

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**THOMAS DUNBAR** : DETERMINATION  
 : DTA NO. 819129  
for Redetermination of Deficiencies or for Refund of :  
New York State Personal Income Tax Under Article :  
22 of the Tax Law for the Years 1998 and 1999. :

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Petitioner, Thomas Dunbar, 63 Stanford Avenue, Colonia, New Jersey 07607, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1998 and 1999.

The Division of Taxation by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), brought a motion on January 27, 2003 seeking dismissal of the petition or, in the alternative, summary determination in the above referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). Petitioner, appearing *pro se*, had 30 days, or until February 27, 2003, to respond to the motion but did not do so, and the 90-day period for issuance of this determination commenced on February 27, 2003. After due consideration of the documents and arguments presented, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner's requests for conciliation conferences to challenge two notices of deficiency were filed in a timely manner.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) received from petitioner, Thomas Dunbar, two separate documents titled “Payment Document” (Form DTF-968.1). These documents, in their preprinted areas, identify petitioner by name, list his address as 63 Stanford Avenue, Colonia, N.J. 07067-2934, and reference assessment ID numbers L-020422060-8 and L-020422095-3, respectively, followed by (in each instance) petitioner’s social security number. Each of these documents indicates, in handwriting, petitioner’s disagreement with the referenced assessments and each requests a hearing. Each document is signed by petitioner and each is hand-dated July 1, 2002.

2. The single envelope in which the two payment documents were mailed bears a United States Postal Service (“USPS”) postmark dated July 8, 2002. One of the payment documents is stamped “Received New York State Dept of Tax & Fin–July 15, 2002–Proc-Rads Acc’t Srves C/O Protest.” The envelope, as well as each of the documents, also bears the receipt stamp of the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) indicating Albany, New York and the date July 19, 2002.

3. The record in this matter includes a copy of each of the challenged notices of deficiency. Each notice is addressed to petitioner, Thomas M. Dunbar, at 63 Stanford Avenue, Colonia, N.J. 07067-2934. In its upper right corner, each notice bears, *inter alia*, the following information:

YEAR	1998	1999
DOCUMENT NUMBER	54461175	74483496
DATE	03/04/02	03/04/02
ASSESSMENT I.D.	L-020422060-8	L-020422095-3

TAXPAYER I.D.	(petitioner's SS No.)	(petitioner's SS No.)
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The notice for 1998 asserts total tax due in the amount of \$776.00, plus interest, and the notice for 1999 asserts total tax due in the amount of \$836.34, plus interest. Each notice provides, in its explanation and instructions section, that any prior disagreement submitted with respect to a Statement of Proposed Audit Changes “cannot be considered a disagreement with this notice,” and specifies that any protest against the notices must be filed by June 6, 2002.

4. The Division treated the foregoing payment documents and their statement of disagreement as requests for a conciliation conference. In turn, by a Conciliation Order Dismissing Request (CMS No. 192877) dated August 2, 2002, BCMS advised petitioner that his requests for a conciliation conference were denied. Specifically, the Order advised that the notices were issued on March 4, 2002, but that the requests were not mailed until July 8, 2002, thus leaving the requests untimely since they were mailed more than 90 days after the issuance of the notices.

5. Petitioner challenged this denial by filing a petition with the Division of Tax Appeals. The petition stated only that the Commissioner of Taxation “never scheduled conciliation conference as requested.”

6. In support of its position that the request was untimely, the Division submitted the affidavits of Geraldine Mahon and Daniel LaFar, employees of the Division, as well as a copy of the certified mail record (“CMR”) containing a list of the notices of deficiency allegedly issued by the Division on March 4, 2002.

7. The affidavit of Geraldine Mahon, principal clerk of the Division’s Case and Resource Tracking System (“CARTS”), sets forth the Division’s general procedure for preparing and

mailing notices of deficiency. This procedure culminates in the mailing of the notices by USPS certified mail and confirmation of the mailing through the receipt and retention of a postmarked copy of the CMR.

8. The computer-generated notices of deficiency are accompanied by a CMR entitled "Assessments Receivable, Certified Record for Non-Presort Mail." The notices are predated with their anticipated date of mailing, while the CMR is dated in its upper left corner with the actual date of its printing, in this case February 20, 2002. The CMR is printed approximately ten days in advance of the anticipated mailing date of the notices, with such difference between the anticipated mailing date for the notices and the printing date of the CMR established to ensure that there is sufficient lead time for the notices to be manually reviewed and thereafter processed for postage and fees by the Division's mechanical section prior to mailing. In this case, consistent with the Division's procedure, the CMR printing date of February 20, 2002 has been lined through and the date "3/4/02" has been handwritten immediately above to indicate and confirm March 4, 2002 as the date of mailing.

9. A certified control number is assigned to each notice listed on the CMR. Each such certified control number is recorded on the CMR under the heading "Certified No." Each such number is also recorded on its own separate one-page "Mailing Cover Sheet," generated for each notice. This cover sheet (Form DTF-997) also bears a bar code, the taxpayer's mailing address and the Division's return address on its front, as well as taxpayer assistance information on its reverse side. CARTS also generates any enclosures referenced within the body of each notice, and these enclosures together with the mailing cover sheet, and the notice itself form a discrete unit within the batch of notices listed on the CMR. The mailing cover sheet is the first sheet in such unit.

10. The CMR for the block of notices issued by the Division on March 4, 2002 is a 15-page, fan-folded (connected) document, with its pages numbered sequentially “1” through “15.”

11. There are 11 certified control numbers listed on each of the 15 pages of the CMR for March 4, 2002, for a total of 165 separate certified control numbers. The certified control number 7104 1002 9737 0075 0023 followed by reference (Assessment ID) number L-020422060, and the certified control number 7104 1002 9737 0075 0230 followed by reference (Assessment ID) number L-020422095, appear as the sixth and seventh entries on page one of the CMR for March 4, 2002. Each such entry is followed by “Dunbar, Thomas M., 63 Stanford Avenue, Colonia, N.J. 07067-2934,” and a listing of the amounts of postage and fees.<sup>1</sup> The CMR is date stamped March 4, 2002 on each of its pages by the Colonie Center branch of the USPS in Albany, New York and each page bears the initials of the postal employee. At the bottom of the last page of the CMR (page 15), the number “165” has been circled as the “Total Number of Pieces Listed,” accompanied by the initials of the postal employee to verify the receipt of 165 pieces of certified mail by the USPS.

12. The affidavit of Daniel LaFar, Chief Mail Processing Clerk in the Division’s Mail Processing Center (“mailroom”), 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. More specifically, after a piece of correspondence, including a statutory notice with its accompanying enclosures and mailing cover sheet, is placed in the “Outgoing Certified Mail” basket in the mailroom, a member of the mailroom staff operates a machine which places each notice and its associated documents into a windowed envelope so that the address and certified control number

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<sup>1</sup> The portions of the CMR which pertain to taxpayers other than petitioner have been redacted to preserve the confidentiality of those other taxpayers.

on the mailing cover sheet shows through the envelope's windows. That staff member also weighs and seals each envelope and places postage and fee amounts thereon.

13. A mailroom clerk then checks the first and last pieces of mail listed on the CMR against the information contained on the CMR, and also performs a random review of 30 or fewer pieces of certified mail by checking the information on the envelopes against that appearing on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office. Mr. LaFar's knowledge that the postal employee circled the number "165" on the CMR and initialed the same page to indicate the receipt of 165 pieces of certified mail is based on the fact that the Division's mailroom specifically requested that the postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. The CMR is the Division's record of receipt, by the USPS, for the pieces of certified mail listed on the CMR. In the ordinary course of business and pursuant to the practices and procedures of the Division's mailroom, as followed in this case, the CMR is picked up at the post office by a member of Mr. LaFar's staff on the following day after its delivery and is then delivered to the originating office within the Division (here CARTS).

14. Petitioner's only communication in this matter subsequent to the filing of his petition has been a February 18, 2003 letter responding to a Notice to Schedule a Hearing, in which petitioner requests a hearing date of May 22, 2003 and includes a hearing memorandum setting forth the substantive issues of the case. Petitioner did not file a response to the subject motion and its claim that his protests against the notices were not timely filed.

***CONCLUSIONS OF LAW***

A. Tax Law § 681(a) authorizes the Commissioner of Taxation and Finance to issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined. Said section further provides that the notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.”

B. In order to challenge a notice of deficiency, a petition for an administrative hearing must be filed with the Division of Tax Appeals within 90 days after the issuance of the notice (Tax Law § 689[b]). Alternatively, Tax Law § 170(3-a)(a) allows a taxpayer to file a request for a conciliation conference with the Division’s BCMS 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 these provisions, then, petitioner had 90 days from the issuance of the subject notices to file a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals.

C. Where a taxpayer fails to file either a timely request for a conciliation conference or a petition contesting a notice of deficiency, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case, (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). There is no claim that a petition was filed at any time within 90 days after issuance of the notices in this case. The only issue presented, then, is whether the payment documents, which indicated petitioner’s disagreement with the statutory notices and were thus treated as conference requests, were filed within 90 days after the issuance (mailing) of the notices of deficiency.

D. It is the mailing date of the statutory notice which triggers the 90-day period within which a protest must be filed. Where, as here, a taxpayer files a request, but the timeliness of the request is at issue, the Division bears the burden of proving proper mailing of the statutory notice (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered to the custody of the USPS (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a notice of deficiency is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, that notice is valid and petitioner bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id.*; *see also, Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). In turn, the evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices 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., supra*).

E. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. LaFar, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices. Furthermore, the Division has offered adequate proof to establish the fact that the particular notices at issue were actually mailed to petitioner on March 4, 2002, the date appearing on the CMR. The affidavits generally describe the various stages of producing and



mailing notices and, in addition, attest to the authenticity and accuracy of the copies of the notices and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Mahon and Lafar affidavits were followed with respect to the notices issued to petitioner. Petitioner's name and address, as well as the Assessment ID number on the face of the notices in issue, appear on the CMR which bears a USPS date stamp of March 4, 2002. There are 165 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "165" near his initials, that he received 165 items for mailing. In short, the Division established that it mailed the notices of deficiency to petitioner by certified mail on March 4, 2002 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). In turn, in order to be considered timely, any protest against the notices had to have been filed within 90 days thereafter, or by June 6, 2002.

F. Conciliation Order No. 192877 denied petitioner's request for a conciliation conference on the basis that the requests were not filed within 90 days after the issuance of the notices. In this case, the requests (petitioner's payment documents hand dated July 1, 2002) were not filed until they were mailed on July 8, 2002, as borne out by the USPS postmark showing such date. Petitioner did not respond to the subject motion or otherwise provide any documents or other evidence to establish that any protest occurred within the requisite 90-day time period. Since the requests were not timely filed (i.e., within 90 days after March 4, 2002), they were untimely and there is no jurisdiction to proceed with this matter.<sup>2</sup>

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<sup>2</sup> Since there is no jurisdiction to address the merits underlying the statutory notices, the Division's alternative pleading seeking summary determination is moot.

G. The petition of Thomas Dunbar is hereby dismissed.<sup>3</sup>

DATED: Troy, New York  
April 3, 2003

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>3</sup> Petitioner is not entirely without recourse in this matter. That is, petitioner may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 689[c]). Upon its denial, petitioner may then proceed with a timely petition for a hearing to contest the refund denial.