

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**VASILIOS TSOUMAS** : DECISION  
for Redetermination of Deficiencies or for Refund : DTA NO. 827009  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Periods Ended January 4, 2013 through :  
March 31, 2014. :

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Petitioner, Vasilios Tsoumas, filed an exception to the determination of the Administrative Law Judge issued on June 16, 2016. Petitioner appeared by Jeffery M. Rosenblum, Esq. and Vincent Chirico, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard on January 12, 2017 in New York, New York, which date began the six-month period for the issuance of this decision.

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

***ISSUE***

Whether petitioner filed timely requests for conciliation conference following the issuance of five notices of deficiency.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 6 and 15 to reflect the procedural history of this matter and findings of fact 1 and 19 to more fully reflect the record. As so modified, the Administrative Law Judge’s findings of fact are set forth below.

1. The Division of Taxation (Division) issued to petitioner, Vasilios Tsoumas, at a Douglaston, New York, address, five notices of deficiency, each dated January 6, 2015, asserting penalty due for withholding tax as follows:

Assessment ID Number	Tax Period Ended	Penalty
L-042337707	March 31, 2014	\$25,997.47
L-042337708	December 31, 2013	\$67,490.15
L-042337709	September 30, 2013	\$64,720.42
L-042337710	June 30, 2013	\$51,436.28
L-042337711	March 31, 2013 <sup>1</sup>	\$47,025.07

Each of these notices of deficiency was issued because petitioner was determined to be an officer or responsible person of Atlas Restoration Corp. (Atlas), who was liable for a penalty equal to the tax not paid by the corporation pursuant to Tax Law § 685 (g).

The explanation and instructions section of each notice of deficiency included, among other things, the following information:

“IF YOU DISAGREE on the grounds that you are not personally liable for this assessment, refer to the Notice of Taxpayer Rights to determine your options. YOU must initiate action to protest the penalty asserted against you. You CANNOT rely on a petition that may have been filed by or on behalf of the business, regarding the business’ tax liability, to stop collection action against

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<sup>1</sup> Notice number L-042337711 also listed zero tax, penalty and interest due for the tax periods ended January 4, 2013 and January 11, 2013.

you, or to result in resolution of your personal responsibility for this penalty in the amount of tax owed by the business.

- To request a Conciliation Conference, complete the Request for Conciliation Conference (Form CMS-1) available at [www.tax.ny.gov](http://www.tax.ny.gov) or call us at (518) 457-3280.

- To request a Petition for a Tax Appeals Hearing, complete form TA-10 available at [www.nysdta.org](http://www.nysdta.org) [subsequently changed to [www.dta.ny.gov](http://www.dta.ny.gov)] or call (518) 266-3000.

- Attach a photocopy of all pages of this notice to the Request for Conciliation Conference.

NOTE: You must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 04/06/15.”

2. On April 23, 2015, the Division issued a notice and demand for payment of tax due and an enclosed consolidated statement of tax liabilities that listed the subject notices of deficiency as unpaid liabilities totaling \$256,669.39.

3. Petitioner filed five separate requests for conciliation conference (form CMS-1-MN [3/15]) with the Division’s Bureau of Conciliation and Mediation Services (BCMS) hand-dated as signed on May 5, 2015. The envelope in which the five requests were mailed bears the United States Postal Service (USPS) metered stamp dated May 7, 2015. The requests list petitioner’s address as the Douglaston, New York, address. Included with the requests was the consolidated statement of tax liabilities, dated April 23, 2015.

4. On May 29, 2015, BCMS issued a conciliation order dismissing request to petitioner. Bearing CMS No. 266530 and referencing notice numbers L-042337707, L-042337708, L-042337709, L-042337710 and L-042337711, the order determined that petitioner’s protest was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on January 6, 2015, but the

request was not mailed until May 7, 2015, or in excess of 90 days, the request is late filed.”

5. On June 8, 2015, the Division of Tax Appeals received a petition seeking redetermination of the five deficiencies issued in this matter. The envelope in which the petition was sent by certified mail bears a USPS metered stamp dated June 4, 2015. There is no dispute that the petition was filed within 90 days after the May 29, 2015 issuance of the conciliation order, and constitutes a timely challenge thereto. In his petition, petitioner asserts, among other things, that he responded to the notices of deficiency as soon as possible and did not exceed the 90 days.

6. On January 25, 2016, the Division filed a motion with the Division of Tax Appeals seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9 (a) (1) (i) and 3000.9 (b). In support of the motion and to prove proper and timely mailing of the five notices of deficiency under protest, the Division submitted the following: (i) an affidavit, dated January 22, 2016, of Peter Ostwald, Esq., the Division’s representative; (ii) an affidavit, dated January 14, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) dated January 6, 2015; (iv) an affidavit, dated January 15, 2016, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; (v) copies of petitioner’s request for conciliation conference, received by BCMS on May 11, 2015; (vi) a copy of the Conciliation Order Dismissing Request, dated May 29, 2015, with cover letter;<sup>2</sup> and (vii) a copy of the joint New York State resident income tax return (form IT-201) for the year 2013,

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<sup>2</sup> Mr. Ostwald’s affidavit incorrectly states that petitioner’s request for conciliation conference was mailed on July 22, 2015 and that the order was issued on August 14, 2015.

dated April 7, 2014, e-filed by petitioner and his spouse, Kathy Tsoumas.<sup>3</sup>

7. 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 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 "1/6/15." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. 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.

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 "CERTIFIED NO." The CMR lists each notice in the order the notices are generated in

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<sup>3</sup> In his affidavit, Mr. Ostwald incorrectly identifies petitioner's return as a copy of petitioner's "e-Filed IT-370 application for automatic six-month extension of time for individuals for the tax year 2012, dated April 13, 2013." He further incorrectly states that the address appearing on the application is a Closter, New Jersey, address, and that this address corresponds to the address appearing on the subject notices.

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 P.O. ADDRESS."

9. The CMR relevant to the notices of deficiency under protest consists of 73 pages and lists 797 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. The date "JAN - 6 2015" is stamped on all of the pages of the CMR, many of which dates are illegible. No legible postmarks appear on any pages of the CMR. The date "JAN - 6 2015" is stamped on the last page of the CMR, page 73, which also contained a statement of the total number of pieces received by the Postal Service for mailing.

10. Page 35 of the CMR indicates that five notices of deficiency, assigned certified control numbers 7104 1002 9730 0337 4975, 7104 1002 9730 0337 4982, 7104 1002 9730 0337 4999, 7104 1002 9730 0337 5002 and 7104 1002 9730 0337 5019, and reference numbers L-042337707, L-042337708, L-042337709, L-042337710 and L-042337711, respectively, were mailed to "TSOUMAS-VASILIOS" at the Douglaston, New York, address listed thereon. The corresponding mailing cover sheets, attached to the Nagengast affidavit as "Exhibit B," bear these certified control numbers and petitioner's name and address as noted.

11. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently Principal Mail and Supply Supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. 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. That staff member then weighs, seals and places postage and fee amounts 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 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, many pages of the CMR contained the stamped date "JAN - 6 2015" but no legible postmarks. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, on the last page next to "TOTAL PIECES RECEIVED AT POST OFFICE" appears the circled handwritten number "797." In addition, handwritten initials or a signature appear under the stamped date of "Jan - 6 2015" on the last page.

12. Mr. Peltier's affidavit states that the CMR is the Division's record of receipt, by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

13. According to both the Nagengast and Peltier affidavits, copies of the subject notices of deficiency were mailed to petitioner on January 6, 2015, as claimed.

14. Vasilios and Kathy Tsoumas's joint 2013 resident income tax return, electronically filed on or about April 7, 2014, reported Mr. and Mrs. Tsoumas's address as one in Douglaston,

New York 11363. This was the last return filed by petitioner and his spouse prior to the issuance of the subject notices of deficiency.

15. In opposition to the Division's motion, petitioner submitted the affidavit of Jeffrey M. Rosenblum, Esq., and the affidavits of Vasilios Tsoumas, Dimitrios Tsoumas and Constantine S. Kapetanos, Esq., and exhibits attached thereto, in opposition to the Division's motion and in support of his petition.<sup>4</sup>

16. In his affidavit, petitioner asserts that as of May 25, 2010, he was no longer a responsible party for Atlas. Petitioner claims that he had no knowledge that Atlas had failed to pay its trust fund taxes until he received, at his Douglaston, New York, home address, on January 22, 2015, notices of deficiency dated January 6, 2015, in the aggregate amount of \$256,669.69. He further claims that after numerous telephone calls to the Division's civil enforcement section, he finally spoke with an agent, who advised that "they needed Form DTF-95 for proof that I was no longer a responsible person of Atlas." Petitioner, in his affidavit, avers that to show his disagreement with the notices of deficiency, he returned "the notices of deficiency marked 'Please see Form DTF-95 attached' to the civil enforcement section" on March 3, 2015, via certified mail. He further avers that he thought this matter was resolved and that he was complying with his requirements to object to the notices of deficiency by his submission of Form DTF-95. However, petitioner maintains that on or about April 23, 2015, he received a notice and demand for payment in the amount of \$256,669.36, called the number provided on said notice and spoke with Samuel Chacko who directed him to file formal conciliation conference requests, "by going on-line and print the forms seeking a conciliation conference, fill out one form for each

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<sup>4</sup> The affidavits of Dimitrios Tsoumas and Constantine S. Kapetanos, Esq., address the merits of the petition, not the timeliness of the requests for conciliation conference.



assessment, and return them certified mail to the Department. . . .” He further maintains that he filed the formal requests for conciliation conference on May 7, 2015 via certified mail.

17. Documents attached to petitioner’s affidavit include, among others things: 1) a page containing photocopies of a USPS Priority Mail Express label and a sales receipt issued by the Flushing, New York, branch of the USPS on March 2, 2015; 2) a two-page photocopy of form DTF-95 (2/11) New York State Department of Taxation and Finance business tax account update for Atlas, completed and signed by petitioner and hand-dated “5-25-2010”; and 3) photocopies of the first page of each of the five subject notices of deficiency.

18. The photocopy of the USPS Priority Mail Express label (customer copy), bears number EK 757568075 US and a corresponding bar code, lists the sender as Vasilios Tsoumas, Douglaston, New York, and the recipient as “NYS TAX DEPT, WA HARRIMAN CAMPUS, Albany NY 12227-0155.” The photocopy of the sales receipt issued by the Flushing, New York, branch of the USPS on March 2, 2015 at 4:52:31 P.M. reflects the purchase of Priority Mail Express 1-Day service, USPS Tracking # EK757568075US, scheduled to be delivered to “Albany NY 12227 Zone-2” on Tuesday, March 3, 2015 by 3:00 p.m., and bears the handwritten words “DTF-95 FORM.”

19. The top of the form DTF-95 provides instructional information, including the following sentence: “Use this form to update your business name, identification number, telephone number, address, owner/officer/responsible person information and business activity.”

In Step 1 of Atlas’s Form DTF-95, the following tax types were checked to be updated: “All business tax types on file with NYS Tax Dept.,” “Corporation,” “Sales and use,” and “Withholding/MCTMT.” In Step 4 of the Form DTF-95, the following owner/officer/responsible person was deleted: Vasilios Tsoumas, president, effective date “1-26-1998 thru 5-25-2010;” and

the following owner/officer/responsible person was added: Dimitrios Tsoumas, president, effective date “5-25-2010.” In Step 5 of the DTF-95, the following information appeared “I gift it to my Son and Resigned as an officer,” and the name of buyer was “Dimitrios Tsoumas.”

20. On the page of each notice of deficiency attached to petitioner’s affidavit, a line has been drawn through petitioner’s name and address, and the following handwritten sentence appears at the top of the page “[p]lease see Form DTF-95 attached.”

21. Dimitrios Tsoumas, in his affidavit, asserts, among other things, that he believes that Atlas’s withholding taxes have been paid, in full, by the surety company, Hudson Insurance.

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

After finding that the Division’s motion was properly treated as a motion for summary determination, the Administrative Law Judge reviewed the standards for granting such a motion. Next, the Administrative Law Judge reviewed the well-established rules to determine the timeliness of a request for conciliation conference or a petition. The Administrative Law Judge noted that the Division has the burden to establish the date and fact of mailing of the notice or notices at issue. Upon review of the Division’s evidence, the Administrative Law Judge concluded that the Division did not establish the date of mailing of the subject notices of deficiency because the CMR was not properly completed. The Administrative Law Judge noted that, under such circumstances, the limitations period for the filing of a request for conciliation conference or a petition is properly measured from the date the notices were received by the taxpayer. Here, the record shows that petitioner received the notices at issue on January 22, 2015. Accordingly, the Administrative Law Judge found that the 90-day period in which to protest expired on April 22, 2015. The Administrative Law Judge thus concluded that petitioner’s requests for conciliation conference mailed on May 7, 2015 were untimely. The

Administrative Law Judge also found, contrary to petitioner's contention, that petitioner's completed form DTF-95, mailed on March 2, 2015, did not constitute a request for a conciliation conference. The Administrative Law Judge reasoned that, although the completed form contains facts relevant to the issue of petitioner's status as a responsible officer of Atlas, it does not contain any written request for a conciliation conference. The Administrative Law Judge thus concluded that petitioner's requests for conciliation conference were properly dismissed and granted the Division's motion.

***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioner asserts that the determination must be reversed because the Administrative Law Judge failed to address the issue of whether he was a responsible officer of Atlas during the period at issue. Petitioner argues that he was not and observes that the Division has offered no evidence to show that he was. Petitioner also contends that the Division opened the door to evidence that he was not a responsible person of Atlas by its allegation in its amended answer that petitioner was such a responsible person.

Next, petitioner asserts that the determination must be reversed pursuant to the estoppel doctrine of manifest injustice. Petitioner contends that the Division engaged in a series of false representations. Specifically, petitioner contends that the Division advised him to file form DTF-95 to show that he was no longer a responsible person of Atlas and later advised him to file a request for conciliation conference. Petitioner contends that such advice was erroneous and resulted in the late-filed requests. Petitioner argues that he reasonably relied on such incorrect advice and, considering his assertedly strong case on the merits, the Administrative Law Judge's determination should be reversed.

Petitioner also asserts that the form DTF-95, which was sent to the Division along with copies of the statutory notices, each of which contained the notation “Please see Form DTF-95 attached,” demonstrated petitioner’s objection to and disagreement with the notices.

With his exception, petitioner submitted a 233-page document captioned “Petitioner’s Exhibits on Appeal.” Pages 1 through 70, 138 through 161 and 194 through 233 of this document consist of copies of documents that were included in the record below. Pages 71 through 137 and 162 through 193 are not part of the record considered by the Administrative Law Judge. These pages were submitted for the first time on exception. Petitioner asserts that such documents were provided to him by the Division pursuant to a FOIL request after he filed his papers in opposition to the motion below. As a consequence, petitioner argues that it would be unfair to exclude such documents from the record as they had been in the Division’s possession and were provided to him only after the record was closed.

The Division contends that the Administrative Law Judge properly determined that petitioner’s requests for conciliation conference were untimely filed as measured from the admitted date of receipt. As the Division did not file an exception, it does not contest the Administrative Law Judge’s finding that the CMR was not properly completed.

The Division asserts that petitioner’s estoppel claim must fail because petitioner did not establish that the Division made any express misrepresentations to him. The Division also contends that petitioner did not establish that his reliance on the Division employee who assertedly advised him to file a form DTF-95 was reasonable. The Division also argues that petitioner did not establish that he reasonably relied on the Division employee who, after the expiration of the 90-day filing period, assertedly advised him to file a request for conciliation conference.

The Division agrees with the Administrative Law Judge's conclusion that petitioner's completed form DTF-95 did not constitute a request for conciliation conference because that form as filed does not contain any written request for such a conference.

### ***OPINION***

The Administrative Law Judge properly treated the Division's motion as a summary determination motion. Such a motion is properly 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]).

The standard of review for a summary determination motion is the same as that for summary judgment under CLPR § 3212 (20 NYCRR 3000.9 [c]). We have previously summarized that standard as follows:

“Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is arguable. If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion. Upon such a motion, it is not for the court to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist.” (*Matter of United Water New York* (Tax Appeals Tribunal, April 1, 2004 [internal quotations and citations omitted]).

A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals or, alternatively, a request for conciliation conference with BCMS (Tax Law § 681 [b]; 170 [3-a] [a]). As relevant here, there is a 90-day statutory time limit for filing such a protest, as measured from the date of mailing (*id.*). If a protest is not timely filed, a notice of deficiency becomes an assessment subject to collection (Tax Law § 681 [b], [c]).

A request for conciliation conference or a petition must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 6, 2007). Therefore, we may not consider petitioner's substantive claim that he was not a responsible officer of Atlas and thus not personally liable for a penalty equal to Atlas' unpaid withholding tax unless we find that he timely protested the notices of deficiency.

When, as in the present matter, the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

The Division has not taken exception to the Administrative Law Judge's conclusion that the CMR was not properly completed and that, accordingly, the Division failed to prove that the subject notices of deficiency were mailed on January 6, 2015, as claimed.

The Division's inadequate mailing evidence, however, does not necessarily resolve the timeliness issue in petitioner's favor. As the Administrative Law Judge correctly noted, under

such circumstances, and where the record establishes the date of receipt of the statutory notice by the taxpayer, the 90-day time limit for filing a protest is measured from the date of such receipt (*see Matter of Bryant Tool & Supply*, Tax Appeals Tribunal, July 30, 1992). Petitioner's affidavit in opposition to the Division's motion expressly states that he received the notices of deficiency on January 22, 2015. As measured from that date, the statutory period expired on April 22, 2015.

Petitioner concedes that his requests for conciliation conference using form CMS-1 were mailed to BCMS on May 7, 2015, and were, therefore, filed beyond the 90-day statutory period, even as measured from the date of receipt. He contends, however, that his protest should be considered timely nonetheless. Petitioner makes two arguments in support of his position.

First, petitioner contends that the determination must be reversed pursuant to the estoppel doctrine of manifest injustice. Equitable estoppel may be invoked against a government agency charged with the administration of taxes only where exceptional circumstances are present and application of the doctrine is necessary to prevent a "manifest injustice" (*see Matter of Suburban Restoration Co. v Tax Appeals Trib. of State of N.Y.*, 299 AD2d 751, 753 [2002]). Additionally, in order for the doctrine to apply in a specific case, it must be established that:

- “(1) there was a misrepresentation made by the government to a party and the government had reason to believe that the party would rely upon the misrepresentation;
- (2) the party's reliance on the government's misrepresentation was reasonable; and
- (3) prior to the party discovering the truth, the party acted to its detriment based upon the misrepresentation” (*Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013).

Petitioner contends that he was misled by an agent in the Division's civil enforcement section who advised him by telephone that “they needed form DTF-95 for proof that I was no

longer a responsible person of Atlas” (*see* finding of fact 16).

This contention implies a context for the quoted statement that simply is not in the record, for petitioner has provided no other details of the conversation in which it was made. Standing alone, the statement does not appear to be misleading, as one of the uses of the DTF-95 form is to change a business’ responsible person information. Consistent with that purpose, the DTF-95 here appears intended to update the responsible person information for Atlas. Absent additional evidence of the circumstances in which the quoted statement was made, we cannot reasonably infer that it was false or misleading. Accordingly, the statement does not provide a basis for estoppel against the Division.

Even if we were to consider the quoted statement to be erroneous advice, any reliance on such advice was unreasonable. We have previously held that reliance on erroneous oral advice regarding a deadline for filing a protest of a statutory notice was unreasonable where such advice was contrary to the “explicit language” contained in an official written notice of the Division of Taxation related to such deadline (*see Matter of Lamanna*, Tax Appeals Tribunal, March 31, 2003). Here, petitioner asserts that a Division employee’s advice to file a form DTF-95 with the civil enforcement section should be considered sufficient to preserve petitioner’s administrative appeal rights. The notices of deficiency, however, expressly state that a request for conciliation conference or a petition for a Tax Appeals hearing must be filed (*see* finding of fact 1). The Tax Law and regulations similarly provide that a request for conciliation conference must be filed with BCMS and/or a petition must be filed with the Division of Tax Appeals in order to protest a notice of deficiency (*see* Tax Law §§ 170 [3-a] [b], 681 [b], 689 [a]; 20 NYCRR 3000.3, 4000.3). Hence, even if petitioner had established that a Division employee gave him erroneous advice as claimed, it was unreasonable for petitioner to rely on such advice, given the explicit



language in the notices of deficiency, Tax Law and regulations.

Petitioner further contends that the orally communicated advice, given on April 23, 2015, to file requests for conciliation conference in respect of the subject notices was also erroneous and justifies the application of estoppel to prevent manifest injustice.

As noted, the 90-day period in which to protest the subject notices expired on April 22, 2015. Accordingly, the advice to file the requests on April 23, 2015 was given after the 90-day period in which to protest had expired and thus had no effect on the timeliness of the requests. As petitioner would have been in the same position whether he followed the advice or not, any reliance on such advice could not be detrimental (*see Matter of Ryan*).

Petitioner also argues that his March 3, 2015 filing with the Division's "civil enforcement section," consisting of the form DTF-95 and copies of the notices of deficiency, was an informal request for conciliation conference sufficient to preserve petitioner's protest rights until formal requests were filed on or about May 7, 2015.

This Tribunal has applied the informal refund claim doctrine developed under federal case law to the question of whether a taxpayer has filed an informal request for a conciliation conference (*see Matter of Crispo*, Tax Appeals Tribunal, April 13, 1995). We have used the same principles to determine whether an informal petition has been filed (*see Matter of Lehal Realty Assoc.*, Tax Appeals Tribunal, May 18, 1995).<sup>5</sup>

The informal claim doctrine provides that, in order to be recognized as such, an informal claim (i.e., one not conforming with regulatory requirements or that contains formal defects), must put the taxing authority on notice, within the relevant period of limitations, that the

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<sup>5</sup> We have also applied the federal informal refund claim doctrine to informal refund claims under the Tax Law (*see e.g. Matter of Rand*, Tax Appeals Tribunal, May 10, 1990).

taxpayer is making a refund claim, requesting a conciliation conference or filing a petition (*see United States v. Kales*, 314 US 186, 194 [1941] [“a notice fairly advising the Commissioner of the nature of the taxpayer’s claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period.”]; *New England Elec. Sys. v United States*, 32 Fed. Cl. 636, 641 [1995] [“an informal claim must provide the Commissioner of the IRS with notice that the taxpayer is asserting a right to a refund.”]; *Matter of Lehal Realty Associates* [“It is necessary that the taxpayer provide some manner of notice to the Division of Tax Appeals within the prescribed period so as to preserve a claim.”]).

An informal claim or protest must have a written component that includes the specific years or periods involved and the basis for the claim (*Hollie v Commr.*, 73 TC 1198, 1213 [1980]; *Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990). The sufficiency of the written component must be considered in the context of the surrounding circumstances (*American Radiator & Sanitary Corp. v U.S.*, 162 Ct. Cl. 106, 114 [1963]). “The determination of whether a taxpayer has satisfied the requirements for an informal claim is made on a case-by-case basis and is based on the totality of the facts (citation omitted)” (*Donahue v U.S.*, 33 Fed. Cl. 608 [1995]). The ultimate question is whether the taxing authority knew or should have known that a refund claim was being made or a request for conciliation conference or petition was being filed (*see Krape v Commr.*, TC Memo 2007-125).

Applying these principles to the present matter we find that petitioner did not file an informal request for conciliation conference on March 3, 2015 with his mailing of the form DTF-95 and copies of the January 6, 2015 notices of deficiency. The mailed documents do not

provide any express indication that petitioner sought to request a conciliation conference. Additionally, the orally communicated statement regarding form DTF-95 provides little support to petitioner's position because, as discussed previously, petitioner has provided no context to that statement. Furthermore, petitioner mailed the documents to the "civil enforcement section" and not to BCMS, the entity to which such a request is properly directed. At most, the completed DTF-95 together with the annotated statutory notices provided the Division with information from which it "might deduce" that petitioner "might desire" a conciliation conference (*see American Radiator & Standard Sanitary Corp. v. United States*, 162 Ct. Cl. at 114 [citations omitted]). This is not sufficient notice of a request for such a conference (*id.*). Although we do not condone the Division's lack of further inquiry into the question, we must conclude that the Division neither knew nor should it have known that petitioner was making a request for conciliation conference with the documents mailed on March 3, 2015. Had petitioner mailed these same documents to BCMS or mentioned his desire for a conciliation conference in the documents submitted to the "civil enforcement section," the result may have been different. Without such additional facts, however, we cannot conclude that an informal request for conciliation conference was filed.

Finally, we note that petitioner offered certain documents with his exception that were not part of the record before the Administrative Law Judge. This Tribunal has consistently held that we will not consider evidence offered with an exception if such evidence was not part of the record before the Administrative Law Judge (*see e.g., Matter of Strohli*, Tax Appeals Tribunal, December 19, 1996; *Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *confirmed sub nom. Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation & Fin.*, 116 AD3d 1176 [2014]). Hence, we do not consider the documents newly offered by petitioner with the

exception.<sup>6</sup>

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Vasilios Tsoumas is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Vasilios Tsoumas is denied; and
4. The May 29, 2015 conciliation order dismissing request is sustained.

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<sup>6</sup> Even if we were to include the newly offered documents in the record, they would have no impact on our decision as none of these documents are relevant to the issue of the timeliness of petitioner's request for conciliation conference.

DATED: Albany, New York  
June 15, 2017

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner