

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DENNIS FALLON	:	ORDER
	:	DTA NO. 821389
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Year 2001.	:	

Petitioner, Dennis Fallon, 1627 West 4th Street, Brooklyn, New York 11223, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2001.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion filed February 12, 2007, 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)(1) and (b). The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with exhibits attached in support of the motion. Petitioner, appearing *pro se*, did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this order commenced on March 14, 2007, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the documents and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of a notice of deficiency.

FINDINGS OF FACT

1. The petition of Dennis Fallon was filed with the Division of Tax Appeals on October 23, 2006. In it, petitioner challenges a deficiency in New York State and City personal income taxes for 2001 asserted by the Division of Taxation (“Division”). A Conciliation Order Dismissing Request (CMS No. 214845) dated July 28, 2006 is attached to the petition. This order states, in part:

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 April 3, 2006, but the request was not mailed until July 12, 2006, or in excess of 90 days, the request is late filed.

2. In response to the dismissal order, petitioner filed a petition with the Division of Tax Appeals, to which the Division filed an answer dated December 27, 2006. The Division subsequently brought this motion dated February 12, 2007 seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioner’s protest of the statutory notice was filed more than 90 days from the date of issuance of the statutory notice. Petitioner did not reply to the motion.

3. In support of its motion for summary determination, the Division submitted: copies of the Request for Conciliation Conference dated July 9, 2006 and the envelope, bearing the United States Postal Service (“USPS”) postmark of July 12, 2006, in which the request was mailed; the

Conciliation Order Dismissing Request; the petition filed with the Division of Tax Appeals; the answer of the Division; a copy of the Notice of Deficiency dated April 3, 2006; a copy of petitioner's 2005 New York State Resident Income Tax Return (Form IT-201) and attached 2005 forms 1099-Misc; copies of three pages of a certified mail record; and the affidavit of John E. Matthews, Esq., the Division's representative, as well as affidavits of James Steven Vanderzee and Thomas Kelly, employees of the Division.

4. The affidavit of James Steven Vanderzee, Principal Mail and Supply Supervisor in the Division's Registry Unit, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the USPS. Statutory notices that are ready for mailing are received by the Mail Processing Center in an area designated for "Outgoing Certified Mail." Each notice in the batch is preceded by a "Mailing Cover Sheet" and accompanied by any required enclosures. A certified mail record is also received by the Mail Processing Center for each batch of statutory notices. A member of the Mail Processing Center staff operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the windows. The staff member then weighs and seals each envelope and places postage and fee amounts on the envelope.

A mail processing clerk then checks the first and last pieces of certified mail listed on the certified mail record against information contained on the certified mail record. The clerk then performs a random review of up to 30 pieces of certified mail listed on the certified mail record by checking those envelopes against information contained on the certified mail record. Once the review of the certified mail record and envelopes is completed, a member of the Mail Processing Center staff then delivers the sealed, stamped envelopes to one of the various

branches of the USPS located in the Albany, New York area where a postal employee will then affix a postmark or his or her initials or signature to the certified mail record indicating receipt of the mail listed on the certified mail record and the certified mail record itself. The Mail Processing Center has requested that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the certified mail record. Mr. Vanderzee explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. As a matter of standard procedure, to ensure accountability, the certified mail record may be left overnight at the USPS to enable the postal employee sufficient time to process the certified mail and make the appropriate notations on the certified mail record. The certified mail record is then picked up at the USPS the following day by a member of the Mail Processing Center staff who delivers it to the Case Resource and Tracking System Control Unit.

5. On the basis of the procedures enumerated and the information contained in Mr. Kelly's affidavit, Mr. Vanderzee concluded that on April 4, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Dennis Fallon, 1627 W 4th St., Brooklyn, NY 11223-1532, to the USPS in Albany, New York in a sealed postpaid windowed envelope for delivery by certified mail. In addition, based on his review of the certified mail record, Mr. Vanderzee averred that a member of the Mail Processing Center staff obtained a copy of the postmarked certified mail record delivered to and accepted by the Postal Service on April 4, 2006 for the records maintained by the Case Resource and Tracking System Control Unit ("CARTS") of the Division. He concluded that the regular procedures comprising the ordinary course of business for the staff of the Mail Processing Center were followed in the mailing of the item of certified mail at issue herein.

6. The affidavit of Thomas Kelly, Tax Processing Specialist 2, and supervisor of the Division's Refunds, Deposits, Overpayments and Control Units, including the CARTS Control Unit, described the regular practices of the CARTS Control Unit regarding the general procedures for issuing and mailing statutory notices. As part of his regular duties, Mr. Kelly supervises the processing of notices of deficiency, notices of estimated determination and notices of determination ("statutory notices") prior to shipment to the Division's Mail Processing Center for mailing. In the course of these duties, he routinely receives a batch of statutory notices generated by CARTS. The computer generated statutory notices are predated with the anticipated date of mailing and each statutory notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page Mailing Cover Sheet that is generated by CARTS for each statutory notice. The Mailing Cover Sheet, form DTF-997, also bears a bar code and the taxpayer's mailing address. CARTS also generates any enclosures referenced within the body of each notice. Each notice, with accompanying Mailing Cover Sheet and enclosures is a discrete unit within the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

Each batch of statutory notices is accompanied by a computer printout entitled "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" ("certified mail record" or "CMR"). The certified mail record lists each statutory notice in the order that it is generated in the batch. The certified control numbers appear on the CMR under the first heading, entitled "CERTIFIED NO." The assessment numbers are listed under the second heading, entitled "REFERENCE NO." The names and addresses of the taxpayers are listed under the third heading, entitled "NAME OF ADDRESSEE, STREET AND PO ADDRESS."

Each CMR and associated batch of statutory notices are forwarded to the Mail Processing Center together.

7. Mr. Kelly avers that the certified mail record pertaining to the mailing at issue consisted of 157 fan-folded (connected) pages and included a Notice of Deficiency issued to Dennis Fallon on April 4, 2006. He described the certified mail record as having all pages connected when the document is delivered into the possession of the USPS. The pages remain connected until otherwise requested by Mr. Kelly.

8. Attached to Mr. Kelly's affidavit, as Exhibit A, is a copy of pages 1, 70 and 157 of the original certified mail record issued by the Division on April 4, 2006. There are 11 entries on each page, except for page 157 which has 7 entries. Mr. Kelly notes that portions of Exhibit A have been redacted to protect the confidentiality of other taxpayers. In the upper left hand corner of each page of the CMR is the Run which signifies the date and time the CMR was produced by year, ordinal day of the year and military time of day. The ordinal date and time of "20060821700" was the date and time that the entire CMR was printed. The CMR is printed approximately ten days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed, processed for postage, etc., by the Division's Mail Processing Center. In the upper left hand corner of page one of the certified mail record, two handwritten dates appear. The first handwritten date of "4.3.06" has a line drawn through it. The second handwritten date of "4/4/06" appears directly beneath the earlier handwritten date. This change was made in order to ensure that the date on the certified mail record conformed with the actual date that the statutory notices and the certified mail record were delivered into the possession of the USPS. Mr. Kelly avers that the Notice of Deficiency (Notice No. L-026611133) was originally scheduled to be

mailed on April 3, 2006, but was part of a batch of statutory notices that was not mailed until one day later on April 4, 2006.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative. The postal service representative then affixes his or her initials or signature or a U.S. postmark to a page or pages of the CMR. Mr. Kelly avers that page 70 of Exhibit A indicates that a Notice of Deficiency with "NOTICE NUMBER L-026611133" was sent to "FALLON-DENNIS, 1627 W 4th ST., BROOKLYN, NY 11223-1532" by certified mail using control number "7104 1002 9730 1165 8289." Mr. Kelly further avers that a USPS postmark on pages 1, 70 and 157 confirms that the foregoing Notice of Deficiency was sent on April 4, 2006. In addition, Mr. Kelly states that, in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

Mr. Kelly concludes that the procedures followed and described were the normal and regular procedures of the CARTS Control Unit on April 4, 2006.

9. As noted, in conjunction with the affidavit of Mr. Kelly, the Division offered three pages of a certified mail record, a Notice of Deficiency and the associated Mailing Cover Sheet. A review of these three pages of the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE," "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE." The upper right corners of the pages are numbered 1, 70 and 157, respectively. The upper left corner of each page contains a run date and time of "20060821700." On the first page, a line has been drawn through the handwritten date "4.3.06," and the date "4/4/06" has been handwritten directly beneath the earlier handwritten date, which handwritten dates appear above the original printed run date and

time. Each of the pages contains columns labeled “CERTIFIED No,” “REFERENCE NO,” and “NAME OF ADDRESSEE, STREET, AND P.O. ADDRESS.” The certified numbers listed in a vertical column on the left side of each page do not run consecutively. Page 70 shows an article of certified mail, certified control number 7104 1002 9730 1165 8289, notice number L 026611133, addressed to petitioner, FALLON-DENNIS, 1627 W 4th ST, BROOKLYN, NY 11223-1532. The notice and certified control numbers correspond with those found on the Notice of Deficiency and the associated Mailing Cover Sheet which are attached to the affidavit of Mr. Kelly. On page 157, the phrases “TOTAL PIECES AND AMOUNTS” and “TOTAL PIECES RECEIVED AT POST OFFICE” appear. On that page, the number 1,723 is stated to be the number of pieces listed on the CMR and this number has been circled. The number 1723 is handwritten below the phrase “TOTAL PIECES RECEIVED AT POST OFFICE.” An illegible handwritten signature appears beneath the handwritten number. A stamp of “APR 04 2006” from the Albany, New York General Mail Facility of the United States Postal Service appears on each of the three pages of the certified mail record which accompanied the affidavit of Mr. Kelly.

10. Attached to Mr. Kelly’s affidavit as exhibit “B” is a copy of a Notice of Deficiency addressed to petitioner, FALLON-DENNIS, 1627 W 4th ST, Brooklyn, NY 11223-1532, bearing a date of April 3, 2006 and assessment identification number L-026611133-3, and the associated Mailing Cover Sheet addressed to FALLON-DENNIS, 1627 W 4th ST, Brooklyn, NY 11223-1532, bearing certified control number 7104 1002 9730 1165 8289.

11. The Bureau of Conciliation and Mediation Services received petitioner’s Request For Conciliation Conference in protest of Notice of Deficiency L-026611133-3 on July 14, 2006.

The request form signed by petitioner is dated July 9, 2006. The envelope in which the request

form was mailed bears the USPS postmark of July 12, 2006. On the request form, petitioner's address is listed as 1627 W 4th St., Brooklyn, New York 11223-1532.

12. The record includes a copy of petitioner's New York State Resident Income Tax Return (Form IT-201) for the year 2005 and attached copies of forms 1099-MISC issued to petitioner for the year 2005. Petitioner's address is listed as 1627 West 4th Street, Brooklyn, NY 11223, on this personal income tax return and the accompanying forms 1099-MISC. The personal income tax return signed by petitioner is dated April 16, 2006.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR." (20 NYCRR 3000.9[c]; *see also*, ***Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a

“drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see, Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. 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, 544, 369 NYS2d 667, 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). However, in determining a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Village of Patchogue Fire Dept., supra*, 536 NYS2d at 179; *see also, Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458, 461).

C. Tax Law § 681 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 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, in the alternative, may file 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]). The filing of a petition or a request for a conference within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals (***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

D. When, as here, the Division brings a motion for summary determination on the ground that the request for a conciliation conference was not made within a statutory time limit, it bears the initial burden of proving when the applicable time limit began by establishing the date of mailing of the statutory notice (***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). A statutory 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).

E. The Division is not required to produce employees who personally recall the mailing of each individual notice of deficiency. Rather, the act of mailing may be proven by evidence of the Division's standard mailing procedure, corroborated by direct testimony or documentary evidence of actual mailing (*e.g.*, ***Matter of Roland***, *supra*; ***Matter of Air Flex Custom Furniture***, *supra*; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, *supra*). A properly completed Postal Service Form 3877, reflecting Postal Service receipt of the item listed on the form, represents direct documentary evidence of the date and fact of mailing (***Matter of Air Flex Custom Furniture***, *supra*; *see also*, ***Coleman v. Commr.***, 94 TC 82, ***Wheat v. Commr.***, 63 TCM 2955). The United States Tax Court has held that precise compliance with the postal service Form 3877 mailing procedures serves two purposes. "A properly completed postal service Form 3877 . . . reflects compliance with IRS established procedures for mailing deficiency notices . . .

[and the properly completed form] raises a presumption of official regularity in favor of [the Internal Revenue Service]” (*Wheat v. Commr.*, *supra*, at 2958). When the Internal Revenue Service (“IRS”) is entitled to a presumption of official regularity, the burden of going forward is shifted to the taxpayers, and to prevail, they must affirmatively show that the IRS failed to follow its established procedures. If there is no fully completed Form 3877, the IRS may still prove, by documentary or direct evidence, the fact and date of mailing. However, it would not be entitled to the presumption of official regularity.

The Tax Appeals Tribunal has also held that a properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing, shows the Division’s compliance with its own procedures and creates a presumption of official regularity in favor of the Division (*Matter of Air Flex Custom Furniture*, *supra*). As with the IRS, a failure to comply precisely with the Form 3877 mailing procedure need not be fatal to the Division’s case “if the evidence adduced is otherwise sufficient to prove mailing” (*Coleman v. Commr.*, *supra*, at 91). Further, the Tax Appeals Tribunal has found that a properly completed certified mail record is substantively the same as the Postal Service Form 3877 (*see, Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

F. The Division’s proof in this case consists of the affidavits of Thomas Kelly and James Steven Vanderzee, which were offered to establish the general procedure for generating and issuing (mailing) notices of deficiency pursuant to Tax Law § 681(a), and Exhibit A of the Kelly affidavit, three pages of a longer multi-page computer-generated certified mail record, which was offered to establish that the procedure was followed in this instance. The Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Kelly and Mr. Vanderzee, employees of the Division who are involved in and possessing knowledge of

the process of generating and issuing (mailing) notices of deficiency. However, I find that the Division's proof that the standard procedure was followed in this instance to be deficient.

Exhibit A of Mr. Kelly's affidavit contains three pages of what purports to be a longer multi-page computer-generated certified mail record. This certified mail record was offered to establish that the Division's mailing procedure was followed on April 4, 2006. Exhibit A fails to show that the procedure articulated by the Division's affiants was followed. The Division's affiants describe a procedure which allows each page of the certified mail record to be associated with the other pages, i.e., the pages are connected when they are delivered to the USPS and remain connected when they are returned to the unit which generated the certified mail record (the CARTS Control Unit). Moreover, the number of pieces of mail listed on the certified mail record is totaled at the bottom of the last page and a postal employee either circles or enters the actual number of items received by the USPS. The entries at the end of the certified mail record demonstrate that each item listed on the certified mail record was delivered to the custody of the USPS on the date stamped on the certified mail record. This procedure, as described by the Division's affiants, seeks to establish that the Division has a method "to ensure the integrity of the certified mail record is maintained from the time that the document is generated, delivered to the Postal Service and returned to the custody of the Division" (*Matter of Greene Valley Liquors*, Tax Appeals Tribunal, November 25, 1992). I find the truncated certified mail record submitted as Exhibit A of Mr. Kelly's affidavit does not establish that the articulated procedure was followed in this case.

Page 70, where petitioner's name appears, cannot be associated with page 1 or page 157 of Exhibit A. The handwritten date of 4.3.06 with a line through it and a second date of 4/4/06 appear on page 1, but neither of these dates appears on either page 70 or page 157. The three

pages of Exhibit A are not physically connected; and the pages are not consecutively numbered. As a result, it cannot be positively determined that pages 1, 70 and 157 are from the same certified mail record. Neither the Division's attorney nor its affiants explain the reason for submitting abstracts from the original certified mail record or offer a method of associating the various pages of Exhibit A of the Kelly affidavit.

Page 70 of Exhibit A, standing alone, is insufficient to show that the items of mail listed on that page were actually delivered to the USPS (*see, Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Prior cases of the Tax Appeals Tribunal establish that the presence of a USPS postmark on a selected page of a longer certified mail record is not sufficient to prove that an item listed on that page was delivered to the USPS on the postmark date. In *Matter of Roland (supra)*, a USPS postmark appeared on each page of the certified mail record, including the page bearing the subject taxpayer's name and address; nonetheless, the Division's proof was found inadequate to prove that the item of mail addressed to Roland was actually delivered to the USPS. Delivery of a particular item listed in the certified mail record is proven when an employee of the USPS acknowledges receipt of the items listed by completing the form as it is designed, i.e., by entering the number of pieces of mail received in the space provided for that entry. A USPS date stamp placed on one or more pages of the certified mail record is not sufficient (*see, Matter of Rakusin, supra; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Cal-Al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998; *see also, Matter of Roland, supra; Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995).

In summary, the Division's proof of mailing fails in two ways. First, Exhibit A of Mr. Kelly's affidavit does not demonstrate that the standard procedure for maintaining the integrity of the certified mail record was followed in this case. Second, Exhibit A does not prove that an item of mail addressed to petitioner was delivered to the USPS on April 4, 2006 because the page listing petitioner's name and address cannot be associated with the first and last pages of Exhibit A. As a consequence, the Division has not proved mailing of a Notice of Deficiency to petitioner on April 4, 2006.

G. In an administrative proceeding, a party may submit into evidence copies or excerpts of any document of which it desires to avail itself (State Administrative Procedure Act § 306[2]). However, the submission of only a portion of a document may be considered in the context of the weight to be accorded to the document (*see, Matter of Swick v. New York State & Local Employees' Retirement Sys.*, 213 AD2d 934, 623 NYS2d 960). In this case, I find that Exhibit A of Mr. Kelly's affidavit raises issues of fact which prevent the Division from carrying its burden of showing the fact and date of mailing of the Notice of Deficiency.

H. The Division of Taxation's motion for summary determination or dismissal is denied. The matter will be scheduled for a hearing limited to the issue of the timeliness of petitioner's request for a conciliation conference.

DATED: Troy, New York
June 7, 2007

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE