

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

In the Matter of the Petition :  
of :  
**GREGG M. REUBEN** : DECISION  
 : DTA NO. 827467  
for Redetermination of Deficiencies or for Refund of :  
Personal Income Tax under Article 22 of the Tax Law for :  
the Periods Ended June 30, 2013, December 31, 2013, :  
March 31, 2014 and June 30, 2014. :

---

Petitioner, Gregg M. Reuben, filed an exception to the determination of the Administrative Law Judge issued on March 16, 2017. Petitioner appeared by Ballon Stoll Bader & Nadler, P.C. (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard in New York, New York on August 10, 2017, 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 a timely protest following the issuance of four 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, 9, 11 and 24 to more clearly reflect the record. We have also excluded the Administrative Law Judge’s finding of fact 37 because that finding is a summary of petitioner’s arguments on the motion below and not a finding of fact. As so modified, the Administrative Law Judge’s findings of fact appear below.

1. The Division of Taxation (Division) issued to petitioner, Gregg M. Reuben, notice of deficiency L-041957386, dated September 30, 2014, which asserted a withholding tax penalty in the amount of \$72,007.12 for the tax period ended June 30, 2013. This notice is addressed to “REUBEN-GREGG M, 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247.” The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0282 0152.

This notice was issued because petitioner was determined to be an officer or responsible person of Alliance Parking Services, LLC (Alliance Parking), who was liable for a penalty equal to the tax not paid by the corporation pursuant to Tax Law § 685 (g).

2. The Division issued to petitioner, at the same “555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247” address, three notices of deficiency, each dated December 2, 2014, and asserting penalty due for withholding tax as follows:

Assessment ID Number	Tax Period Ended	Penalty
L-042249671	June 30, 2014	\$58,972.38
L-042249672	March 31, 2014	\$73,293.71
L-042249673	December 31, 2013	\$98,527.26

The mailing cover sheets of notices of deficiency L-042249671, L042249672 and L-042249673

bore certified control numbers 7104 1002 9730 0330 4415, 7104 1002 9730 0330 4422 and 7104 1002 9730 0330 4439, respectively.

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

3. Petitioner's representative, Norman R. Berkowitz, Esq., filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of deficiency L-041957386, L-042249671, L-042249672, and L042249673. Mr. Berkowitz hand-dated and signed the request on December 9, 2015. The reasons given on the request for protesting the four listed notices included, among others, that the notices were not received by the taxpayer, and that the notices were not mailed in accordance with the Tax Law. Attached to the request was a consolidated statement of tax liabilities (form DTF-967), dated October 6, 2015, and issued to petitioner, that listed a number of statutory notices, including the four notices being protested by the request. On the request, petitioner's address is listed as 555 West 59th Street, Apt 31-D, New York, NY 10019. The envelope in which the request was mailed bears United States Postal Service (USPS) metered stamps dated December 9, 2015.

4. On December 31, 2015, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. Bearing CMS No. 268840 and referencing notice numbers L-041957386, L-042249671, L-042249672 and L-042249673, the conciliation 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 September 30, 2014 and December 2, 2014, but the request was not until [date omitted in original], or in excess of 90 days, the request is late filed.”

5. On February 1, 2016, the Division of Tax Appeals received a petition seeking revision of the four notices of deficiency, L-041957386, L-042249671, L-042249672 and L-042249673. The envelope in which the petition was sent by certified mail bears a USPS metered stamp dated January 28, 2016. Petitioner's petition lists his address as 555 West 59th Street, Apt. 31-D, New York, NY 10019. In his petition, it was asserted, among other things, that "[t]he appropriate and required Notices were not served on the Petitioner in accordance with the Tax Law and are therefore invalid and void," and that the conciliation order dismissing request is ineffective and void because it is "imprecise in that the date the Petitioner's Request for a Conciliation Conference was received is missing."

6. On June 27, 2016, the Division filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9 (a) (1) (i), and 3000.9 (b). Petitioner, through his representative, filed a letter in opposition to the Division's motion on July 14, 2016. The Administrative Law Judge treated the Division's motion as one for summary determination and denied the motion without prejudice, by an order dated October 20, 2016.

7. On November 18, 2016, the Division filed a second motion for summary determination. In support of the motion and to prove proper and timely mailing of the four notices of deficiency under protest, the Division submitted the following: (i) an affirmation, dated November 18, 2016, of Linda A. Jordan, Esq., the Division's representative; (ii) an affidavit, dated November 2, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS) (first Nagengast affidavit); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated September 30, 2014; (iv) an affidavit, dated November 4, 2016, of Bruce Peltier, a stores and mail operations

supervisor in the Division's mail room (first Peltier affidavit); (v) a notice of deficiency, dated September 30, 2014, and the accompanying mailing cover sheet; (vi) a second affidavit, dated November 2, 2016, of Mary Ellen Nagengast (second Nagengast affidavit); (vii) a CMR, dated December 2, 2014; (viii) a second affidavit, dated November 4, 2016, of Bruce Peltier; (ix) three notices of deficiency, each dated December 2, 2014, and corresponding mailing cover sheets; (x) an affidavit, dated November 15, 2016, of Lori Schettine, a Taxpayer Services Specialist 3 in the Division's Office of Processing and Taxpayer Services, Enterprise Services Bureau (ESB); (xi) a copy of the Division's online services account terms and conditions for individuals (version 1 [modified October 5, 2010 at 2:08:09 PM] through version 15 [modified July 16, 2015 at 8:09:18 AM]); (xii) a printout of the "Steps to change an individual address through Online Services Change of address application;" (xiii) a copy of a notice dated November 20, 2012, sent to Gregg M. Reuben; (xiv) copies of two emails from IADR.EmailUtility to tax.sm.OTC.applications.IADR, dated November 13, 2013 and October 27, 2014, respectively, regarding "Change of Address application - Individual - PROD;" (xv) the Division's "e-MPIRE" printout documents related to petitioner; (xvi) a copy of petitioner's request for conciliation conference, dated December 9, 2015, with the accompanying cover letter of petitioner's representative and a copy of the mailing envelope; (xvii) a copy of the conciliation order dismissing request, dated December 31, 2015; (xviii) a copy of petitioner's New York State resident income tax return (form IT-201) for the year 2012, which was electronically filed on or about October 9, 2013; and (xix) a copy of petitioner's New York State resident income tax return (form IT-201) for the year 2013, which was electronically filed on or about October 2, 2014.

8. As noted, the Division submitted four affidavits pertaining to the mailing of the subject

statutory notices. The first Nagengast affidavit 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. Ms. Nagengast has been in her current position since October 2005.

9. Statutory notices are generated from CARTS and predated with the anticipated date of mailing. Each page of the CMR lists an initial production date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date is manually changed on the first and last pages of the CMR. 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.

10. 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 Division's return address on the front, and taxpayer assistance information on the back. The certified control numbers are also listed on the CMR under the heading "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 P.O. Address."

11. The September 30, 2014 CMR relevant to notice of deficiency L-041957386 consists of 20 pages and lists 217 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 20, which contains eight entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. In accordance with the Division's general practice, the production date on the first and last pages of this CMR was manually changed to "9/30/14," to reflect the actual mailing date. A USPS employee initialed or signed and affixed a postmark, dated September 30, 2014, of the Colonie Center, New York branch of the USPS to each page of the CMR, wrote and circled the number "217" on page 20 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE." Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 217.

12. Page six of the September 30, 2014 CMR indicates that a notice of deficiency, assigned certified control number 7104 1002 9730 0282 0152 and reference number L-041957386, was mailed to "REUBEN-GREGG M," at 555 W 59th St., Apt 31D, New York, NY 10019-1247, i.e., the same address listed on the notice of deficiency. The corresponding mailing cover sheet, attached to the first Nagengast affidavit as "Exhibit B," bears this certified control number and petitioner's name and address as noted above.

13. The first affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999, 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 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, the USPS employee affixed a postmark dated September 30, 2014 to each page of the CMR and initialed or signed on page 20. 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, the USPS employee complied with this request by writing and circling the number "217" on the last page of the CMR.

14. The first Peltier affidavit states that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the Division's mail room, 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.

15. With respect to the mailing of the three notices of deficiency, each dated December 2, 2014, the Division submitted a second set of affidavits from Mary Ellen Nagengast and Bruce Peltier. Each of the additional affidavits sets forth the same introductory paragraphs regarding the respective affiants' titles and job duties and the standard mailing procedures of the Division.

16. Attached as an exhibit to Ms. Nagengast's second affidavit is a 35-page CMR, on each page of which is listed an initial production date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, the date was manually changed on the first and last pages to "12/2/14," to reflect the actual mailing date. This 35-page CMR lists 381 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 35, which contains seven entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers.

17. Page two of this 35-page CMR indicates that two notices of deficiency, assigned certified control numbers 7104 1002 9730 0330 4415 and 7104 1002 9730 0330 4422 and reference numbers L-042249671 and L-042249672, respectively, were mailed to “REUBEN-GREGG M,” at 555 W 59th St., Apt. 31D, New York, NY 10019-1247, i.e., the same address listed on each notice of deficiency. The corresponding mailing cover sheets, attached to the second Nagengast affidavit as “Exhibit B,” bear these certified control numbers and petitioner’s name and address as noted above.

18. Page three of this 35-page CMR indicates that a notice of deficiency, assigned certified control number 7104 1002 9730 0330 4439 and reference number L-042249673, was mailed to “REUBEN-GREGG M,” at 555 W 59th St., Apt. 31D, New York, NY 10019-1247, i.e., the same address listed on this notice of deficiency. The corresponding mailing cover sheet, attached to the second Nagengast affidavit as “Exhibit B,” bears this certified control number and petitioner’s name and address as noted above.

19. Review of this 35-page CMR indicates that a USPS employee initialed or signed and affixed a postmark, dated December 2, 2014, of the Colonie Center, New York, branch of the USPS to each page of the CMR. On the last page, page 35, the USPS employee wrote and circled the number “381” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE.”

20. The affidavit of Lori Schettine, a Tax Services Specialist 3 in the Division’s ESB Office of Processing and Taxpayer Services since November 2012, describes the general practice

and procedure for creating and maintaining an online services (OLS) account. Ms. Schettine has been employed by the Division for approximately 32 years, and has held numerous positions within the Division, including with its Office of Information Technology Services. Her current responsibilities include supervising the Account Summary and Online Services section of the ESB.

21. Since 2006, the Division has offered OLS accounts to provide New York State taxpayers with a secure portal to access their tax information and a number of Division supported web applications. To set up an OLS account, a taxpayer is required to visit the Division's website and click on the link "create account" for online services for individuals. Once a taxpayer has chosen to create an OLS account, he or she is asked to input his or her social security number (SSN), and first and last name. The taxpayer is then required to authenticate his or her identity which can be done via one of two methods: an assessment ID or a shared secret from a recently filed return. To create an account using an assessment ID, the taxpayer must enter the assessment ID from a notice issued to him or her. To create an account using a shared secret, the taxpayer must enter a specific dollar amount from a previously filed New York State income tax return, such as federal adjusted gross income. Once all information is verified, the taxpayer is then directed to the terms and conditions.

22. The taxpayer must agree to the terms and conditions of an OLS account prior to activating his or her account. These terms and conditions have been updated various times throughout the existence of the OLS system. Among other things, these terms and conditions require the taxpayer "to provide true, accurate, current and complete information" and "to maintain and update this information to keep it true, accurate, current and complete." The taxpayer also agrees "that your username and password are to be used by you exclusively for the purposes of your own Online Services Account and no other." The terms and conditions also

include the following statement:

“DTF may change these Terms and Conditions of Use at any time. You are responsible for checking these terms periodically for changes. If you continue to use an Online [Services] Account after we post changes, you are signifying your acceptance of the new terms.”

23. Once the taxpayer agrees to the terms and conditions, the account will be created. The taxpayer must provide the first and last name of the person creating the account, a telephone contact number, and an email address. The taxpayer will also be directed to create a username and password. A notice confirming creation of the OLS account will be sent to the individual’s address of record via USPS, as well as an email to the email address entered during the account’s creation. Once an individual has created an account, he or she can access numerous online services offered by the Division such as individual change of address, submitting payments, and responding to Division notices. An individual also has the ability to disable his or her OLS account at any time.

24. An update of a taxpayer’s address of record may be done within the taxpayer’s OLS account using the change of address web service. Once logged into his or her account, from the account summary page, a taxpayer can view the mailing address the Division currently has on file. To change the address, the taxpayer can either click on the “change of address” link in the services menu or click on the link next to his or her current address that says “edit,” and then input the updated information. The taxpayer is then required to certify that the provided information is complete and that he or she is authorized to report the change. Next, the taxpayer must submit the change. A statement located above the submit link advises the taxpayer that the new address information will be used “for communications and notices between DTF [the Division] and the taxpayer.” Once any changes are submitted, the taxpayer receives a confirmation page, and the new address is displayed at the bottom of the account summary page.

25. When an address is changed in a taxpayer's OLS account, an internal email is automatically generated. This email includes the taxpayer's name and ID as well as the updated information. It also includes "Environment: PROD" or "Environment: UTM." If the email includes the code "UTM," it means the address change was made internally for testing enhancements or fixes to the Division's applications. If, instead, the email includes the code "PROD," it means the change was made using the change of address web service from within the taxpayer's account. Lastly, the address change is automatically updated in the taxpayer's e-MPIRE account address summary tab with the source of "WEB ADR CHG (N9)" indicating that the address change was initiated through the change of address web service. The taxpayer's e-MPIRE account summary tab will be used by the Division to determine the taxpayer's address for all mailings, including notices of deficiency.

26. Ms. Schettine avers that on November 15, 2012, an OLS account was created for petitioner using the email address XXXXXXXXXXXXXXXX.com and the telephone number 917-XXX-XXXX.<sup>1</sup> She further avers that to create this account, petitioner was required to follow all of the steps set forth in findings of fact 21 through 23, including authentication of his identity via one of the outlined methods, and agreement to the terms and conditions in effect in November 2012.

27. Ms. Schettine attests that the creation of petitioner's account was confirmed by email as well as via a notice dated November 20, 2012 sent by USPS to Gregg M. Reuben at 4320 Broadway, New York, NY 10033, his address of record at the time of the notice. This notice, issued by OPTS - SAT - eServices Management, stated, in pertinent part, as follows:

“[T]hank you for creating an online account with the New York State Department of Taxation and Finance. This letter is to confirm that on 11/15/2012 you or your

---

<sup>1</sup> Petitioner's email address and telephone number have been redacted for confidentiality purposes.

authorized representative created an account through our Web site to use the applications provided through Online Services for your own account.

Your username, XXXXXXXXXXXXXXXX.COM, used in conjunction with the password selected when creating your account will allow you to log in to Online Services. Please retain this letter for future reference.”

28. In her affirmation in support of the Division’s motion, Ms. Jordan avers that the Division maintains a record of all taxpayer data through its internal software, called e-MPIRE, which is maintained in the ordinary course of business and accessible by Division employees as needed. Each taxpayer has an internal e-MPIRE account which keeps track of, among other things, the taxpayer’s last known address.

29. The record includes petitioner’s resident income tax return (form IT-201) for the year 2012, electronically filed on or about October 9, 2013 (*see* finding of fact 7). This return was the last return filed by petitioner prior to the issuance of notice of deficiency L-041957386, and it lists petitioner’s address as 555 West 59th Street, **Apt. No. 32D**, New York, NY 10019 (emphasis added).

30. Ms. Schettine, in her affidavit, states that on October 15, 2013, petitioner’s address was updated in his e-MPIRE account to 555 West 59th Street, Apt. No. 32D, New York, NY 10019, based upon petitioner’s electronically filed form IT-201 for the year 2012. Ms. Schettine further states that on November 13, 2013, an address change was made through petitioner’s OLS account updating his address of record from “555 West 59th St Apt. No. 32D, New York, NY 10019” to “555 West 59th St Apt. No. 31D, New York, NY 10019.” When this address change was made, an internal email was automatically generated showing the address change and the code “Environment: PROD,” indicating the address change was made through petitioner’s OLS account using the change of address web service.

31. The record includes a copy of a one-page email, dated November 13, 2013 at 10:08

a.m., from IADR.EmailUtility to tax.sm.OTC.applications.IADR regarding a “Change of Address application - Individual - PROD” for “REUBEN-GREGG.” On this November 13, 2013 email, the following code appears “Environment: PROD,” along with petitioner’s “New physical [and] mailing address of 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247, US,” as well as new contact information (i.e., telephone numbers). When petitioner’s address was updated through the OLS system, his address was automatically updated in the e-MPIRE system to reflect these changes.

32. The record includes a two-page e-MPIRE printout document, dated “11/02/2016 at 11:05:13” containing an “Address Summary” for petitioner’s taxpayer identification number, petitioner’s name, and an “Address” in Hoboken, New Jersey. This document shows petitioner’s address change history, including the change made on November 13, 2013, updating petitioner’s address to 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247, reflected on petitioner’s address summary tab as sequence #028. Review of the “Address Details” section of the e-MPIRE Address Summary indicates that the change of address to 555 W 59TH ST **APT 31D**, NEW YORK, NY 10019-1247, address sequence number 028, was initiated through “WEB ADR CHG (N9),” i.e., the change of address web service (emphasis added). This was the last known address of record prior to the issuance of notice of deficiency L-041957386.

33. The record includes petitioner’s resident income tax return for the year 2013 electronically filed on or about October 2, 2014 (*see* finding of fact 7). This return was the last return filed by petitioner prior to the issuance of notices of deficiency L-042249671, L-042249672, and L-04229673, and it lists petitioner’s address as 555 West 59th Street, **Apt. No. 32D**, New York, NY 10019 (emphasis added). Ms. Schettine, in her affidavit, states that on October 10, 2014, petitioner’s address was updated in his e-MPIRE account to 555 W 59th St

Apt 32D, New York, NY 10019, based upon petitioner's electronically filed form IT-201 for the year 2013, dated October 2, 2014. She further states that on October 27, 2014, an address change was made through petitioner's OLS account, updating his address of record from "555 West 59th St Apt. No. 32D, New York, NY 10019" to "555 West 59th S Apt. No. 31D, New York, NY 10019." When this address change was made, an internal email was automatically generated showing the address change and the code "Environment: PROD," indicating the address change was made through petitioner's OLS account using the change of address web service.

34. The record includes a copy of a one-page email, dated October 27, 2014 at 10:49 a.m., from IADR.EmailUtility to tax.sm.OTC.applications.IADR regarding a "Change of Address application - Individual - PROD" for "REUBEN-GREGG." On this October 27, 2014 email, the following code appears "Environment: PROD," along with petitioner's "New physical [and] mailing address of 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247," as well as new contact information (i.e., telephone numbers). When petitioner's address was updated through the OLS system, his address was automatically updated in the e-MPIRE system to reflect these changes.

35. The record includes a two-page e-MPIRE printout document, dated "11/02/2016 at 11:04:27" containing an "Address Summary" for petitioner's taxpayer identification number, petitioner's name, and an "Address" in Hoboken, New Jersey. This document shows petitioner's address change history, including the change made on October 27, 2014, updating petitioner's address to 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247, reflected on petitioner's address summary tab as sequence #030. Review of the "Address Details" section of the e-MPIRE Address Summary indicates that the change of address to 555 W 59TH ST **APT 31D**, NEW YORK, NY 10019-1247, address sequence number 030, was initiated through "WEB ADR CHG (N9)," i.e., the change of address web service (emphasis added). This was the last

known address of record prior to the issuance of notices of deficiency L-042249671, L-042249672, and L-04229673.

36. Ms. Schettine, in her affidavit, also avers that the Division's Office of Processing and Taxpayer Services has not received any notification or information that petitioner's OLS account "should be modified or discontinued."

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

The Administrative Law Judge first observed that summary determination may be granted when sufficient evidence has been presented such that no material or triable issue of fact remains in dispute. Next, the Administrative Law Judge reviewed statutory and case law relevant to the timeliness of protests of statutory notices. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the notice by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that the Division must establish its standard mailing procedure and that its procedure was followed in this specific case in order to meet this burden.

The Administrative Law Judge concluded that the Division met the foregoing evidentiary standards and established that the subject notices of deficiency were properly mailed to petitioner on September 30, 2014 and December 2, 2014, respectively. The Administrative Law Judge specifically found that the Division had established its standard mailing procedure through affidavits submitted by Ms. Nagengast and Mr. Peltier. The Administrative Law Judge also concluded that such affidavits, along with the properly completed CMRs, established that such procedure was followed on the dates in question. In response to petitioner's contention that the subject notices were not mailed to petitioner's last known address as required, the Administrative Law Judge found that the evidence submitted by the Division established that petitioner requested the changes of address made through his OLS account. The Administrative Law Judge



further found that the address listed in petitioner's OLS account was petitioner's last known address on the respective mailing dates. The Administrative Law Judge thus concluded that the Division established proper mailing of the notices and that, accordingly, petitioner's request for conciliation conference was untimely filed. The Administrative Law Judge thus granted the Division's motion and denied the petition.

***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioner does not take exception to the Administrative Law Judge's conclusion that the Division proved that the notices at issue were mailed by certified mail as addressed on September 30, 2014 and December 2, 2014. The sole issue on exception is whether the Division mailed the notices of deficiency to petitioner's last known address as required. Petitioner contends that his last known address was that reported on the last New York personal income tax returns filed by him at the time the notices were issued. This is the 555 West 59<sup>th</sup> Street, Apartment 32 D address. Petitioner contends that the record lacks credible evidence to show that petitioner created the OLS account or that he gave notice to the Division through the OLS account of a change in his address after his 2012 and 2013 New York returns were filed. Petitioner thus contends that the question of his correct last known address is a triable issue of fact in the present matter. Accordingly, petitioner asserts that the Division's motion should be denied.

The Division contends that it met its burden of establishing that it mailed the subject notices of deficiency to petitioner's last known address. Specifically, the Division asserts that it established that it had a standard process for creating an OLS account and a standard process for updating an address through such an account. The Division further asserts that it established that this standard procedure was followed when petitioner created an OLS account and when he subsequently updated his address through this account. The Division notes that petitioner offered neither evidence nor an alternative theory to explain the address changes to his OLS

account. The Division thus contends that it properly mailed the notices to the 555 West 59<sup>th</sup> Street, Apartment 31 D address.

### ***OPINION***

As correctly noted by the Administrative Law Judge in her determination, the rules of practice and procedure of the Tax Appeals Tribunal 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]). Our rules further provide that a motion for summary determination is subject to the same provisions as a motion for summary judgment brought under the CPLR (20 NYCRR 3000.9 [c]). Accordingly, the proponent of a motion for summary determination “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v City of New York*, 49 NY2d 557 [1980]). As we noted in *Matter of United Water New York, Inc.* (Tax Appeals Tribunal, April 1, 2004):

“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’ (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93). 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 (*see Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879). 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’ (*Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990).”

If it determines a deficiency of income tax, the Division is authorized to mail a notice of deficiency to a taxpayer at his or her last known address using certified or registered mail (Tax Law § 681 [a]). A taxpayer’s last known address is “the address given in the last return filed by

him, unless subsequently to the filing of such return the taxpayer shall have notified the tax commission [i.e., the Division] of a change of address” (Tax Law § 691 [b]).

We agree with the Administrative Law Judge that the Division has presented sufficient evidence to establish that it used petitioner’s last known address when it mailed the subject notices to him. Specifically, through the affidavit of Ms. Schettine and the documents attached thereto, the Division has shown that it has a standard process by which a taxpayer may create an OLS account. We observe that there are safeguards in place to prevent the creation of an erroneous account (*see* findings of fact 21 and 23) and that a taxpayer must agree to the Division’s terms and conditions in order to create and use such an account (*see* finding of fact 22). Among such terms and conditions, the online account holder must agree to provide information that is accurate and up-to-date (*id.*). Changing one’s address of record is a service available through such an account and the Division has shown that there is a standard process by which online account holders may change their address (*see* finding of fact 24). When an account holder changes his or her address, he or she is advised that the Division will use that new address for communications and notices between the Division and the taxpayer (*id.*).

We also find, again through the affidavit of Ms. Schettine and the documents attached thereto, that the Division has established that petitioner followed these standard procedures in creating his online services account on November 15, 2012. We note that the Division’s evidence includes a copy of a letter confirming the creation of his account addressed to petitioner at his address of record at the time.

Additionally, we agree with the Administrative Law Judge’s finding that petitioner requested a change of address through his online services account on November 13, 2014 and on October 27, 2014. This finding is based on the Schettine affidavit; the internal email notifications generated by petitioner’s request, both indicating by the code “PROD” that the

source of the requested change was petitioner's OLS account; and the listing of these address changes in the address summary record with the code "WEB ADR CHG (N9)," indicating that the change was made through the change of address service in the OLS account (*see* findings of fact 25, 28, 30, 31, 32, 34 and 35). By these change requests, petitioner notified the Division that the 555 West 59<sup>th</sup> Street, Apartment 31 D address was his correct address. This was petitioner's address of record with the Division at the time the subject notices of deficiency were mailed on both September 30, 2014 and December 2, 2014. Such notices were thus mailed to petitioner at his last known address as defined in Tax Law § 691 (b).

As noted, petitioner contends that there is no credible evidence in the record to show that he created the OLS account or that he gave notice to the Division through the OLS account of a change in his address after his 2012 and 2013 returns were filed. We disagree. Pursuant to the foregoing discussion, we find that the Division has made a prima facie showing that petitioner did create an OLS account on November 15, 2012 and that he did initiate changes of address to that account on October 27, 2014 and on November 13, 2014. Given such evidence, it was incumbent upon petitioner to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" in order to prevail against the Division's motion (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], *quoting Zuckerman v City of New York*). Petitioner, however, has offered no evidence in support of his contentions. Hence, he may not prevail on the present motion (*see Matter of Brewsky's Goodtimes Corp.*, Tax Appeals Tribunal, February 22, 2001 [petitioner's unsupported contentions in a summary determination motion were "without evidentiary value"]).

Regarding petitioner's complaint that, although the OLS account was not created until 2012, the address summary in the record tracks petitioner's address from 2004, we observe that taxpayer address information is maintained by the Division in an internal software program

called e-MPIRE (*see* finding of fact 28). A change of address entered into an OLS account is automatically entered into the e-MPIRE database (*see* findings of fact 31 and 34). Accordingly, we see no inconsistency between the e-MPIRE address summary information in the record which tracks petitioner's address back to 2004 and the fact that petitioner created his OLS account in 2012.

Having found that the subject notices of deficiency were properly addressed to petitioner at his last known address, and considering that petitioner did not take exception to the Administrative Law Judge's conclusion that the subject notices were mailed by certified mail as addressed on September 30, 2014 and December 2, 2014, we must conclude that such notices were properly mailed on those dates in accordance with Tax Law § 681 (a).

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]).

Petitioner's request for conciliation conference was filed on December 9, 2015, long after the expiration of the 90-day statutory time limit. BCMS thus properly dismissed such request.

Furthermore, given the late-filed request, the Division of Tax Appeals may not consider the merits of petitioner's protest (*see e.g. Matter of Tsoumas*, Tax Appeals Tribunal, June 15, 2017).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gregg M. Reuben is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Gregg M. Reuben is denied; and
4. The conciliation order dated December 31, 2015 is sustained.

DATED: Albany, New York  
February 8, 2018

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner