

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>BARBARA L. RONON</b>	:	DECISION
	:	DTA NO. 818584
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Taxes under Article 22 of the Tax Law	:	
and the New York City Administrative Code for the Years	:	
1996 and 1997.	:	

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Petitioner Barbara L. Ronon, 6139 Carversville Road, P.O. Box 137, Carversville, Pennsylvania 18913, filed an exception to the determination of the Administrative Law Judge issued on January 7, 2002. Petitioner appeared by Pierre F. V. Merle, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

### ***ISSUE***

Whether the Division of Taxation is entitled to summary determination in its favor on the ground that petitioner's request for a conciliation conference with the Bureau of Conciliation and Mediation Services was untimely.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation (“Division”) purportedly issued to petitioner, Barbara Ronon, a Notice of Deficiency dated September 14, 2000, identified by Assessment ID No. L-018532284-2, bearing certified mail control number P 911 205 579. Such notice asserted additional personal income taxes due for the years 1996 and 1997, as follows:

<b>Tax Period Ended</b>	<b>Tax</b>	<b>Interest</b>	<b>Penalty</b>	<b>Total Amount Due</b>
12-31-96	\$21,412.32	\$6,098.28	0.00	\$27,510.60
12-31-96	20,440.92	5,821.62	0.00	26,262.54
12-31-97	4,271.95	796.80	0.00	5,068.75
12-31-97	15,419.34	2,876.01	0.00	18,295.35
<b>Totals</b>	<b>\$61,544.53</b>	<b>\$15,592.71</b>	<b>\$0.00</b>	<b>\$77,137.24</b>

The notice of deficiency is addressed to petitioner at “6139 Carversville RD, Carversville, PA 18913-9701” and has been made a part of the record herein. The notice of deficiency states that the notice may be challenged by filing a request for a conciliation conference or a petition for a tax appeals hearing by “12/13/00.” The notices then state, in part, “[i]f we do not receive a response to this notice by 12/13/00: This notice will become an assessment subject to collection action.”

Petitioner filed a Request for Conciliation Conference dated October 14, 2000, stating that she is a resident of Pennsylvania and has provided the appropriate documentation requested. She further stated that she did not agree with the tax assessed. This request was mailed to the Bureau

of Conciliation and Mediation Services (“BCMS”) in an envelope bearing a postage paid date stamp of March 6, 2001.

A conciliation order dismissing petitioner’s request, dated March 30, 2001, was issued by BCMS, bearing the following explanation:

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 September 14, 2000, but the request was not mailed until March 6, 2001, or in excess of 90 days, the request is late filed.

Petitioner filed a petition with the Division of Tax Appeals in protest of the order on June 23, 2001.

In support of its motion for summary determination, the Division submitted the following: its answer to the petition; an affidavit of its representative Jennifer A. Murphy, Esq.; affidavits of Geraldine Mahon, James Baisley and Mary Sauter, employees of the Division; a copy of the notice of deficiency issued to petitioner; a copy of the Certified Record for Non-Presort Mail; United States Postal Service (“USPS”) Form 3811-A; a copy of the first two pages of petitioner’s 1999 Nonresident and Part-Year Resident Income Tax Return; a copy of the petition received by the Division of Tax Appeals on June 25, 2001; a copy of petitioner’s Request for Conciliation Conference dated October 14, 2000; a copy of the envelope in which petitioner’s request for conciliation conference was made, dated March 6, 2001; a copy of a payment document sent to petitioner; and a copy of the Conciliation Order (CMS No. 185652) dated March 30, 2001 dismissing petitioner’s request for a conference as untimely.

Geraldine Mahon, has, since 1989, held the position of Principal Clerk of the Case and Resource Tracking System (hereinafter “CARTS”) Control Unit of the Division. Her duties include supervising the processing of notices of deficiency and determination prior to sending

the notices to the Division's mechanical section for mailing. The general process for issuing and mailing notices of determination and deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Non-Presort Mail," referred to as a Certified Mail Record ("CMR"), and the corresponding statutory notices generated by CARTS. The CMR is printed approximately ten days prior to mailing to allow time for review and processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

The affidavit of James Baisley, Chief Mail Processing Clerk of the Mail Processing Center of the Division since 1994, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. Statutory notices ready for mailing are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center. A member of the staff weighs and seals each envelope and places postage and fee amounts on each. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of 30 or fewer pieces of certified mail is checked against the information on the CMR. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee affixes a postmark and initials or a signature to the CMR indicating receipt of the mail

listed on the certified mail record and of the CMR itself. An employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate the total number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

In support of its position that the procedures outlined in Finding of Fact "6" were followed in this case, the Division has also submitted a copy of the CMR. The CMR consists of 18 pages with 11 entries on each page, with the exception of page 18 which bears one entry. It shows a printed date of "09/04/00" on each of the 18 pages. On page one the printed date has a line through it and above it is handwritten the date of "9-14-00." There is a consecutive listing of 188 certified control numbers beginning with P 911 205 407 and ending with P 911 205 594. There is a clear and complete Postal Service postmark of September 14, 2000 on pages 1, 3, 5-9, 11, 13 and 17 of the CMR. The remaining pages bear postmarks that are only partially legible. A Postal Service postmark without a clear date, though obviously from the month of September 2000, appears on page 16. On the last page next to "TOTAL PIECES AND AMOUNTS LISTED" appears the printed number 188. There is no amount next to "TOTAL PIECES

RECEIVED AT POST OFFICE.” There is no signature or initials under the number 188 on the last page, and the number is not circled.

Petitioner’s name is listed on page 16 of the CMR concerning the notice in issue. The certified number listed on the CMR for the notice sent to petitioner is P 911 205 579, which matches the certified number shown at the top of the notice issued to petitioner.<sup>1</sup> The name and address of petitioner is listed next and also corresponds to the information set forth on petitioner’s notice.

Mary Sauter is employed as a Legal Assistant 1 in the Division’s Office of Counsel. As part of her duties, she prepares USPS Forms 3811-A, a Request for Delivery Information/Return Receipt After Mailing. This form is available to a mailer to request return receipts with respect to registered, certified, insured and express mail after mailing. The Form 3811-A is sent to the USPS post office where the piece of mail in question was delivered, in this case to the Carversville, Pennsylvania post office. The USPS employee at that post office, in turn, fills in Form 3811-A based upon evidence they have of such delivery.

For petitioner, Ms. Sauter prepared Form 3811-A, Request for Return Receipt, for the notice in issue, identified by its certified mail number. Based upon information provided to her by the Office of Counsel, she filled out sections 2B and 2C of the form, indicating the article was addressed to Barbara Ronon, 6139 Carversville Rd., Carversville, PA 18913, and the Article Number P 911 205 579 and mailing date of 9/14/00, respectively. In Section 2D, as “Requestor,” Ms. Sauter filled in her name and business mailing address. She also placed an “x” in a box midway on the form to indicate “Return receipt WAS NOT paid for at time of mailing,”

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<sup>1</sup> The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

and placed an “x” next to “certified” in Section 2A, indicating the type of postal service. Ms. Sauter mailed the Form 3811-A from the Colonie Center branch of the USPS on July 19, 2001. In turn, she received confirmation back from the Carversville, Pennsylvania post office, with such delivering post office’s postmark dated July 31, 2001 stamped in a box in the lower right hand corner of the page. On the form, “Barbara Ronon” was handwritten in a box indicating to whom the delivery was made, and the date “09-23-00” was handwritten beneath petitioner’s name in a box designated for the “Delivery Date.”

Attached to the Division’s motion papers was a copy of the first two pages of petitioner’s 1999 Nonresident and Part-Year Resident Income Tax Return (“Form IT-203”), dated October 13, 2000. The form indicates petitioner’s address as “6139 Carversville Road, Carversville, PA 18913.”

On June 23, 2001, petitioner filed a petition with the Division of Tax Appeals. The petition was hand dated June 20, 2001, signed by petitioner, and bore a Request for Conciliation Conference attached thereto. The Request for Conference stated that petitioner is a resident of Pennsylvania and that she has provided the appropriate documentation requested, protesting the tax claimed due.

Petitioner submitted no response to the Division’s motion.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In her determination, the Administrative Law Judge noted that in order to obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, to show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor. If material facts are in dispute or if contrary

inferences may reasonably be drawn from undisputed facts, summary determination should be denied.

The Administrative Law Judge also observed that in order to challenge a notice of deficiency of personal income tax, a taxpayer must request a conciliation conference with the Division's Bureau of Conciliation and Mediation Services or file a petition for an administrative hearing with the Division of Tax Appeals within 90 days after the issuance of the notice. Where a taxpayer fails to file a timely request for a conciliation conference or a petition contesting a notice, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case. The Administrative Law Judge found that in this case, the earliest document in the record indicating petitioner's disagreement and protest against the Division's notice is the Request for Conciliation Conference postmarked March 6, 2001. The Administrative Law Judge concluded that this request was not filed within 90 days after the issuance of the statutory notice of deficiency.

The Administrative Law Judge stated that when the timeliness of a petition or request for conference is at issue, the Division has the burden of proving proper mailing of the notices. To do this, the Division must first establish the standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, demonstrate that the standard procedure was followed in this particular instance. The Administrative Law Judge found that the Division bore this burden despite the fact that petitioner raised no claim that the notice at issue was not properly mailed to the correct address or that she did not receive the notice.



The Administrative Law Judge found that the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, Division employees involved in and possessing knowledge of the process of generating, reviewing and mailing notices of deficiency. However, the Administrative Law Judge found that due to defects in the CMR (incomplete postmarks on many pages, including the page bearing petitioner's name, no initials or signature of a USPS employee, and no indication of verification that 188 pieces were received by the USPS), the documents and affidavits in the record do not establish that the general mailing procedures described by Ms. Mahon and Mr. Baisley were followed with respect to the notice issued to petitioner. Therefore, the Division failed to prove by such affidavits the actual mailing of the subject notice or the date of such mailing. However, the Administrative Law Judge also concluded that based on the affidavit of the Division's employee, Mary Sauter, together with the Form 3811-A, the Division satisfactorily proved that the notice of deficiency was received by petitioner, Barbara Ronon, on September 23, 2000. The Administrative Law Judge concluded that, based on case law, the 90-day statutory period for petitioner to file a timely protest began to run from the date of receipt of the notice. Measuring from the date of receipt of the notice, the Administrative Law Judge concluded that the 90-day protest period expired on December 22, 2000.

The Administrative Law Judge noted that petitioner failed to respond to the Division's motion for summary determination and, therefore, she is deemed to have conceded that no question of fact requiring a hearing exists. Since petitioner did not contest the facts concerning receipt of the notice, as established by Form 3811-A, the Administrative Law Judge concluded that those facts were deemed admitted. As the Administrative Law Judge determined that the

Division had tendered evidence establishing petitioner's receipt of the notice on September 23, 2000, and that there was no protest thereafter within 90 days as required, the Administrative Law Judge found that there was no jurisdiction to address the merits of the underlying notice of deficiency and granted summary determination to the Division.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that summary determination should not have been granted because a material and triable issue of fact exists; i.e., whether or not petitioner timely mailed her request for a conciliation conference on October 14, 2000. Petitioner argues that on October 14, 2000, she timely filed her request for a conciliation conference with the Division as per the directions contained in the Notice of Deficiency she received on September 23, 2000. Having received no response to this request and having received a payment document in February 2001, petitioner responded to the payment document by certified mail, claiming that she had already requested a conciliation conference and she included therewith a copy of her October 14, 2000 conciliation conference request. Petitioner claims that in its motion for summary determination, the Division failed to reference petitioner's two allegations concerning the timely filing of her conciliation request. Petitioner maintains that the Division's failure to recite this material fact concerning petitioner's allegations of the timely filing of a conciliation conference request should be grounds for denial of summary determination. Further, petitioner argues that the Division's failure to rebut or refute petitioner's allegations of timely mailing gives rise to a material issue of fact as to such mailing. Petitioner has also attempted to submit with her brief in support of exception an affidavit concerning her allegation of timely mailing.

Petitioner maintains that the envelope introduced by petitioner as bearing petitioner's conference request was, in fact, the envelope used to mail the copy of such request in response to petitioner's receipt of the payment document in February 2001, and not the envelope used to mail the original conference request in October 2000. Although petitioner acknowledges that by failing to respond to the Division's motion for summary determination, the facts in the Division's affidavits are deemed to be admitted, petitioner argues that she did not actually receive the Division's motion until three days prior to its return date. Finally, petitioner argues that even though the Division expressly denied petitioner's allegation, contained in her petition, that she had requested a conciliation conference on October 14, 2000, petitioner believes that the contents of an attachment to her petition, in which petitioner states that she did not agree with the tax asserted due, should have also been expressly denied and, absent this, petitioner is not liable for the tax.

In opposition, the Division argues that the summary determination granted in its favor should be affirmed because petitioner did not file a request for a conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notice. The Division asserts that the evidence introduced by it establishes that the notice was mailed and received by petitioner. The Division maintains that there is no triable issue of fact because petitioner bears the burden of demonstrating that her request for conciliation conference was mailed within the 90-day period at issue. The Division asserts that petitioner's unsupported allegation of mailing does not create an issue of fact. Further, the Division argues that it does not have to disprove receipt of the request allegedly mailed on October 14, 2000.

Finally, the Division maintains that it is irrelevant whether or not it adequately responded to an allegation concerning petitioner's liability for the tax asserted due contained in an attachment to the petition as the Division of Tax Appeals cannot entertain the merits of petitioner's case unless it has jurisdiction to do so as the result of petitioner having filed a timely conference request or a timely petition for a hearing. The Division also has attempted to submit an affidavit in support of its position with its brief in opposition.

In petitioner's reply brief, petitioner reiterates her prior arguments and attempts to introduce further evidence in support of her claim.

### ***OPINION***

We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not helpful towards that end and does not provide an opportunity for the adversary to question the evidence on the record (*Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *see also, Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). As summary judgment is the procedural equivalent of a trial (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93), we find this principle equally applicable to attempts to submit additional evidence for consideration subsequent to the granting of a motion for summary determination. As a result, we reject both petitioner's and the Division's attempts to introduce additional evidence into the record after the determination of the Division's motion for summary determination had been issued by the Administrative Law Judge (*see, Matter of Moore*, Tax Appeals Tribunal, June 28, 2001).

Generally, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]).

Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 413 NYS2d 309). Petitioner did not respond to the Division's motion for summary determination. Therefore, petitioner is deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667; *Whelan by Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, *Matter of Dooley*, Tax Appeals Tribunal, March 21, 2002). Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it ORDERED, ADJUDGED and DECREED that:

1. The exception of Barbara L. Ronon is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Barbara L. Ronon is dismissed.

DATED: Troy, New York  
October 24, 2002

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/s/Donald C. DeWitt

Donald C. DeWitt  
President

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/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

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/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner