. Page 17 of the CMR indicates that a notice with certified control number 9207 1041 0029 7360 450202, and reference number L 059260747, was mailed to petitioners at the Southampton, New York, address listed on the subject notice. The corresponding mailing cover sheet, attached to the Denier affidavit with a copy of the notice as exhibit “B,” bears this same certified control number and petitioners’ name and address as noted.

11. Appearing below the certified control number entries on page 27 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS,” and next to which is the preprinted number “316.” On page 27 of the CMR is a stamp indicating “POST OFFICE Hand write total # of pieces and initial Do Not stamp over written areas.”

12. Ms. Denier states that the notice was mailed on March 15, 2024, as indicated by the CMR.

13. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on March 15, 2024.

14. Mr. Lombardo, a manager of the Division’s mail room, describes the mail room’s general operations and procedures in his affidavit as they relate to statutory notices. Mr. Lombardo has been a manager of the mail room since 2016. As a mail room manager, Mr. Lombardo is knowledgeable regarding past and present office procedures as they relate to

statutory notices. Mr. Lombardo's official title is Associate Administrative Analyst, and his duties include managing the staff that delivers mail to branch offices of the USPS.

15. The mail room receives statutory notices that are ready for mailing in an "Outgoing Certified Mail" area. The mail room also receives the corresponding CMR for each batch of notices. A staff member receives 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. A clerk then checks the first and last pieces of certified mail against the information contained on the CMR. A clerk will also perform a random review of up to 30 pieces of certified mail 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.

16. A USPS employee affixes a postmark and writes his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. The mail room also 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

17. Mr. Lombardo avers that each page of the CMR contains a postmark. A review of the CMR indicates that a USPS employee did not write the total number of pieces the USPS received on the CMR, did not circle the preprinted number next to the heading "TOTAL PIECES AND AMOUNTS," or initial the CMR.

18. Based on his review of the affidavit of Ms. Denier and the exhibits attached thereto, and his personal knowledge of the procedures of the mail room, Mr. Lombardo stated that on March 15, 2024, an employee of the mail room delivered one piece of certified mail addressed to petitioners at their Southampton, New York, address in a sealed postpaid envelope for delivery by certified mail. He also stated that the CMR delivered to the USPS on March 15, 2024, was returned to the Division. Mr. Lombardo attested that the procedures described in his affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on March 15, 2024.

19. In her affidavit, Ms. Levy details the filing of USPS form 3811-A in this matter. As part of her job duties, Ms. Levy prepares USPS form 3811-A or asks the Division's mail room staff to make such requests on behalf of her office. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail.

20. Attached to the Levy affidavit as exhibit "A" is form 3811-A for article number 9207 1041 0029 7360 4502 02. Exhibit "B" to the Levy affidavit is the USPS response to the Division's request indicating delivery of the same article. In this instance, Ms. Levy filed form 3811-A seeking information for the item mailed by the Division bearing certified control number 9207 1041 0029 7360 4502 02 on March 15, 2024, to petitioners at their Southampton, New York, address. Although the USPS response to the request confirmed that the article, bearing the aforementioned certified control number and addressed to petitioners, was delivered on March 23, 2024, at 9:33 a.m., it did not confirm the exact address the item was delivered to. Furthermore, the USPS response shows a scanned image of an illegible recipient's signature.

21. Petitioners did not file a response to the Division's motion.

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

A. As noted, the Division brings a motion seeking summary determination in its favor pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). 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]).

B. 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 Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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 [1st Dept 1992], citing *Zuckerman v City of New York*, 49 NY2d at 562).



C. 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 of deficiency by filing a request for 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 conciliation conference is strictly enforced and that, accordingly, protests filed even one date 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).

D. Where, as here, the timeliness of a request for conciliation conference is at issue, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice to petitioners’ 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).

E. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Denier and Mr. Lombardo, Division employees

involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). However, the submission of a partial (or truncated) CMR, as here, is not sufficient to establish that the Division's standard mailing procedure was followed in mailing the notice to petitioners (*see Matter of Ankh-Ka-Ra Sma-Ntr*, Tax Appeals Tribunal, April 14, 2016; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Moreover, the Division has failed to establish that its standard mailing procedure was followed in this instance because the USPS employee neither wrote nor circled the number of pieces of certified mail received, nor initialed the CMR as requested by the Division (*see* finding of fact 17). Hence, that proof alone fails to establish that the notice was properly mailed on March 15, 2024 and, therefore, the period within which to file a protest was not triggered as of such date.

F. An inadequacy in the evidence of mailing may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing, the 90-day period for filing either a request or a petition is tolled until such time as the taxpayer actually receives the notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib.*, 179 AD2d 970, 971 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest will commence (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v Tax Commn.*, 68 NY2d 891, 893 [1986], *rev'd* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

G. Notwithstanding the evidentiary deficiencies with regard to demonstrating the mailing of the notice, the Division attempts to establish, via the Levy affidavit and the accompanying

USPS form 3811-A and response thereto, that the notice was mailed by certified mail and was, in fact, delivered to and accepted at petitioners' last known address on March 23, 2024 (*see* finding of fact 20). However, the evidence provided does not establish the address the notice was delivered to, nor does the illegible recipient's signature establish delivery of the notice to petitioners (*id.*). As such, the Division has failed to establish delivery of the notice to petitioners on March 23, 2024.

H. The Division of Taxation's motion for summary determination is denied and a hearing for this matter will be scheduled in due course.

DATED: Albany, New York  
May 08, 2025

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE