STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PANAGIOTA BETTY TUFARIELLO	:	ORDER DTA NO. 823613
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Periods Ended December 31, 1999, October 31, 1999, September 30, 1999, March 31, 2000, September 30, 2000 and March 31, 2001.	:	

Petitioner, Panagiota Betty Tufariello, 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 periods ended December 31, 1999, October 31, 1999, September 30, 1999, March 31, 2000, September 30, 2000 and March 31, 2001.

On June 25, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On July 28, 2010, petitioner, appearing by Saranto Calamas, CPA, submitted an affirmation and exhibits in opposition to dismissal. On July 27, 2010, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on July 25, 2010. After due consideration of the documents submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division of Taxation properly issued the notices of deficiency herein.

II. Whether petitioner filed a timely petition following the issuance of the notices of deficiency in issue.

FINDINGS OF FACT

1. Petitioner, Panagiota Betty Tufariello, filed a petition for a conciliation conference on January 8, 2010 in the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of deficiency numbered L-022220217, L-022220218, L-022220219, L-022220220 and L-022220221. All of the notices were dated April 17, 2003.

2. BCMS issued to petitioner a conciliation order (CMS No. 236997), dated February 5, 2010. The order denied the request for a conference because it was filed in excess of 90 days from the issuance of the notices of deficiency.

3. On April 29, 2010, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the conciliation order bearing CMS number 236997.

4. On June 25, 2010, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the notices of deficiency appear to have been issued on April 17, 2003, but that the petition was not filed until April 29, 2010, or more than six years later.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the following: affidavits of Division employees, John E. Matthews, Esq., an attorney in the Office of Counsel; James Steven VanDerZee, the Head Mail and Supply Supervisor in the Division's Registry Unit; and Patricia Finn Sears, Tax Processing Specialist 2 and Supervisor of the CARTS (Case and Resource Tracking System) Control Unit.

In addition, the Division submitted various pertinent documents including copies of the petition filed with the Division of Tax Appeals on April 29, 2010; copies of the notices of deficiency, dated April 17, 2003; a copy of the certified mail record (CMR) containing a list of the statutory notices mailed by the Division on April 17, 2003; petitioner's request for conciliation conference; the conciliation order; a transcript of petitioner's New York personal income tax returns for the years 2001 and 2002; and a Division computer record indicating that petitioner's bankruptcy case was closed as of December 18, 2003.

6. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner submitted her own affirmation, dated July 26, 2010, which asserted that she never received the notices of deficiency in issue, that there was an automatic stay of all proceedings pursuant to 11 USCS § 362 and that once the stay was lifted when the bankruptcy case was closed on December 18, 2003, the Division failed to reissue the notices, and therefore they were never properly served on her. Attached to the affirmation was a docket entry indicating that petitioner had filed a bankruptcy petition on March 21, 2003 and a copy of the order of the Bankruptcy Court, dated December 18, 2003, discharging debtor and closing the case.

7. The affidavit of Patricia Finn Sears, sworn to July 20, 2010, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, pages 7 and 8 of the 10-page CMR contain information on the notices in issue and list an initial date of April 7, 2003. Following general practices, this date was manually changed to the actual mailing date of "4/17," April 17, 2003, and appears on page 1 of the CMR. Taxpayer addresses, certified control numbers, and reference numbers assigned to each notice may be found under their respective columns on the CMR. The reference number

and control number appear on the corresponding notice and accompanying cover sheet, respectively, while the address appears on both. Pages 7 and 8 of the CMR establish that notices with the control numbers 7104 1002 9739 0169 8241, 7104 1002 9739 0169 8258, 7104 1002 9739 0169 8265, 7104 1002 9739 0169 8272 and 7104 1002 9739 0169 8289 and respective reference numbers L-022220217, L-022220218, L-022220219, L-022220220 and L-022220221 were sent to petitioner at 8 Fountain Ave, Selden, NY 11784-1906. A United States postmark on each of the 10 pages of the CMR, including those containing the name of petitioner, pages 7 and 8, confirms that the notices of deficiency in issue were sent to petitioner on April 17, 2003.

Ms. Sears specifically states that the procedures described and followed in this case were the normal and regular procedures in effect as of April 17, 2003.

8. The affidavit of James Steven VanDerZee, sworn to July 20, 2010, describes the Mail Processing Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. A mailing cover sheet precedes each notice. A staff member retrieves the notices and operates a machine that puts each notice into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature or initials on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number

on the CMR. A review of the CMR submitted by the Division confirmed that a USPS employee marked said pages of the CMR with the USPS postmark and placed his initials on the last page, page 10, and wrote and circled the number 100, indicating the number of pieces of certified mail received. Pages 7 and 8 contained the mailings addressed to petitioner at 8 Fountain Ave, Selden, NY 11784-1906, which were assigned certified numbers of 7104 1002 9739 0169 8241, 7104 1002 9739 0169 8258, 7104 1002 9739 0169 8265, 7104 1002 9739 0169 8272 and 7104 1002 9739 0169 8289 and respective reference numbers L-022220217, L-022220218, L-022220219, L-022220220 and L-022220221. On the final page, page 10, corresponding to "Total Pieces and Amounts," is the number 100, and a short distance below this number are the handwritten initials of the USPS employee and the handwritten and circled number "100," confirming that all notices were received by the USPS. The USPS postmark is from "Colonie Center" and bears the date April 17, 2003, confirming that the notices were mailed on that date.

9. The transcripts of petitioner's 2001 and 2002 personal income tax returns indicate that petitioner's address was 8 Fountain Ave, Selden, NY 11784-1906, thus constituting her last known address prior to the issuance of the notices of deficiency herein. The 2001 return was filed on October 15, 2002 and the 2002 return was filed on August 15, 2003.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) authorizes the Division of Taxation to issue a notice of deficiency for additional income tax due. A taxpayer may file a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals seeking redetermination of such deficiency within 90 days of the mailing of the notice of determination (***see*** Tax Law § 170[3-a][e]; § 681[b] and § 689[b]). After this 90-day period, the amount of tax, penalty and interest specified in the notice becomes an assessment. (Tax Law § 681[b].) The Division of Tax

Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (***see Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989). In this case, it appeared upon receipt of the petition by the Division of Tax Appeals that it was filed late and a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

B. Section 3000.9(a)(4) of the Tax Appeals Tribunal Rules of Practice and Procedure allows the supervising administrative law judge on his or her own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction. Similarly, section 3000.9(a)(1) of the Rules of Practice and Procedure allows a party to bring a motion to dismiss a petition for lack of jurisdiction (20 NYCRR 3000.9[a][1][ii], [vii]). Under the Rules, such a motion brought by a party may be treated as a motion for summary determination (20 NYCRR 3000.9[a][2][i]). Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under section 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss. Accordingly, the instant matter shall be treated as a motion for summary determination.

C. As provided in section 3000.9(b)(1) of the Rules, a motion for summary determination "shall 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."

D. Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v. New York Univ. Med. Ctr***, 64 NY2d 851, 853, 487 NYS2d 316, 317 [1985], ***citing Zuckerman v. City of New York***, 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439, 441, 293 NYS2d 93, 94 [1968]; ***Museums at Stony Brook v. Vil. of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879 [1960]). "To defeat a motion for summary judgment the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (***Whelan v. GTE Sylvania***, 182 AD2d 446, 448-449, 582 NYS2d 170, 173 [1992] ***citing Zuckerman***). In order to decide whether such an issue exists herein, a discussion of the relevant substantive law is appropriate.

E. Where the timeliness of a taxpayer's petition 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). 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 (***Matter of Novar TV & Air Conditioning Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

F. 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 the 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 Conditioning Sales & Serv.***). In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. VanDerZee and Ms. Sears, Division employees involved in and possessing knowledge of the process.

The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the five subject notices of deficiency were mailed as addressed to petitioner on April 17, 2003. Specifically, this document lists certified control numbers with corresponding names and addresses and bears a U.S. Postal Service postmark dated April 17, 2003. Additionally, a postal employee wrote "100" next to the total pieces received heading, circled it and initialed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing. (***See Matter of Rakusin***, Tax Appeals Tribunal, July 26, 2001.)

G. Petitioner did not dispute that the notices were mailed as addressed on April 17, 2003. Rather, petitioner contended that the notices were never received by her. Tax Law § 681(a) requires that a Notice of Deficiency "shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state." On the same point, Tax Law § 691(b) provides that a taxpayer's last known address shall be the address given in the last return filed by him unless a subsequent notice was given by the taxpayer of a change of address. The mailing of such notice is presumptive evidence of its delivery to the addressee. (***Matter of Katz.)***

H. Here, the record shows that petitioner's address as listed on her 2001 and 2002 personal income tax returns was 8 Fountain Ave, Selden, NY 11784-1906. The 2001 return was filed on October 15, 2002 and the 2002 return was filed on August 15, 2003. There is no evidence before this forum that petitioner subsequently filed a change of address notice with the Division. Thus her last known address prior to the issuance of the notices of deficiency on April 17, 2003 was that stated on the notices and the 2001 tax return: 8 Fountain Ave, Selden, NY 11784-1906.

Accordingly, the Division has shown that it properly mailed the subject notices of deficiency to petitioner at her "last known address" consistent with Tax Law § 681(a) and § 691(b). Once deemed properly mailed, the risk of nondelivery is on the taxpayer, i.e., a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail. (***Matter of Katz***.) Petitioner has submitted no evidence to rebut the presumption of delivery to her in the normal course of the mail.

I. Petitioner argues that the fact that she filed for bankruptcy on March 21, 2003 precluded the Division from issuing a Notice of Deficiency against her after that date and before the bankruptcy matter was closed on December 18, 2003. This argument is baseless. United States Bankruptcy Code § 362(c) (11 USC § 362[c]) provides that the automatic stay imposed upon the commencement of a bankruptcy proceeding is in effect until the case is closed or dismissed. As disclosed in the facts, the prohibited bankruptcy period in this matter began on petitioner's filing on March 21, 2003 and ended with the closing of the case on December 17, 2003.

However, 11 USC § 362(b)(9)(A) provides that the filing of a petition in bankruptcy does not stay an audit by a governmental unit to determine tax liability *or the issuance of a notice.* (11 USC § 362[b][9][D].) Therefore, the Division's issuance of the notices of deficiency on April

17, 2003 was valid and proper. The Bankruptcy Code does prohibit the commencement or continuation of a judicial, administrative or other action or proceeding against the debtor. (11 USC § 362[a][1].) Thus, the remaining question becomes when petitioner's 90-day period to file a petition began.

> Where the commencement of an action has been stayed by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced. Thus, statutes that specifically prohibit the commencement of a suit for a specified period will result in a tolling during that period, unless the particular statute also specifically states that the time involved should not extend the statute of limitations. (75A NY Jur2d, Limitations and Laches, § 294.)

Since the automatic stay ended on December 18, 2003, the tolling of the period within which petitioner was required to have filed ended, and it was then that the 90-day period within which to file a petition for a conciliation conference or a hearing in the Division of Tax Appeals began. Petitioner filed her petition for a conciliation conference on January 8, 2010, more than 90 days after the expiration of the 90-day period.

J. The Division of Taxation has established that it properly mailed the notices of deficiency to petitioner on April 17, 2003 and that the petition for conciliation conference, filed on January 8, 2010, was not timely filed. Therefore, the Division of Tax Appeals does not have jurisdiction to hear this matter. (***Matter of Sak Smoke Shop***.)

K. The petition of Panagiota Betty Tufariello is hereby dismissed.

DATED: Troy, New York
October 7, 2010

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE