

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JAMES F. AND VICTORIA SIMERMEYER** : DETERMINATION  
for Redetermination of a Deficiency or for : DTA NO.815074  
Refund of New York State and New York City :  
Personal Income Tax under Article 22 of the :  
Tax Law and the New York City Administrative :  
Code for the Year 1991. :

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Petitioners, James F. Simermeyer and Victoria Simermeyer, 162-58 Pidgeon Meadow Road, Flushing, New York 11358, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of New York City for the year 1991.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 24, 1997 at 10:15 A.M., which date began the six-month period for the issuance of this determination. Petitioner James F. Simermeyer appeared pro se and on behalf of petitioner Victoria Simermeyer, his wife. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation properly dismissed petitioners' request for a conciliation conference as untimely filed.

***FINDINGS OF FACT***

1. The Division of Taxation ("Division") issued to each petitioner, James Simermeyer and Victoria Simermeyer, separate but virtually identical notices of deficiency. Each notice is dated January 27, 1995, references assessment identification number L-010022505-4, and lists the names of each of the petitioners herein. The notices assert a tax deficiency of \$41,568.54

plus interest and penalties for the periods ended December 31, 1989, December 31, 1990, December 31, 1991 and December 31, 1992.

2. The Division issued to petitioners a Consolidated Statement of Tax Liabilities dated December 14, 1995, referencing Assessment ID number L-010022505-4 and asserting a tax liability of \$41,568.54.

3. Thereafter, petitioners mailed a Request for Conciliation Conference to the Division's Bureau of Conciliation and Mediation Services ("BCMS"). The request was received by BCMS on January 18, 1996 in an envelope bearing a postmark date of January 11, 1996.

4. BCMS issued to petitioners a Conciliation Order Dismissing Request, dated February 23, 1996 (CMS No. 152626). It states:

"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 January 27, 1995, but the request was not mailed until January 11, 1996, or in excess of 90 days, the request is late filed."

5. The Division issued a Notice of Assessment Resolution to petitioners, dated March 11, 1996, which sustained the assessment of \$41,468.54, plus penalty and interest. The following explanation was included in the notice:

"We received your correspondence about the above assessment(s).

"A Notice of Deficiency was issued on 01/27/95. Since you did not file a request for a Conciliation Conference or a Petition within 90 days of the date of the Deficiency, no further review can be granted."

6. On May 23, 1996, petitioners filed a petition in the Division of Tax Appeals. The petition states:

"This assessment is based on an assessment made on the partnership of Simermeyer and Wallace Esqs. A petition on the same assessment is filed in Tax Court by Mr. Harry Wallace, a general partner, a Conciliation Request on the partnership was also timely made. We request collection be stayed and mediation be scheduled so that a determination on the merits of this matter be made [sic]. The above assessment was based on allegations that the information was not supplied to the tax department. We are prepared to supply all information necessary to vacate the above assessment."

7. Notices of deficiency, such as those at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The

computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the certified mail record to the CARTS Control Unit.

8. Each computer-generated notice of deficiency is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case page 1 of the CMR lists an initial date of January 18, 1995, which has been manually changed to January 27, 1995.

9. After a notice of deficiency is placed in the Division's Mail and Supply Room ("mailroom") "Outgoing Certified Mail" basket, a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a mailroom employee delivers the stamped envelopes and the associated CMR to the Roessleville Branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and/or his signature to the CMR.

10. In the ordinary course of business a mailroom employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

11. The CMR relevant to this case is an 18-page, fan-folded (connected) computer-generated document entitled "Certified Record for Non-Presort Mail". This CMR lists

consecutive certified control numbers P 911 205 816 through P 911 206 009, inclusive. Each such certified control number is assigned to an item of mail listed on the 18 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The CMR herein lists 194 items of mail corresponding to the 194 certified control numbers listed thereon and there are no deletions from the list.

12. Information regarding the notices of deficiency at issue is contained on page 12 of the CMR. Specifically, corresponding to certified control numbers P 911 205 944 and P 911 205 945 is notice number L 010022505, along with information listing each petitioner's name and address, which is identical to that listed on the subject notices of deficiency. The notice numbers, names and addresses of taxpayers other than petitioners have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

13. Each page of the CMR bears the postmark of the Roesseville Branch of the U.S. Postal Service, dated January 27, 1995.

14. In addition to bearing a Postal Service postmark dated January 27, 1995, the last page of the CMR, page 18, indicates "total pieces" listed thereon of 194. This figure has been manually circled and beneath it is the signature or initials of a Postal Service employee.

15. Appearing immediately beneath the "total pieces" listing is the confirmatory listing "Total Pieces Received at Post Office". No information appears after this listing.

16. The affixation of the Postal Service postmark, the signature or initials of the Postal Service employee, and the circling of the "total pieces" listed figure indicate that all 194 pieces listed on the CMR were received at the post office.

17. The Division generally does not request, demand, or retain return receipts from certified or registered mail.

18. The facts set forth above in Findings of Fact "7" through "12", "14", "16", and "17" were established through the affidavits of Geraldine Mahon and Daniel G. LaFar. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties

include supervising the processing of notices of deficiency such as those at issue herein. Mr. LaFar is employed as a Principal Mail and Supply Clerk in the Division's mailroom. Mr. LaFar's duties include supervising mailroom staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

19. The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received (see, Finding of Fact "16") was established through the affidavit of Mr. LaFar. Mr. LaFar's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center specifically requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

20. The subject notices of deficiency bore petitioners' last known address.

21. At hearing the Division's representative produced the original of the CMR relevant to this case. Said original was not received in evidence, but was inspected, in camera, by the administrative law judge to compare the original with the copy offered in evidence. This inspection established that, except for the redaction of the names and addresses of other taxpayers, the copy offered in evidence was an accurate reproduction of the original.

22. The Division brought a motion for summary determination in this matter on August 27, 1996 on the grounds that petitioners' request for a conciliation conference was untimely filed. In support of its motion, the Division submitted two copies of its motion papers, with a copy of the CMR relevant to this matter attached to each set of motion papers. The two copies of the CMR submitted with the motion papers were not identical. Specifically, one of the copies conforms to the description given in the Mahon affidavit. The second copy is identical to the first except that on page nine this copy lists only seven certified control numbers: P 911 205 904 through P 911 205 909 and P 911 205 911. The bottom third of this page is blank. This page also lists eight postage and fee amounts. The first six such postage and fee amounts appear to correspond to certified control numbers P 911 205 904 through P 911 205 909. The eighth postage and fee listed appears to correspond to certified control

number P 911 205 911. The seventh postage and fee amount listed on this page appears to correspond to the space between P 911 205 909 and P 911 205 911. It is noted that the space between these two certified control numbers is larger than the space between any other two certified control numbers listed on the page.

23. Pursuant to an order dated December 19, 1996, the Division's motion was denied. In her order, the administrative law judge found that a material issue of fact existed because of the differences between the two copies of the CMR which were submitted with the Division's motion papers. The administrative law judge did not resolve this factual issue, but rather denied the Division's motion "without prejudice" and directed that a hearing be held in this matter to resolve all issues of fact. In her order, the administrative law judge specifically stated that "[t]he Division raised the issue of timeliness in its answer and may pursue this issue at hearing".

24. On January 27, 1997 and January 31, 1997, respectively, petitioners and the Division executed a Stipulation for Discontinuance of Proceeding pursuant to which the parties agreed to discontinue the instant proceeding with respect to the years 1989, 1990 and 1992. The stipulation specifically provided that petitioners would continue to pursue their administrative remedies for the year 1991.

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

A. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice "shall be mailed by certified or registered mail to the taxpayer at his last known address." Tax Law § 689(b) provides that a taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency within 90 days of the mailing of the notice of deficiency. Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Deficiency so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to this provision, then, petitioners had 90 days from the issuance of the subject notice to file a request for a conciliation

conference.

B. Where the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. A notice is mailed when it is delivered to the custody of the United States Postal Service (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992). As noted previously, to be "properly mailed", a notice of deficiency must be mailed by registered or certified mail to the taxpayer's "last known address" (see, Tax Law § 681[a]). In this case the Division has established that the address listed on the subject notices was correct. In turn, where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer 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 (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).

C. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of notices of deficiency 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, supra; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Geraldine Mahon and Daniel LaFar, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency (see, Finding of Fact "18").

E. The Division has also presented sufficient documentary proof, i.e., the certified mail record, to establish that the notices of deficiency at issue were mailed to petitioners on January 27, 1995. Specifically, this 18-page document lists sequentially numbered certified

control numbers with corresponding names and addresses. No entries on this document have been deleted. All 18 pages of the certified mail record bear a U.S. Postal Service postmark dated January 27, 1995. Additionally, a postal employee circled the total pieces listed figure and signed page 18 of the certified mail record to indicate receipt by the post office of all pieces of mail listed thereon.<sup>1</sup> The CMR was therefore completed in accordance with the standard mailing procedures described by the Division's affiants and the Division has thus established that the subject notices of deficiency were mailed on the date claimed (see, Matter of Katz, supra; Matter of Novar TV & Air Conditioning Sales & Serv., supra).

F. Petitioner contended that the Division should be collaterally estopped from raising the timeliness issue because the Division's prior motion for summary determination on the same issue in this matter was denied. This contention is rejected. Petitioner has cited no case law to support the proposition that where a motion for summary determination is denied, the movant should be estopped from raising the same issue at hearing. It is axiomatic that the function of the summary judgement/summary determination motion is not to resolve factual issues, but to determine whether factual issues exist (see, Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498, 505). Where, as in this case, an issue or issues of fact are found on a summary determination motion, the matter is properly scheduled for hearing in order to resolve those factual issues. In this case, the administrative law judge found that material issues of fact were present because of the discrepancies between the two copies of the CMR which were submitted with the Division's motion papers. The administrative law judge did not resolve this factual issue, but rather denied the Division's motion "without prejudice" and directed that a hearing be held in this matter to resolve all issues of fact. In her order, the administrative law judge specifically stated that "[t]he Division raised the issue of timeliness in its answer and may pursue this issue at hearing."

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<sup>1</sup>It should be noted that this fact was established through the affidavit of Mr. LaFar and that the LaFar affidavit also states the basis for the affiant's knowledge of this fact (see, Finding of Fact "19"). These circumstances distinguish the instant matter from Matter of Roland (Tax Appeals Tribunal, February 22, 1996), where, in a similar situation, an affidavit by Mr. LaFar stated that the circling of the total number of pieces figure on a CMR indicated that all such pieces were actually received at the post office, but did not state Mr. LaFar's basis of knowledge of this fact.



G. Petitioner also contended that the Division's submission of the copy of the certified mail record in evidence and the administrative law judge's review of the original of the certified mail record without the testimony of anyone with personal knowledge of the Division's mailing procedures to explain the difference between the certified mail records submitted on the summary determination motion and the documents submitted at hearing was prejudicial and unfair. Regarding this contention, first, it is observed that the submission of affidavits in lieu of oral testimony is authorized by the Tax Appeals Tribunal Rules of Practice and Procedure (see, 20 NYCRR 3000.15[d][1]). Second, the Mahon affidavit authenticates the copy of the CMR which was submitted into the record by the Division at hearing. Third, my review of the original CMR in camera at the hearing revealed that the copy of the CMR submitted at hearing was an accurate reproduction of the original. Finally, a review of the CMR submitted by the Division at hearing along with the two copies of the CMR submitted by the Division as part of its summary determination motion papers indicates that the difference between the two copies submitted on motion resulted from a photocopying error (see, Findings of Fact "21" and "22"). Petitioner's contention is therefore rejected.

H. The petition of James F. and Victoria Simermeyer, as amended pursuant to Finding of Fact "24", is dismissed.

DATED: Troy, New York  
December 11, 1997

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE