

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>LESLIE THOMPSON</b>	:	DETERMINATION
	:	DTA NO. 824908
for Redetermination of a Deficiency or for Refund	:	
of New York State Personal Income Tax under	:	
Article 22 of the Tax Law for the Years 2004	:	
through 2009.	:	

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Petitioner, Leslie Thompson, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2004 through 2009.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John Matthews, Esq., of counsel), brought a motion on August 13, 2012, seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1) and (b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Jared J. Scharf, Esq., filed a response on September 26, 2012.<sup>1</sup> Accordingly, the 90-day period for the issuance of this determination began on September 26, 2012. After due consideration of the motion papers and pleadings filed in this matter, Arthur S. Bray, Administrative Law Judge, issues the following determination.

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<sup>1</sup> In his affidavit, Mr. Scharf requested that the delay in submitting his Affidavit in Opposition be excused because the lateness was caused by the injuries he sustained when he was hit by a car while riding a bicycle. In view of the excuse offered, the short delay in submitting the reply brief is allowed (*Matter of O'Keh Caterers Corporation*, Tax Appeals Tribunal, November 5, 1992).

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction over the petition filed in this matter.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Leslie Thompson, a Notice of Deficiency, dated November 10, 2011, that asserted a deficiency of personal income tax for the years 2004 through 2009 in the amount of \$147,960.00, plus interest and a penalty for fraud, for a balance due of \$330,950.75. The notice explained that a field audit of petitioner's records disclosed that additional tax was due.

2. On December 20, 2011, the Westchester District Office of the Division received a power of attorney form authorizing Jared J. Scharf, Esq., to appear on petitioner's behalf.

3. On January 19, 2012, the Bureau of Conciliation and Mediation Services (BCMS) received a Request for Conciliation Conference challenging the forgoing notice. The request was dated January 17, 2012 and bore a U.S. Postal Service postmark of the same date. It listed petitioner's representative as Mr. Scharf and explained that the amount of the asserted deficiency was incorrect because it failed to consider deductible expenses. The request also stated that the assertion of the fraud penalty was inappropriate.

4. On February 3, 2012, the Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request, that stated, in pertinent part:

The Tax Law requires that a request be filed within thirty days from the mailing date of the statutory notice. Since the notice(s) was issued on November 10, 2011, but the request was not mailed until January 17, 2012, or in excess of thirty days, the request is late filed.

5. Petitioner filed a timely petition with the Division of Tax Appeals challenging the amount of the deficiency, the assertion of the fraud penalties and the dismissal of the request by BCMS. With respect to the dismissal of the request, the petition asserted that neither petitioner's representative nor petitioner ever received the notice although the power of attorney "was in effect." The petition also stated that the request would be timely if the time were measured from the date a Notice and Demand was mailed to him.

6. To show proof of proper mailing of the notice dated November 10, 2011, the Division provided, among other documents, the following: (i) an affidavit, dated August 7, 2012, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated July 13, 2012, of Daniel A. Maney, manager of the Division's Refunds, Deposits, Overpayments and Control Unit, that includes the Case Resource Tracking System (CARTS), (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked November 10, 2011, and (iv) a copy of the petition.

7. The affidavit of Daniel A. Maney describes certain facets of the Division's general practice and procedure for the processing of notices of deficiency. Mr. Maney 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 "11/10/11." 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 U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay

banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

8. 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."

9. The CMR relevant to the present matter consists of 12 pages and lists 128 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated November 10, 2011 to each page of the CMR, circled "128" on page 12 of the certified mail record and initialed or signed page 12 of the CMR.

10. Page 2 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0870 4173 and assessment number L-036880431, was mailed to petitioner at his Mount Vernon, New York, address listed thereon. The corresponding mailing cover sheet, submitted with the Division's motion papers, bears this certified control number and petitioner's name and address as noted.

11. 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 first and last pieces 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 information contained on 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 page of the CMR contains such postmarks. 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. The USPS complied with this request by circling "128" on the last page of the CMR.

12. According to the Peltier affidavit, a copy of the subject Notice of Deficiency was mailed to petitioner on November 10, 2011, as claimed.

13. In his responding affidavit, petitioner's representative states that he was retained by petitioner on April 21, 2011 in connection with the matter before the Division and that, in furtherance of this representation, he had a series of telephone calls and written correspondence with the Division. There was also one personal meeting.

14. In a letter dated November 23, 2011, which was addressed to Mr. Welch and Mr. Sassone of the Division's office of Tax Enforcement, Mr. Scharf, among other things, requested a copy of the Notice of Deficiency that was mailed to petitioner.

15. On January 4, 2012, the Division mailed a copy of a Notice and Demand for Payment of Tax Due that assessed personal income tax due from petitioner. The Notice and Demand explained that it was mailed to Mr. Scharf because the Division's records indicated that he had a power of attorney to act as a legal representative.

#### ***SUMMARY OF PETITIONER'S POSITION***

16. In her petition, petitioner argues that the request for a conference was timely because it was filed within 30 days of the notice and demand.

17. In a memorandum of law, petitioner contends that since May 9, 2011, the Division dealt with Mr. Scharf as petitioner's representative and communicated tax matters to him. It is submitted that as the actual or constructive power of attorney, the "last known address" for purposes of communication with the Division was Mr. Scharf's address. Petitioner also argues that the Notice of Taxpayer Rights, which the Division failed to include with the notice, states that petitioner has 90 days to either file a request or a petition. Thus, Mr. Scharf submits that the Request for a Conciliation Conference, which was mailed on January 17, 2012, was timely because it was filed within 90 days of the date that the Notice of Deficiency was mailed. Petitioner also submits that he filed his petition for a hearing within the requisite 30 days following the issuance of the Conciliation Order Denying Request.

**CONCLUSIONS OF LAW**

A. 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 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 the timeliness of a petition or Request for Conciliation Conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address (*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*).

C. In this case, the CMR, along with the affidavits of Mr. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency, establish the Division's standard mailing procedure. Additionally, the CMR has been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division has thus established that the Notice of Deficiency at issue was mailed as addressed to petitioner on November 10, 2011.

D. Petitioner has correctly noted that, in general, there is a 90-day statutory time limit for filing a request for a conciliation conference or a petition for a hearing following the issuance of

a notice of deficiency (Tax Law § 170[3-a][a]; § 689[b]). However, as a result of an amendment to the Tax Law, that became effective in 2010 (L 2010, ch 57), a different time limit was adopted when the notice imposed a penalty for fraud. In order for BCMS to review a notice that imposes a fraud penalty, the request for review must be made within 30 days of the mailing of the notice (Tax Law § 170[3-a][b], [h]). It is clear that since the notice was issued on November 10, 2011 and imposed a fraud penalty, and the request for a conference was not mailed until January 17, 2012, it was not timely.

E. Petitioner has correctly noted that once an attorney has appeared in an administrative matter, the time period for filing a request for a conference or a petition for a hearing does not begin to run until that counsel is served with the notice (*Matter of Multi-Trucking, Inc.*, Tax Appeals Tribunal, October 6, 1988). An attorney makes an appearance by filing a power of attorney (*id*). Here, while there may have been discussions, correspondence and a meeting with the Division regarding an alleged deficiency of tax due from petitioner, these events do not constitute an appearance that would toll the period for filing a petition or require the service of a notice.

F. Petitioner's argument that she filed her request within 30 days of the notice dated January 4, 2012 is also without merit. The notice of January 4, 2012 was a notice and demand. Filing a request for a conference in response to this document does not confer the right to a conference (Tax Law § 170[3-a][a],[b]; § 173-a[2]; *Matter of Chait*, Tax Appeals Tribunal, April 22, 2010). Lastly, it is noted that petitioner's argument regarding the filing of a timely petition following the issuance of the Conciliation Order Dismissing Request is irrelevant. The

issue on this motion is whether petitioner filed a timely request for a conference following the issuance of the notice of deficiency.

G. The motion for summary determination is granted and the petition is dismissed.

DATED: Albany, New York  
November 8, 2012

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE