

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**GEORGE J. GODFREY** :  
for Redetermination of a Deficiency or for Refund of New : DETERMINATION  
York State and New York City Personal Income Tax under : DTA NO. 819464  
Article 22 of the Tax Law and the Administrative Code of :  
the City of New York for the Year 1998. :

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Petitioner, George J. Godfrey, 300 East 75<sup>th</sup> Street, Apartment 21-0, New York, New York 10021, 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 1998.

On August 14, 2003, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that there are no material issues of fact and that the facts mandate a determination in its favor. Petitioner's response was served on September 5, 2003, which started the 90-day period for issuing this determination. The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel). Petitioner appeared *pro se*. Based upon the pleadings and motion papers, Arthur S. Bray, 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 ("BCMS").

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to petitioner, George J. Godfrey, a Notice of Deficiency dated March 4, 2002. It was addressed to petitioner at 333 Rector PL 10Q, New York, NY 10280-1423. The notice bore assessment identification number L-020668242-4 and asserted that tax was due in the amount of \$45,549.92 plus interest in the amount of \$10,363.39 and penalty in the amount of \$8,915.69, for a balance due of \$64,829.00.

2. On March 5, 2003, petitioner mailed by United States Postal Service Express Mail a Request for Conciliation Conference.

3. On March 28, 2003, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on March 4, 2002, but the request was not mailed until March 5, 2003, or in excess of 90 days, the request is late filed.

4. Petitioner filed a petition with the Division of Tax Appeals. It was dated April 19, 2003 and was received on April 25, 2003. The United States Postal Service postmark on the envelope was not legible.

5. Notices of deficiency, such as the one at issue herein, were computer-generated by the Division’s computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also included the preparation of a certified mail record (“CMR”). The CMR listed those taxpayers to whom notices of deficiency were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained 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. CARTS also generates a Mailing Cover Sheet with the corresponding certified number for each notice. The

Mailing Cover Sheet contains a bar code, the taxpayer's mailing address, the Division's return address and taxpayer assistance information.

6. Each computer-generated notice of deficiency was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading "Certified No." The CMR listed an initial date, the date of its printing, in its upper left hand corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial date on the CMR was 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 listed an initial date of February 21, 2002 which was manually changed to March 4, 2002.

7. After a notice of deficiency was placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer placed the statutory notice and associated documents into a windowed envelope, weighed and sealed each envelope, affixed postage and placed fee amounts thereon. A Mail Processing Center clerk then counted the envelopes and verified 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 delivered the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark or his signature or initials, or both, to the CMR.

8. In the ordinary course of business a Mail Processing Center employee picked up the CMR from the post office on the following day and returned it to the CARTS Control unit.

9. In the instant case, the CMR was a 22-page, fan-folded (connected) computer-generated document entitled “Assessments Receivable Certified Record for Non-Presort Mail.” All pages were connected when the postmarked document was returned after mailing. This CMR lists 238 control numbers. Each such certified control number was assigned to an item of mail listed on the 22 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

10. Information regarding the Notice of Deficiency issued to petitioner was contained on page 8 of the CMR. Corresponding to certified control number 7104 1002 9739 0075 6522 was notice number L 020668242, along with petitioner’s name and an address, which was identical to that listed on the subject Notice of Deficiency.

11. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated March 4, 2002, and the initials of the postal employee, verifying receipt of the items.

12. The last page of the CMR, page 22, contained a printed entry of “238” corresponding to the statement “Total Pieces and Amounts Listed.” This printed entry was manually circled and, at the top of the page, the postmark of the Colonie Center Branch of the USPS and the initials of a Postal Service employee appear. These same initials appeared on each page of the CMR.

13. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the “238” indicated that all 238 pieces listed on the CMR were received at the post office.

14. 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 was established through the affidavit of Daniel LaFar. The basis of Mr. LaFar's knowledge of this fact is that the Division's Mail Processing Center 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.

15. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

16. The facts set forth above in Findings of Fact "5" through "15" were established through the affidavits of Geraldine Mahon and Daniel LaFar. Ms. Mahon was employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties included supervising the processing of notices of deficiency. Mr. LaFar was employed as a Principal Mail and Supply Clerk in the Division's Mail Processing Center. Mr. LaFar's duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

17. On July 10, 2001, the Division received a completed audit questionnaire and documents. The audit questionnaire stated that petitioner's address was 333 Rector Place, Apt# 10Q, New York, NY.

#### ***SUMMARY OF PETITIONER'S POSITION***

18. In response to the motion, petitioner submitted a letter which noted that on an employment application with a firm, that hired him on June 30, 1997, he listed his residence as being in Florida. Petitioner further stated that his application with the National Association of

Security Dealers and the Securities and Exchange Commission listed his home address as being in Florida. According to petitioner, this document was verified by the Federal Bureau of Investigation. Lastly, petitioner noted that, although the motion for summary determination was dated August 14, 2003, the affidavit of Jacob Schmookler, which was included in the Division's motion, stated that it was affirmed on August 30, 2003. Petitioner posits that the date on the affirmation must be wrong.

### ***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 presented no evidence to contest the facts alleged in the Mahon and LaFar affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. A petition contesting the notice at issue herein must be filed within 90 days after the date of mailing of the notice (Tax Law § 689[b]). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a notice of deficiency (*see, Matter of SAK Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). As pertinent here, a petitioner has the option of requesting a conciliation conference with BCMS upon receipt of the notice of deficiency, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must

also be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]).

D. Where the taxpayer files a request for conference, but the timeliness of the request is at issue, the Division has the burden of proving proper mailing of the notice (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is twofold: 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 the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

E. The affidavits of two Division employees, Geraldine Mahon and Daniel LaFar, provide adequate proof of the Division's standard mailing procedure for the mailing of statutory notices like the one mailed to petitioner. 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 also establish that the general mailing procedures described in the Mahon and LaFar affidavits were followed with respect to the notice issued to petitioner. Petitioner's name and address appears on page eight of the certified mail record which bears a USPS date stamp of March 4, 2002. There are 238 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated that he received 238 items for mailing. In short, the Division established that it mailed the notice in issue to petitioner by certified mail on March 4, 2002.

F. Having determined that the Division properly issued the subject notice of deficiency on March 4, 2002, it must now be determined whether petitioner's request for conciliation

conference was timely filed. Where an envelope containing a request bears a United States Postal Service postmark, the date of the USPS postmark is deemed the date of filing (*see*, 20 NYCRR 4000.7[a][2]). Here, the photocopy of the envelope containing petitioner's request indicates a USPS postmark dated March 5, 2003. Since the Division mailed the notice on March 4, 2002 and a request challenging this notice was not mailed until March 5, 2003, the request was not filed within the requisite 90-day period. Therefore, the Division of Tax Appeals does not have jurisdiction to consider the merits of the arguments in the petition. Nevertheless, petitioner may obtain review of his position by paying the tax and filing a claim for a refund within the prescribed period (Tax Law § 687[a]).

G. It is noted that petitioner has not presented any evidence or argument that would cause one to question that the mailing did not occur as claimed by the Division. Further, although the date on the affidavit of Jacob Schmookler is apparently in error, the defect is of no consequence because petitioner has not disputed the facts set forth in that affidavit.

H. The Division of Taxation's motion for summary determination is granted and the petition of George J. Godfrey is dismissed.

DATED: Troy, New York  
November 20, 2003

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE