

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**DANE E. CLAYTON** : DECISION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 826469  
Personal Income Tax under Article 22 of the Tax Law :  
for the Year 2012. :

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Petitioner, Dane E. Clayton, filed an exception to the determination of the Administrative Law Judge issued on March 19, 2015. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on August 5, 2015, the due date for petitioner's reply brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of deficiency.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. We have also made an additional finding of fact, numbered 10 herein. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

1. On August 19, 2014, petitioner, Dane E. Clayton, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a notice of deficiency (notice number L-040187688), issued by the Division of Taxation (Division), dated January 3, 2014.<sup>1</sup>

2. On November 4, 2014, the Petition Intake Unit of the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioner. The notice of intent indicates that the relevant notice of deficiency was issued on January 3, 2014, but that the petition was not filed until August 19, 2014, or 228 days later.

3. In response to the issuance of the notice of intent to dismiss petition, the Division submitted, among other documents, (i) an affidavit of Leo Gabovich, an employee in the Office of Counsel of the Division, dated January 15, 2015; (ii) an affidavit, dated January 6, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked January 3, 2014; (iv) an affidavit, dated January 9, 2015, of Bruce Peltier, a mail and supply supervisor in the Division's mail room; (v) petitioner's resident income tax return for the year 2012, filed jointly with Deborah Francis Clayton on April 6, 2013, which lists a Willmohr Street, Brooklyn, New York, address for petitioner and Deborah Francis Clayton, which is the same address as that listed on the subject notice. The 2012 return was the last return filed with the Division by petitioner before the notice was issued; and (vi) printouts from the Division's e-Managed Process for an Integrated Revenue Enterprise that indicates Deborah Francis Clayton updated her address with the Division on September 3, 2013

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<sup>1</sup> The subject notice of deficiency was issued to both petitioner and petitioner's spouse, Deborah Francis Clayton. The petition in this matter was filed by petitioner, Dane E. Clayton, only.

to an address on 96<sup>th</sup> Street, Brooklyn, New York. A copy of the subject notice was also issued to petitioner and Deborah Francis Clayton at this Brooklyn, New York, address.

4. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and 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 and last page of the CMR in the present case to the actual mailing date of "1/3/14." In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," 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. The CMR in the present matter consists of 55 pages and lists 603 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 55, which contains 9 entries. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated January 3, 2014 to each page of the CMR, wrote and circled the number "603" on page 55 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 55. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 603.

7. Page 22 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0113 2843 and reference number L-040187688 was mailed to "FRANCISCLAYTON-DEBORAH" at the 96<sup>th</sup> Street, Brooklyn, New York, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit "B," bears this certified control number and the names "FRANCISCLAYTON-DEBORAH" and "CLAYTON-DANE E" and address as noted. Page 22 of the CMR also indicates that the subject Notice of Deficiency with certified control number 7104 1002 9730 0113 2850 and reference number L-040187688 was additionally mailed to "CLAYTON-DANE E" at the Willmohr Street, Brooklyn, New York, address listed on the subject notice. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit "B," bears this certified control number and the names "CLAYTON-DANE E" and "FRANCISCLAYTON-DEBORAH" and address as noted.

8. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the mail room's general operations and procedures. The

mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier confirms that 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 contained on the CMR. A clerk then performs a random review of 30 or fewer pieces 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 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. Here, as noted, the USPS employee initialed page 55 and affixed a postmark dated January 3, 2014 to each page of the CMR. 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 CMR. Here, the USPS employee complied with this request by writing and circling the number “603” on the last page next to the heading “Total Pieces Received at Post Office.”

9. According to the Peltier affidavit, copies of the subject notice were mailed to petitioner on January 3, 2014, as claimed, to both the 96<sup>th</sup> Street address and the Willmohr Street address. Mr. Peltier notes that the names of both petitioner and Deborah Francis Clayton and their address would have been displayed in the windows of the envelopes containing the statutory notices.

10. Petitioner’s response to the notice of intent to dismiss was returned to petitioner by the Administrative Law Judge as late filed.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge first noted that there is a 90-day statutory time limit for filing a petition following the issuance of a notice of deficiency (Tax Law §§ 681 [b]; 689 [b]). She further noted that the Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond this 90-day time limit (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

Next, the Administrative Law Judge reviewed the well established rule that, where, as in the present matter, 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 of the relevant notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). She further noted that the Division may meet this burden by showing proof of a standard procedure and proof that such procedure was followed in this particular instance (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). She also noted that where a notice of deficiency of income tax has been properly mailed, Tax Law § 681 (a) does not require actual receipt by the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

Turning to the proof submitted by the Division in the present matter, the Administrative Law Judge found that the CMR, along with the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices, established the fact that the notice at issue was actually mailed to petitioner at his last known address by certified mail on January 3, 2014, the date appearing on the CMR. The Administrative Law Judge noted that the affidavits described the various stages of producing and mailing notices and attested to the authenticity and accuracy

of the CMR. As to the CMR itself, the Administrative Law Judge observed that petitioner's name and address, as well as the numerical information on the face of the notice, appear on that document, which bears a USPS date stamp of January 3, 2014 on each page. She noted further that there are 603 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing and circling the number "603" on the line stating "total pieces received at post office," that the post office received 603 items for mailing. The Administrative Law Judge thus found that the Division's evidence established that the general mailing procedures described in the Nagengast and Peltier affidavits were followed with respect to the notice issued to petitioner.

Accordingly, the Administrative Law Judge determined that the subject notice of deficiency was properly issued to petitioner when it was mailed on January 3, 2014 and the 90-day time limit to file a petition with the Division of Tax Appeals commenced on that date. As petitioner's petition was not filed until August 19, 2014, or 228 days later, the Administrative Law Judge determined that it was late-filed and that the Division of Tax Appeals lacked jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

The Administrative Law Judge noted that her determination followed a notice of intent to dismiss petition and that the standard of proof was equivalent to that required on a motion for summary determination. She further noted that our Rules of Practice and Procedure provide that 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" (20 NYCRR 3000.9 [b] [1]).

The Administrative Law Judge observed that petitioner submitted no evidence to show that the petition was timely filed or that the Division's proof of mailing was flawed. She also noted that petitioner's legal arguments premised on the four-year statute of limitations applicable to Federal civil actions (28 USCA § 1658) were inapplicable to this proceeding.

Accordingly, the Administrative Law Judge dismissed the petition.

### ***ARGUMENTS ON EXCEPTION***

As he did before the Administrative Law Judge, petitioner raises various legal arguments premised on the four-year statute of limitations applicable to Federal civil actions (28 USCA § 1658).

Additionally, petitioner contends that he moved from the Willmohr Street, Brooklyn, New York, address on July 1, 2013. He also makes assertions regarding the substantive merits of his claim.

The Division asserts that the subject petition was untimely filed and therefore must be dismissed.

### ***OPINION***

Upon review of the record, we find that the Administrative Law Judge's determination fully and correctly addressed all issues presented. We therefore affirm the determination for the reasons stated therein.

With respect to the issues raised on exception, we find no evidence in the record to support petitioner's contention that he moved from the Willmohr Street, Brooklyn, New York, address on July 1, 2013, or that he notified the Division of such a move (*see* Tax Law § 691 [b]). We therefore reject this contention. With respect to petitioner's assertions, made in his exception, regarding the substantive merits of his claim, we note, as did the Administrative Law

Judge, that we lack jurisdiction to consider the merits of an untimely protest (*see Matter of Voelker*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dane E. Clayton is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Dane E. Clayton is dismissed.

DATED: Albany, New York  
January 28, 2016

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
Commissioner