

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ROBERT TOWNLEY</b>	:	DECISION DTA NO. 827660
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2012, 2013 and 2014.	:	

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Petitioner, Robert Townley, filed an exception to the determination of the Administrative Law Judge issued on June 15, 2017. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Linda Jordan, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on August 8, 2017, the date petitioner's letter reply brief was received.

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

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of deficiency.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except for findings of

fact 2, 4, 11 and 12, which we have modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact appear below.

1. The Division of Taxation (Division) issued three notices of deficiency, all dated December 14, 2015, to petitioner, Robert Townley. The notices of deficiency refer to the detailed computation of additional amounts due as set forth in the associated statements of proposed audit change, dated October 27 and 28, 2015. The explanation asserted the following:

“Based on our review, it does not appear that you are carrying on your Schedule E activity for profit. A review of our records indicates that you have been claiming a business loss for the last several years and do not appear to be operating for a profit. . .

\* \* \*

If your activity is not carried on for profit, allowable deductions cannot exceed the gross receipts for the activity. Based on the above we have disallowed your claimed business losses. . .”

Each of the statements of proposed audit change disallowed the business losses for the corresponding tax year: \$196,593.00 for 2012, \$163,194.00 for 2013 and \$163,498.00 for 2014.

The asserted deficiencies of personal income tax were as follows:

Period Ended	Assessment No.	Tax	Interest	Penalty	Payments/ Credits	Balance Due
12-31-12	L-043884040-1	\$20,170.73	\$4,463.66	\$609.00	0.00	\$25,243.39
12-31-13	L-043884041-9	\$17,599.43	\$2,341.72	\$6.20	0.00	\$19,947.35
12-31-14	L-043875566-8	\$16,465.48	\$842.93	0.00	0.00	\$17,308.41

2. On April 4, 2016, petitioner mailed a request for conciliation conference to the Bureau of Conciliation and Mediation Services (BCMS). The request referred to each of the notices listed above. BCMS issued a conciliation order dismissing request, dated April 22, 2016, which stated:

“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 December 14, 2015, but the request was not mailed until April 4, 2016, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is dismissed.”

3. On June 6, 2016, petitioner filed a timely petition before the Division of Tax Appeals challenging the conciliation order.

4. The Division brought a motion, dated October 24, 2016, for an order dismissing the petition or granting summary determination in its favor pursuant to section 3000.9 (a) and (b) of the Tax Appeals Tribunal’s Rules of Practice and Procedure (20 NYCRR 3000.9 [a] and [b]). In support of its motion and to show proof of proper mailing of the three notices dated December 14, 2015, the Division provided, among other things: (i) the affidavit of Linda A. Jordan, dated October 21, 2016; (ii) a copy of the petition filed with the Division of Tax Appeals on June 6, 2016, with attachments, including the request for conciliation conference dated April 4, 2016, and a conciliation order dismissing request dated April 22, 2016; (iii) an affidavit, dated October 20, 2016, of Mary Ellen Nagengast, the Director of the Division’s Management Analysis and Project Services Bureau since October 2005, who is responsible for the receipt and storage of certified mail records; (iv) an affidavit, dated September 21, 2016, of Bruce Peltier, a supervisor in the mail room of the Division since March 1999; (v) the “Certified Record for Presort Mail - Assessments Receivable” (CMR), each page date-stamped December 14, 2015; (vi) a copy of the notices of deficiency dated December 14, 2015, with the associated mailing cover sheets bearing certified control numbers 7104 1002 9730 0700 1303, 7104 1002 9730 0700 1310 and 7104 1002 9730 0700 1327; and (vii) a copy of petitioner’s e-filed resident income tax return, Form IT-201, for tax year 2014, filed with the Division, according to its records, on March 4, 2015,

which lists the same East 10<sup>th</sup> Street, New York, New York, address for petitioner as that listed on the subject notices.

5. The affidavit of Ms. Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing, i.e., 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 pages of the CMR, in the present case to reflect the actual mailing date of "12/14/15."

In addition, Ms. Nagengast stated that all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to her office. The pages of the CMR stay banded together unless ordered otherwise. The page numbers of the CMR, starting with "PAGE 1," are noted in the upper right corner of each page.

6. All notices are assigned a certified control number. The certified control number for 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 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."

7. Page 17 of the December 14, 2015 CMR shows that three notices of deficiency (L-

043875566, L-043884040 and L-043884041) bearing that date were sent to petitioner at 220 E. 10<sup>th</sup> Street, Apt. 1R, New York, New York 10003-7774, by certified mail. The certified control numbers, assessment identification numbers and address as listed on the CMR all correspond to the information on the mailing cover sheets and the December 14, 2015 notices of deficiency.

8. The Peltier affidavit describes the general operations and procedures of the Division's mail room. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a mailing cover sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice and mailing cover sheet into a windowed envelope so that the addresses and certified number from the mailing cover sheet show through the windows. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the mail room then delivers the envelopes and the CMR to one of the various U.S. Postal Service (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. The mail room further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR.

9. A review of the CMR submitted by the Division confirms that a USPS employee affixed a postmark on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 1,757. In addition, the USPS employee initialed the page and wrote and circled the number "1757." The USPS postmarks are from the GMF Albany, New York, branch and each bears the date December 14, 2015. The affixation of the postmarks, the

USPS employee's initials, and the writing and circling of the number 1,757 indicating that all such pieces were received, confirms that the notices of deficiency dated December 14, 2015, were received by the USPS on that date.

10. Petitioner's 2014 New York resident income tax return, dated March 4, 2015, reported petitioner's address as 220 East 10<sup>th</sup> Street, Apt. 1R, New York, New York 10003. This was the last return filed by petitioner prior to the issuance of the subject notices. This address corresponds with the address on the CMR and on the notices that were sent to petitioner.

11. In his response to the Division's motion, petitioner acknowledged receipt of the statements of proposed audit changes dated October 27, 2015. He contended that he then contacted the Audit Division to object to the proposed deficiency, but asserted that he was told that his objection would not be effective until notices of deficiency were issued. Petitioner claimed that he did not receive the notices of deficiency dated December 14, 2015. He further claimed to have become aware of the notices after his appeal rights had expired.

12. Also with his response to the motion, petitioner submitted tracking information obtained from the USPS website pertaining to the certified control numbers associated with the subject notices of deficiency. This information indicates that notices of attempted delivery were left (presumably at petitioner's residence) for each such notice on December 16, 2015, and that there was "no authorized recipient available" at the address. Petitioner speculated that this means that without a doorman at his building, a notice was left at the address that either blew away or was taken by a person passing by the building, leaving petitioner without proper notice. The USPS records further indicate that, as of January 13, 2016, the items were "unclaimed" and that they were later returned to the sender.

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

The Administrative Law Judge treated the Division's motion as a summary determination motion. The Administrative Law Judge then reviewed the standards for the granting of such a motion.

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 December 14, 2015. Specifically, the Administrative Law Judge 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 CMR, established that such procedure was followed in this instance. In response to petitioner's denial of receipt of the notices, the Administrative Law Judge noted that the notices were properly mailed to petitioner's last known address; that is, the address listed on petitioner's 2014 New York income tax return. The Administrative Law Judge noted that, once properly mailed, the risk of non-delivery rests with the taxpayer. The Administrative Law Judge also noted that, given the proper issuance of the notices, the USPS information indicating that there was "no authorized recipient available" upon attempted delivery and that the notices were deemed "unclaimed," affords petitioner no relief. Accordingly, the Administrative Law Judge

granted the Division's motion and denied the petition herein.

***ARGUMENTS ON EXCEPTION***

Petitioner continues to argue that the notices of deficiency were never delivered and hence never received by him. In his reply brief, petitioner also asserts that, while he did not file a timely request for conciliation conference, he did telephone the Division to object to the proposed deficiency (*see* finding of fact 11). Petitioner requests a reversal of the Administrative Law Judge's determination and an opportunity to proceed on the merits of his protest.

The Division contends that the Administrative Law Judge properly determined that it offered sufficient proof to establish proper mailing of the subject notices of deficiency on December 14, 2015 and, accordingly, properly determined that petitioner's request for conciliation conference was late-filed.

***OPINION***

We affirm the determination of the Administrative Law Judge.

Preliminarily, we note that the Administrative Law Judge properly treated the Division's motion as one for summary determination. This is because the Division of Tax Appeals has jurisdiction over the petition, as it was timely filed following the issuance of the conciliation order dismissing request (*see* finding of fact 3). A motion to dismiss a petition under section 3000.9 (a) of our Rules of Practice and Procedure (20 NYCRR 3000.9 [a]) is an appropriate procedure if the issue is whether the petition itself was timely filed.

Tax Law § 681 (a) authorizes the Division to mail notices of deficiency to a taxpayer at his or her last known address using certified or registered mail. With certain exceptions not relevant here, there is a 90-day statutory time limit for filing a request for conciliation conference following the issuance of a notice of deficiency (Tax Law §§ 170 [3-a] [a]; 689 [b]; 20 NYCRR



4000.5 [c] [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition where the request for conciliation conference is filed beyond the 90-day time limit (*see e.g., Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

If the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of such notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet its burden "by establishing the use of a standard mailing procedure for conciliation orders [or notices] by a person with knowledge of such procedures, and by introducing the evidence that this procedure was used in connection with the mailing of the order [or notice] in this case" (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

We agree with the Administrative Law Judge's conclusion that the Division's proof establishes that the subject notices of deficiency were mailed to petitioner's last known address on December 14, 2015. Specifically, the affidavits establish the Division's standard mailing procedure and such affidavits, along with the properly completed CMR, establish that such procedure was followed with respect to the mailing of the subject notices (*see Matter of Chin* Tax Appeals Tribunal, December 3, 2015; *see also Matter of Western Aries Constr., LLC*, Tax Appeals Tribunal, March 3, 2011). Additionally, the address on the mailing cover sheets and CMR entries is the same as the address listed on petitioner's 2014 New York resident income tax return. This satisfies the last known address requirement (*see* Tax Law § 691 [b]). The Division thus properly mailed the notices at issue to petitioner on December 14, 2015 and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 681 [b];

689 [b]). Petitioner's request for conciliation conference, filed on April 4, 2016, was therefore untimely and properly dismissed by BCMS.

We dismiss petitioner's argument that he should receive a hearing on the merits because he did not receive the notices, as evidenced by the USPS tracking information showing that there was "no authorized recipient available" and that the notices were "unclaimed." Tax Law § 681 (a) authorizes the Division to "mail" a notice of deficiency of income tax to a taxpayer at his or her last known address. Such a notice of deficiency becomes an assessment subject to collection after 90 days from the "mailing" of the notice, unless timely protested (Tax Law § 681 [b]). Given the use of the terms "mail" and "mailing" in the statutory language, it is clear that where, as here, a notice of deficiency of income tax has been properly mailed, actual receipt by the taxpayer is not required. Indeed, this Tribunal has found that a properly mailed notice of deficiency is "valid and sufficient whether or not actually received" (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *see also Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001; *Matter of Carotenuto*, Tax Appeals Tribunal, March 17, 2016). "[T]he statute [thus] places the risk of nondelivery on the taxpayer" (*Matter of Malpica*). Accordingly, petitioner's failure to receive the subject notices is "immaterial" (*Matter of Kenning v Department of Taxation & Fin.*, 72 Misc 2d 929, 930 [Sup Ct Albany Cty 1972], *affd* 43 AD2d 815 [3<sup>rd</sup> Dept 1973], *appeal dismissed* 34 NY2d 667 [1974]).

Regarding petitioner's claim made on exception that he telephoned the Division to protest the proposed deficiency, we note that a phone call is not a valid method of requesting a BCMS conciliation conference or petitioning for a Tax Appeals hearing (*see* 20 NYCRR 3000.3 [a] and 4000.3 [a]).

Regarding petitioner's complaint that following the issuance of the statements of proposed

audit change, he was told by the Audit Division that his protest would “not be effective” until notices of deficiency were issued (*see* finding of fact 11), we note such purported advice is accurate to the extent that petitions filed before the issuance of a statutory notice must be dismissed as premature because it is the issuance of such a notice that gives rise to the right to a Tax Appeals hearing (*see Matter of Sawlani*, Tax Appeals Tribunal, September 14, 1995). Similarly, the right to a conciliation conference is triggered by the issuance of a notice, e.g., a notice of deficiency, that gives rise to a right to a Tax Appeals hearing (*see* Tax Law § 170 [3-a] [a]).

Finally, we note that the Division’s letter brief indicates that petitioner has paid the deficiencies at issue and has requested a refund, which is currently pending. If so, and if the claim is denied, petitioner will have administrative appeal rights under Tax Law §§ 170 (3-a) (a) and 689 (c). In contrast to the present matter, petitioner would have the opportunity to argue the merits of his position during the course of any such timely-filed administrative appeal.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert Townley is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Robert Townley is denied; and
4. The conciliation order dismissing request is sustained.

DATED: Albany, New York  
January 25, 2018

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner