

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>PAULA BRODY</b>	:	DETERMINATION
	:	DTA NO. 817367
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 the City of New York for the Year 1994.	:	

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Petitioner, Paula Brody, 12667 Promontory Road, Los Angeles, California 90049, 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 the City of New York for the year 1994.

The Division of Taxation, by its representative, Barbara G. Billet, Esq. (Peter T. Gumaer, Esq., of counsel), brought a motion dated August 1, 2000 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not respond to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination commenced on August 31, 2000, the date petitioner's time to serve a response to the Division's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, 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 a Notice of Deficiency.

### ***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to petitioner, Paula Brody, a Notice of Deficiency dated January 11, 1999 and addressed to petitioner at “12667 Promontory Rd, Los Angeles, CA 90049-1186.” The notice bears assessment identification number L-015835454-7 and asserts a total amount due of \$9,623.53. As indicated by the computation summary section of the notice, this amount consisted of New York State and New York City personal income tax of \$5,212.86, plus interest and penalty, for the year 1994. The notice bears certified mail control number P 911 005 310.

2. On May 7, 1999, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the Notice of Deficiency dated January 11, 1999.

3. On June 4, 1999, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order states, 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 January 11, 1999, but the request was not mailed until May 7, 1999, or in excess of 90 days, the request is late filed.

4. Notices of deficiency, such as the one 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 CMR to the CARTS Control Unit.

5. 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 December 31, 1998, which has been manually changed to January 11, 1999.

6. After a notice of deficiency is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to the Colonie Center 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 or his signature or both to the CMR.

7. In the ordinary course of business, a Mail Processing Center 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.

8. The CMR relevant to this case is a 36-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Zip + 4 Minimum Discount Mail." This CMR lists consecutive certified control numbers P 911 004 925 through P 911 005 317. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 36 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.

9. Information regarding the Notice of Deficiency issued to petitioner is contained on page 36 of the CMR. Specifically, corresponding to certified control number P 911 005 310 is notice number L 015835454, along with petitioner's name and an address, which is identical to that listed on the subject Notice of Deficiency.

10. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated January 11, 1999.

11. The last page of the CMR, page 36, contains a pre-printed entry of 393 corresponding to the heading "Total Pieces and Amounts Listed." This pre-printed entry has been manually circled and beneath it are the initials of a Postal Service employee.

12. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the "393" indicate that all 393 pieces listed on the CMR were received at the post office.

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

14. The facts set forth above in Findings of Fact “4” through “13” were established through the affidavits of Geraldine Mahon and James Baisley. 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. Mr. Baisley is employed as a Chief Mail Processing Clerk in the Division’s Mail Processing Center. Mr. Baisley’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

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

A. 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 fact 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]).

B. Here, petitioner did not respond to the Division’s motion; she is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Baisley affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173).

C. 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.” A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with the Bureau of Conciliation and Mediation Services, within 90 days of the mailing of the Notice of Deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, 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. 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).

E. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency (*see*, Finding of Fact “14”).

F. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Deficiency at issue was mailed to petitioner on January 11, 1999. Specifically, this 36-page document lists sequentially numbered certified control numbers with corresponding

names and addresses. All 36 pages of the CMR bear a U.S. Postal Service postmark dated January 11, 1999. Additionally, as part of the standard procedure for the issuance of notices of deficiency, a postal employee initialed page 36 of the CMR and circled “393” on that page to indicate receipt by the post office of all 393 pieces of mail listed thereon (*cf.*, ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant’s knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is sufficient to establish that the Division mailed the subject Notice of Deficiency on January 11, 1999.

G. Petitioner’s request for conciliation conference was filed on May 7, 1999, or 116 days after the date of mailing of the subject Notice of Deficiency. The request was therefore untimely filed (*see*, Tax Law §§ 1138[a][1]; 170[3-a][a]; 20 NYCRR 3000.3[c]). It should be noted, however, that petitioner is not without recourse here, for she may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If her request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law §§ 689[c]; 170[3-a][a]; ***Matter of Rosen***, Tax Appeals Tribunal, July 19, 1990).

H. The petition of Paula Brody is dismissed.

DATED: Troy, New York  
September 28, 2000

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE