

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SUKHDEV SINGH AND GURPREET KAUR</b>	:	DETERMINATION
	:	DTA NO. 824853
for Redetermination of a Deficiency or for Refund of	:	
New York State and City Personal Income Taxes under	:	
Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Years 2007 <sup>1</sup>	:	
and 2008.	:	

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Petitioners, Sukhdev Singh and Gurpreet Kaur, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2007 and 2008.

On August 13, 2012, 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). Petitioners, appearing pro se, filed no response to the Division of Taxation's motion by its due date on September 12, 2012, which date commenced the 90-day period for the issuance of this determination. After due consideration of the affidavits and documents presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

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<sup>1</sup> Although the petition indicates petitioners' protest is for tax years 2006, 2007 and 2008, no documentation was included with the motion that addresses any tax issue for 2006, and the references on the petition to assessment and case numbers only concern 2007 and 2008. Thus, any reference to 2006 is eliminated.

***ISSUE***

Whether petitioners 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 the protest of a Notice of Deficiency dated March 30, 2011, and addressed to petitioners, Sukhdev Singh and Gurpreet Kaur, at a South Richmond Hill, New York, address. The notice asserted additional personal income taxes due for tax years 2007 and 2008 in the amount of \$48,854.00 plus penalty and interest. By a request for conciliation conference, filed on January 3, 2012, and in-dated by the Bureau of Conciliation and Mediation Services (BCMS) on January 5, 2012, petitioners protested Case ID number X060934977. This case ID number appears on the notice of deficiency issued to petitioners representing assessment L-035577675-6.

2. BCMS issued a Conciliation Order Dismissing Request to petitioners dated January 20, 2012. The order determined that petitioners' 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 of the statutory notice. Since the notice(s) was issued on March 30, 2011, but the request was not mailed until January 3, 2012, 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 May 1, 2012, of Daniel A. Maney, a Taxpayer Services Specialist 4 and Manager of the Refunds, Deposits, Overpayments and Control Units, which includes the Division's Case and Resource Tracking System (CARTS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked March 30, 2011; (iii) an affidavit, dated May 3, 2012, of Bruce Peltier, a mail

and supply supervisor in the Division's Mail Processing Center; (iv) an affidavit, dated May 4, 2012, 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 a United States Postal Service response to such request dated March 27, 2012; and (vi) a copy of petitioners' 2010 New York Nonresident and Part-Year Resident Income Tax Return, bearing no date.

4. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices.

5. Page 19 of the CMR indicates that one notice of deficiency, assigned certified control number 7104 1002 9730 0543 7531 and assessment ID number L 035577675, was mailed to petitioners at the South Richmond Hill, New York, address listed thereon. The corresponding mailing cover sheet of the notice of deficiency bears this certified control number and petitioners' names and address as noted. This was the same address listed by petitioners on their request for a conciliation conference, i.e., their last known address.

6. 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. Once a staff member 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, 16 pages of the CMR's 37 pages contain illegible postmarks and initials appear only on the first and last pages. The postmark on CMR page 19, where petitioners' notice is listed, is clear, but bears no initials of the postal employee. 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 the CMR. Here, the USPS did not comply with this request.

7. According to the Maney and Peltier affidavits, the subject notice was mailed to petitioners on March 30, 2011, as claimed.

8. The affidavit of Heidi Corina, also submitted as part of the record, 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 0543 7531 and addressed to petitioners. The USPS response to this request indicates that the article bearing such certified control number and addressed to petitioners was delivered as addressed in South Richmond Hill, New York, on April 1, 2011.

### ***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. 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 meet its burden of establishing the date of issuance of the statutory notice, since the CMR's postmarks are not all

legible, the initials on each page are missing and the total number is neither written nor circled to indicate the number of documents received by the USPS for mailing. However, the Division does establish the date of receipt of the notice by the taxpayers. 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 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]).

C. Here, the record shows that petitioners received actual notice of the subject notice of deficiency on April 1, 2011. Specifically, the Maney and Peltier affidavits establish the Division's standard mailing procedure, including the assigning of a certified control number to each notice and the listing of such certified control numbers on the CMR. A review of the mailing cover sheet related to the notice mailed to petitioners 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 petitioners' address on April 1, 2011. Petitioners thus received actual notice of the subject notice of deficiency on that date.

D. Petitioners' request for conciliation conference was filed on January 3, 2012, well beyond 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][b]). Consequently, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioners' protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

E. The petition of Sukhdev Singh and Gurpreet Kaur is hereby dismissed.

DATED: Albany, New York  
December 6, 2012

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE