

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition  | : |                |
| of   | : |                |
| <b>DR. JOSE GARCIA</b>   | : | ORDER          |
|  |   | DTA NO. 822989 |
| 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 Years 2002 through 2004. | : |                |

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Petitioner, Dr. Jose Garcia, 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 years 2002 through 2004.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, dated April 21, 2009, on the ground that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition was untimely filed. The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents dated May 19, 2009 in support of the proposed dismissal. Petitioner, appearing by Goldstein Jones LLP (Richard W. Goldstein, Esq.), submitted a response dated June 19, 2009 in opposition to the proposed dismissal. The 90-day period to issue this order thus commenced on June 19, 2009. Based upon the pleadings in this matter and the affidavits and documents submitted by both the Division of Taxation and petitioner, Catherine M. Bennett, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals.

***FINDINGS OF FACT***

1. Petitioner filed a petition dated April 10, 2009, which was received by the Division of Tax Appeals on April 13, 2009. The petition asserts certain errors on the part of the Division of Taxation (Division) including the fact that the Bureau of Conciliation and Mediation Services (BCMS) did not issue an order dismissing petitioner's appeal.

2. In reviewing the petition, the Petition Intake Unit of the Division of Tax Appeals determined that the petition appeared to have been filed late and notified petitioner of its finding by a Notice of Intent to Dismiss dated April 21, 2009. The notice advised petitioner that the petition was filed on April 10, 2009, its date of mailing, which appeared to be more than 500 days after the issuance of the Notice of Deficiency dated November 5, 2007.

3. The Division included in its response, dated May 19, 2009, in support of the proposed dismissal, proof of mailing of the Notice of Deficiency on November 5, 2007. The Division's proof of mailing consisted of (i) an affidavit dated May 15, 2009 of James Steven VanDerZee, the principal mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit dated May 14, 2009 of Patricia Finn Sears, the Supervisor of the Refunds, Deposits, Overpayments and Control Units; (iii) a 24-page Certified Record for Presort Mail-Assessments Receivable (CMR) and (iv) a copy of petitioner's nonresident and part-year resident tax return, Form IT-203, for tax year 2005, signed and dated June 28, 2007 by petitioner.

4. The affidavit of Ms. Sears sets forth the Division's general practice and procedure for processing statutory notices prior to their shipment to the Division's mail processing center.

Further, it explains that the CMR for statutory notices issued on November 5, 2007<sup>1</sup> shows that a Notice of Deficiency dated November 5, 2007, with reference to assessment number L-029369143, was sent to petitioner by certified mail using certified control number 7104 1002 9730 0357 9653, on November 5, 2007, as indicated by an affixed United States Postal Service postmark.

5. The affidavit of James Steven VanDerZee, the mail and supply supervisor, describes the operations and procedures followed by the mail processing center. After the statutory notices are placed in an “Outgoing Certified Mail” basket, a member of Mr. VanDerZee’s staff weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to a branch of the United States Postal Service in Albany, New York. A postal employee affixes a postmark and also may place his or her initials or signature on the certified mail record indicating receipt by the post office. Here, the postal employee affixed a postmark to each page of the certified mail record, initialed each page of the CMR, crossed off the pre-printed number “258” and replaced it with a handwritten “257,” accounting for one item crossed off the CMR that was not included in the batch delivered to the post office, and initialed the certified mail record on that page to indicate that there were 257 total pieces, including the one addressed to petitioner, received at the post office on November 5, 2007.

6. Petitioner’s Jenkintown, Pennsylvania, address on the petition, the CMR, the notice of deficiency and its cover sheet matches the address listed on petitioner’s 2005 nonresident and

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<sup>1</sup> Although the affidavit of Ms. Sears references the date November 15, 2007, it is clear from the attachment referred to and included therein that the reference was a typographical error and should have been listed as November 5, 2007.

part-year resident personal income tax return. This return, dated by petitioner and his spouse in June 2007, and presumably mailed after that date, was the last return petitioner filed with the Division before the issuance of the notice.

7. In response to the Notice of Intent to Dismiss Petition, petitioner submitted an affidavit in opposition, attesting that he timely filed a request for a conciliation conference and was never granted a conference. He also submitted the affidavit of Ellen Shanley, an employee of Evergreen Enterprise Services and assistant to Walid Farhat, who was listed as petitioner's representative on the request for conciliation form. She states:

To the best of my knowledge and belief, and according to my calendar, I personally mailed a Request for a Conciliation Conference to the New York State Department of Taxation and Finance, Bureau of Conciliation and Mediation Services (with respect to Assessment ID L-029369143-1) on Dr. Garcia's behalf via First Class US Mail on or about October 10, 2007 and before February 2, 2008.

8. The request for conciliation bore a preprinted date of November 5, 2007, which is the same date as the Notice of Deficiency. Dr. Garcia's signature, appearing similar to the one on his tax return, appears on the bottom of the request with the date October 10, 2007. No explanation is provided as to how the request for conciliation could have been signed by petitioner and mailed by Ms. Shanley twenty-five days before the Notice of Deficiency was mailed to petitioner.

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

A. There is a 90-day statutory time limit for filing a petition following the issuance of a Notice of Deficiency (Tax Law § 681[b]; § 689[b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006, ***confirmed*** 50 AD3d 1187, 854 NYS2d 593 [2008]).

B. Where, as here, the timeliness of a taxpayer's petition following the issuance of a statutory notice is in question, the initial inquiry focuses on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 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). When a notice is found to have been properly mailed by the Division to a petitioner's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

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 statutory 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; Matter of Novar TV & Air Conditioner Sales & Serv.*).

In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Patricia Finn Sears and James Steven VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency.

The Division also presented sufficient documentary proof, i.e., the respective CMR, to establish that the subject Notice of Deficiency was mailed as addressed to petitioner on the date claimed. Specifically, with respect to the notice in issue, the CMR lists a certified control number with petitioner's name and address, and bears U.S. Postal Service postmarks dated November 5, 2007. Additionally, a postal employee specifically crossed off the preprinted "258," in order to hand write "257," reflecting an item removed from the group of notices, and added his or her initials to the CMR to indicate receipt by the post office of all pieces of mail listed thereon.

D. The Division has established that the Notice of Deficiency dated November 5, 2007 was mailed to petitioner at the address given on his 2005 New York nonresident and part-year resident return, signed and dated June 28, 2007 by petitioner. This was the last return filed by petitioner as of the date of issuance of the November 5, 2007 notice. Here, the Division's response in support of the proposed dismissal of the alleged untimely petition included adequate documentary evidence which established that the notice in this case was properly mailed to petitioner at the correct address on November 5, 2007. Accordingly, the Division has established that it mailed the subject notice as claimed on November 5, 2007.

E. Where a notice of determination has been properly mailed, actual receipt by the taxpayer is not required (*Matter of Malpica*). The statutory scheme thus places the risk of nondelivery upon the taxpayer, and the 90-day period in which to file a protest is not tolled where a properly mailed notice is not delivered to the taxpayer. Petitioner has offered no evidence to counter the Division's proof regarding the issue of the timeliness of petitioner's protest. His claim of a timely request for a conciliation conference without additional proof is simply insufficient. It was incumbent upon petitioner to respond in some fashion prior to February 3,

2008, and to be able to adequately document a timely protest. Without a timely filed petition, the Division of Tax Appeals has no jurisdiction to consider the timeliness of his conciliation request, much less the underlying merits of his protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; Tax Law § 2006[4]).

F. Petitioner may not be without some remedy, since he may pay the tax and file a claim for a refund (Tax Law § 687). If the refund claim is disallowed, petitioner may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 689[c]).

G. The petition of Dr. Jose Garcia is hereby dismissed.

DATED: Troy, New York  
August 13, 2009

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE