

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>BERNARD BARNETT</b>	:	DETERMINATION
	:	DTA NO. 823758
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 New York	:	
City Administrative Code for the Year 2006.	:	

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Petitioner, Bernard Barnett, 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 New York City Administrative Code for the year 2006.

On January 11, 2011, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated January 11, 2011, and annexed exhibits supporting the motion. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on February 10, 2011, the due date for petitioner's response. After due consideration of the affidavits and documents presented, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

### ***ISSUE***

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Deficiency.

### ***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of Notice of Deficiency numbered L-031942618-7, dated July 9, 2009, and addressed to petitioner, Bernard Barnett, at "620 Malcolm X Blvd Apt 12J, New York, NY 10037-1207." The notice asserted New York State and New York City income tax due for the year 2006 in the amount of \$634.00, plus interest, for a balance due of \$750.83. By his request for conciliation conference, filed on June 16, 2010, petitioner protested the notice.

2. On July 2, 2010, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice was untimely and stated, 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 July 9, 2009, but the request was not received until June 16, 2010, or in excess of 90 days, the request is late filed.

3. To show proof of proper mailing of the Notice of Deficiency dated July 9, 2009, the Division provided the following: (i) an affidavit, dated January 4, 2011, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated December 30, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 9, 2009; (iv) a copy of the July 2, 2010 Conciliation Order Dismissing Request; (v) a copy of the consolidated transcript of petitioner's

personal income tax return for the year 2006, filed with the Division on March 14, 2007, and listing the petitioner's address as "620 Lennox [*sic*] Avenue Apt No 12J, New York NY 10037-1207"; and (vi) documents evidencing that Lenox Avenue in New York, New York, has been renamed Malcolm X Boulevard.

4. The affidavit of Patricia Finn Sears 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, each page of the 15-page CMR lists an initial date, which is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "7/9/09," to reflect the actual mailing date. Each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page "Mailing Cover Sheet," which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address." Page 2 of the CMR contains information on the subject notice and establishes that on July 9, 2009, a notice with the control number 7104 1002 9730 1403 9467 was sent to petitioner at "620 Malcolm X Blvd Apt 12J, New York, NY 10037-1207."

5. The affidavit of Bruce Peltier, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing

Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various United States Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR.

6. A review of the CMR submitted by the Division confirms that a USPS employee at the Colonie Center branch affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 160 with a line through it, and the handwritten entry "159." As explained in the affidavit of Bruce Peltier, the reason for this adjustment was that one of the pieces of mail listed on page seven of the CMR was "pulled" and segregated from the remaining group of statutory notices. Additionally, a line was placed through the entry for the pulled piece of mail. The piece of mail pulled from the CMR was not the notice at issue in this case. As a result, the total pieces of mail received at the Colonie Center branch of the USPS was 159. Below this number, "159" has been handwritten again and circled, and the page is postmarked and initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date July 9, 2009, confirming that the notices were mailed on that date.

7. The last return filed by petitioner prior to issuance of the notice at issue was his personal income tax return for the year 2006, which was filed on March 14, 2007. The address appearing on that return is “620 Lennox [sic] Avenue Apt No 12J, New York NY 10037-1207.” Petitioner’s address on the CMR, the Mailing Cover Sheet and the July 9, 2009 Notice of Deficiency reads “620 Malcolm X Blvd Apt 12J, New York NY 10037-1207.” In 1987, the name of Lenox Avenue in New York was officially changed to Malcolm X Boulevard.<sup>1</sup> Mail is delivered under either street name.

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

A. A motion for summary determination 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 (20 NYCRR 3000.9[b][1]).

B. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner’s last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice 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 (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

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<sup>1</sup>(Lee, *Two Harlem Streets Named for Civil Rights Leaders*, New York Times, Nov. 9, 2009)

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., July 9, 2009, to petitioner's last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of Deweese*, Tax Appeals Tribunal, June 20, 2002). Further, it is clear that "Lennox [*sic*] Avenue" and "Malcolm X Blvd" are the same street in the 10037 zip code. Thus, the address on the CMR, the Mailing Cover Sheet and the July 9, 2009 Notice of Deficiency conforms with the address listed on petitioner's 2006 personal income tax return, which is the last return petitioner filed with the Division before the issuance of the subject Notice of Deficiency and thereby satisfies the "last known address" requirement in Tax Law § 681(a). Moreover, petitioner acknowledges receipt of the notice in his petition. Accordingly, the subject notice was properly mailed, and thus, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on July 9, 2009 (Tax Law § 170[3-a][a]; § 681[b]).

D. Petitioner attached two documents to his petition in support of his claim, neither of which demonstrates a proper timely request for a conciliation conference. The first is an original Request for Conciliation Conference form without any indication of mailing to or receipt by BCMS; the second is a Correspondence Acknowledgment Notice from the Tax Compliance Division dated September 3, 2009. At best, when considered together, the documents suggest that the petitioner may have filed something with the Tax Compliance Division. Tax Law § 170(3-a)(b) provides that "[a] request for a conciliation conference shall be applied for in the manner set forth by regulation of the commissioner . . . ." 20 NYCRR 4000.3 sets forth the manner in which a request for conciliation conference is filed. A person may request a

conciliation conference by filing a written request, and one conformed copy, with BCMS, “either in person at the offices in Albany or by mail addressed to . . .” BCMS (20 NYCRR 4000.3[a]).

There is absolutely no evidence that the Request for Conciliation Conference form was filed with BCMS prior to June 16, 2010. The Correspondence Acknowledgment Notice confirms receipt of a document filed with the Tax Compliance Division and not BCMS. This does not constitute a proper request for a conciliation conference (*see* 20 NYCRR 4000.3[b][1],[2]).

E. While the notice was mailed on July 9, 2009, the request was not filed until June 16, 2010, which is well beyond the 90-day period of limitations. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation (*see Matter of American Woodcraft, Inc.* Tax Appeals Tribunal, May 15, 2003).

F. Finally, petitioner did not respond to the Division’s motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984]).

G. The Division’s motion for summary determination is granted, and the petition of Bernard Barnett is dismissed.

DATED: Troy, New York  
March 10, 2011

/s/ Herbert M. Friedman, Jr.  
ADMINISTRATIVE LAW JUDGE