

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SEAN ROMAINÉ	:	DETERMINATION DTA NO. 823843
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 2007.	:	

Petitioner, Sean Romaine, 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 2007.

On March 14, 2011, the Division of Taxation, by its representative, Mark F. Volk, 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 (b). 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 April 13, 2011, the due date for petitioner's response. After due consideration of the affidavits and documents presented, Timothy Alston, 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 a Notice of Deficiency dated February 1, 2010 and addressed to petitioner, Sean Romaine, at a Brooklyn, New York, address. The notice assessed New York State and New York City income tax for the year 2007 in the amount of \$1,231.10, plus interest, for a balance due of \$1,394.97. By his request for conciliation conference, filed on July 13, 2010, petitioner protested the notice, numbered L-033089041.

2. On July 30, 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 February 1, 2010, but the request was not mailed until July 13, 2010, or in excess of 90 days, the request is late filed.

3. In support of its motion, the Division submitted the following: (i) an affidavit, dated February 25, 2011, of Patricia Finn Sears, a supervisor in the Division's Case and Resource Tracking System (CARTS); (ii) pages numbered 1, 28 and 59 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR) each postmarked February 1, 2010; (iii) an affidavit, dated February 28, 2011, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) an affidavit, dated February 28, 2011, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) a Postal Service form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and United States Postal Service responses to such requests dated November 22, 2010; and (vi) a copy of petitioner's

2007 New York resident income tax return, dated June 5, 2009, the last return petitioner filed with the Division before the issuance of the subject Notice of Deficiency.

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. Each page of the CMR lists an initial date that 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 of the CMR in the present case to the actual mailing date of "2/1/10." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to her office. The pages of the CMR stay banded together unless ordered otherwise by Ms. Sears. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

5. All notices are 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 CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address."

6. According to the Sears affidavit, the CMR in the present matter consists of 59 pages and lists 639 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Sears notes that portions of the CMR that are attached to her affidavit have been

redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She states that the USPS representative affixed a postmark to each page of the CMR and initialed or signed a page or pages thereof.

7. Each of pages 1, 28 and 59 of the CMR has a USPS postmark dated February 1, 2010 and the initials of a USPS employee. Pages 1 and 59 have a handwritten entry of “2/1/10” in the top left corner.

8. Page 28 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 1769 8524 and assessment ID number L-033089041, was mailed to petitioner at the Brooklyn, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner’s name and address as noted.

9. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division’s Mail Processing Center (Center), describes the 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 mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. Here, as noted, each of the three pages of the CMR submitted contains such postmarks and initials. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of CMR. Here, the USPS did not comply with this request.

10. According to the Sears affidavit, the affixation of the postmarks and the postal service employee's initials indicate that all 639 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on February 1, 2010.

11. According to both the Sears and Peltier affidavits, a copy of the subject notice was mailed to petitioner on February 1, 2010, as claimed.

12. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the subject Notice of Deficiency. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 1769 8524 and addressed to petitioner. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 1769 8524 and addressed to petitioner was delivered as addressed in Brooklyn, New York, on February 8, 2010.

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. 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], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Sears, Peltier and Corina

affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]).

C. There is a 90-day statutory time limit for filing a petition or request for conciliation conference following the issuance of a Notice of Deficiency (Tax Law § 681[b]; § 689[b]). In most cases, where, as here, the timeliness of such a protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 681[a]). In the present matter, however, the Division does not seek to establish the date of issuance of the statutory notice, but rather the date of receipt of the notice by the taxpayer. Under such circumstances, that is, where the date of mailing is not established, the 90-day period for filing a petition or request for conciliation conference commences with the date of actual notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3rd Dept 1992], *lv denied* 79 NY2d 759 [1992]).

D. Here, the record shows that petitioner received actual notice of the subject Notice of Deficiency on February 8, 2010. Specifically, the Sears and Peltier affidavits establish the Division's standard mailing procedure, including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheet as well as the CMR, and the inclusion of such mailing cover sheets along with the notices in the windowed envelopes for mailing. A review of the mailing cover sheet related to the notice mailed to petitioner confirms that the control number listed thereon is consistent with the control number listed on the CMR and the USPS response to the Division's request for delivery information. The documentation provided to the Division by the USPS shows that an article of mail bearing

such certified control number was delivered to petitioner's address on February 8, 2010.

Petitioner thus received actual notice of the subject Notice of Deficiency on that date.

E. Petitioner's request for conciliation conference was filed on July 13, 2010, well-beyond the 90 days from the date of actual notice. The request was therefore untimely filed (*see Matter of Hyatt Equities, LLC; see also* Tax Law § 689[b]; § 170[3-a][a]). Consequently, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

F. The petition of Sean Romaine is hereby dismissed.

DATED: Troy, New York
June 2, 2011

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE