

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>TERRY MELTZER</b>	:	DECISION
	:	DTA NO. 827669
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Tax under Article 22 of the Tax Law and the New	:	
York City Administrative Code for the Years 2008,	:	
2013, and 2014.	:	

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Petitioner, Terry Meltzer, filed an exception to the determination of the Administrative Law Judge issued on March 16, 2017. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel).

Petitioner did not file a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter reply brief. Both parties also submitted additional written arguments regarding the consideration of additional evidence on exception. Oral argument was not requested. The six-month period for the issuance of this decision began on October 2, 2017, the due date for written arguments regarding the consideration of additional evidence on exception.

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

***ISSUES***

I. Whether the Division of Tax Appeals has jurisdiction over a notice and demand for payment of tax due.

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

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. We have also added an additional finding of fact, numbered 15. The Administrative Law Judge's findings of fact and the additional finding of fact appear below.

1. On June 8, 2016, the Division of Tax Appeals received a petition from petitioner, Terry Meltzer, which protested the following notices:

Notice #	Notice type	Tax Year	Notice Date
L-037367450	Deficiency	2008	3/7/12
L-041205489	Deficiency	2012	7/1/14
L-042621729	Deficiency	2013	5/12/15
L-043934665	Demand	2014	11/16/15

2. The petition is dated June 5, 2016, and signed by petitioner. The envelope in which the petition was delivered bears a United States Postal Service (USPS) postmark of June 7, 2016.

3. The petition alleges that the amounts asserted in the notices were incorrectly calculated and that the Division of Taxation (Division) improperly applied payments previously made by petitioner.

4. On October 4, 2016, Daniel J. Ranalli, then-Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition indicated that the subject petition was filed in protest of three notices of deficiency issued to petitioner more than 90 days prior to the petition being filed in this

matter and that the Division of Tax Appeals lacks jurisdiction to hear petitioner's challenge to the fourth notice, a notice and demand.

5. In response to the issuance of the notice of intent to dismiss petition, the Division indicated that petitioner was statutorily prohibited from filing a petition on a notice and demand and that it was seeking to establish the timeliness of notices L-037367450 and L-042621729 only. The Division offered no proof with respect to notice L-041205489.<sup>1</sup>

6. To show proof of proper mailing of notice of deficiency L-037367450, dated March 7, 2012, the Division provided the following: (i) 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); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked March 7, 2012; (iii) an affidavit, dated November 4, 2016, of Bruce Peltier, a supervisor in the Division's mail room; and (iv) a copy of petitioner's IT-201 resident income tax return for the year 2009 that lists petitioner's Bayside, New York, address, which is the same address as that listed on the subject notice.<sup>2</sup> According to the affidavit of Mary Hurteau, this address was the last known address for petitioner prior to the issuance of this notice.

7. To show proof of proper mailing of notice of deficiency L-042621729, dated May 12, 2015, the Division provided the following: (i) a second affidavit, dated November 2, 2016, of Mary Ellen Nagengast; (ii) a CMR postmarked May 12, 2015; (iii) a second affidavit, dated

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<sup>1</sup> By letter dated December 2, 2016, the Division of Tax Appeals informed petitioner that the October 4, 2016 notice of intent to dismiss petition was rescinded as to notice L-041205489. Petitioner's challenge to L-041205489 has been severed and assigned DTA# 827694 and was not the subject of the determination.

<sup>2</sup> Petitioner filed a joint return with her late husband, Bernard Meltzer, for the 2009 tax year.

November 4, 2016, of Bruce Peltier; (iv) an affidavit, dated November 9, 2016, of Heidi Corina, a Legal Assistant II in the Division's Office of Counsel; and (v) a copy of petitioner's IT-201 resident income tax return for the year 2013 that lists petitioner's Bellerose, New York, address, which is the same address as that listed on the subject notice.<sup>3</sup> According to the affidavit of Mary Hurteau, this address was the last known address for petitioner prior to the issuance of this notice.

8. The affidavits of Mary Ellen Nagengast, who has been in her current position since October 2005, set forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date is manually changed on the first and last pages of the CMR. In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

9. 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

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<sup>3</sup> Petitioner filed a joint return with her late husband, Bernard Meltzer, for the 2013 tax year.

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."

10. The March 7, 2012 CMR consists of 25 pages and lists 264 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated March 7, 2012 to each page of the CMR. Page 11 of the CMR indicates that a notice of deficiency, assigned certified control number 7104 1002 9730 1009 2039 and assessment number L-037367450, was mailed to Bernard Meltzer at the Bayside, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and Bernard Meltzer and petitioner's names and address as noted.

11. The May 12, 2015 CMR consists of 27 pages and lists 292 certified control numbers, along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated May 12, 2015 to each page of the CMR. Page 17 of the CMR indicates that a notice of deficiency, assigned certified control number 7104 1002 9730 0458 0153 and assessment number L-042621729, was mailed to Bernard Meltzer at the Bellerose, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and Bernard Meltzer's and petitioner's name and

address as noted.

12. Each of the affidavits of Bruce Peltier, a supervisor in the mail room since 1999 and currently a stores and mail operations supervisor, describes the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. Each of the CMRs has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." 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. In this case, the USPS employee affixed a postmark to each page of the respective CMRs. The last page of the March 7, 2012 CMR is initialed while all pages of the May 12, 2015 CMR have been initialed. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the March 7, 2012 and May 12, 2015 CMRs indicate that the USPS employee complied with this request by writing and circling the number of pieces received.

13. According to the Peltier affidavits, copies of the respective notices were mailed on the

dates indicated as claimed. Mr. Peltier notes that the names of both petitioner and her late spouse Bernard Meltzer and their address would have been displayed in the window of the envelope containing the respective statutory notice, and notes that the CMRs only list the name of petitioner's late spouse. Mr. Peltier explains that only Mr. Meltzer's name is listed on the CMRs because it is standard procedure for the CMR to contain only the name of the primary taxpayer associated with the statutory notice. Since petitioner filed joint returns with her husband, and his social security number is listed in the place designated for the primary taxpayer, only his name appears on each of the CMRs.

14. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the May 12, 2015 notice of deficiency (L-042621729) addressed to Bernard Meltzer and Terry Meltzer. Specifically, using PS Form 3811-A, the Division requested delivery information for the article of mail bearing certified control number 7104 1002 9730 0458 0153 addressed to the Meltzers as detailed in Finding of Fact 11. The USPS response to this request indicates that the notice was delivered on May 14, 2015 to petitioner's address in Bellerose, New York.

15. Petitioner's response to the notice of intent to dismiss petition was filed on January 9, 2017. The due date for such response was December 19, 2016. The Administrative Law Judge did not consider petitioner's response in rendering the determination because it was late-filed.

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

The Administrative Law Judge first noted that the jurisdiction of the Division of Tax Appeals is limited to the authority provided by statute. He observed that the Tax Law expressly precludes a hearing before the Division of Tax Appeals with respect to a notice and demand.

Accordingly, the Administrative Law Judge dismissed the petition as to the notice and demand dated November 16, 2015.

Next, the Administrative Law Judge reviewed statutory and case law relevant to the timeliness of protests of notices of deficiency. The Administrative Law Judge noted that 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 these evidentiary standards and established that the subject notices of deficiency were properly mailed to petitioner on March 7, 2012 and May 12, 2015, respectively. Specifically, the Administrative Law Judge found that the Division had established its standard mailing procedure through affidavits of 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 with respect to the notices at issue. Observing that the petition was filed on June 7, 2016, or well in excess of 90 days from the issuance of the notices of deficiency, the Administrative Law Judge dismissed the petition herein.

#### ***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioner's exception discusses her financial difficulties and asserts that the Division misapplied certain payments made on the assessments at issue. Petitioner also complains that the Division did not grant her innocent spouse status. Petitioner asserts that the Division's evidence of mailing of the notices of deficiency does not show delivery or receipt of those documents.



Petitioner specifically asserts that neither she nor her husband ever received the notice of deficiency for the 2013 tax year. She contends that the signature on the USPS's response to the Division's request for delivery information (*see* finding of fact 14) is neither hers nor her late husband's. Petitioner also alleges that she moved to the Bellerose address in June 2013.

Petitioner submitted several documents with her exception and letter briefs that were not part of the record below. Specifically, petitioner submitted a copy of her husband's death certificate; a copy of a promissory note purporting to show that she borrowed money; a letter dated June 9, 2011 from an attorney to the Division pertaining to payment arrangements on certain assessments against her husband; and the purported first page of her 2013 New York State resident income tax return which shows the Bellerose address.

The Division contends that the Administrative Law Judge properly determined that it proved proper mailing of the subject notices of deficiency on March 7, 2012 and May 12, 2015, respectively, and that, accordingly, the petition was late-filed with respect to such notices.

The Division also contends that the Administrative Law Judge properly determined that the Tax Law denies petitioner administrative hearing rights with respect to the notice and demand dated November 16, 2015. The Division thus asserts that the petition was properly dismissed.

Finally, the Division urges this Tribunal not to accept the evidence offered on exception.

### ***OPINION***

Preliminarily, we note that the Administrative Law Judge's determination was issued following the Division of Tax Appeals' issuance to petitioner of a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The standard of review for such a notice is the

same as that for a summary determination motion (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). Such a motion “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]).

The Division of Tax Appeals is a forum of limited jurisdiction (*see* Tax Law § 2008; *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [1991]). Our authority to adjudicate disputes is exclusively statutory (*id*). Therefore, we cannot extend our authority to areas not specifically delegated to us.

The Division of Tax Appeals is authorized to “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . , unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006 [4]).

Tax Law § 173-a (2) provides that a notice and demand for payment of tax due “shall be construed as specifically denying and modifying the right to a hearing with respect to any such notice and demand . . . for purposes of [Tax Law § 2006 (4)].” That provision further provides that “any such notice and demand . . . shall not be construed as a notice which gives a person the right to a hearing [in the Division of Tax Appeals].”

Tax Law § 173-a (2) plainly denies petitioner a right to a hearing with respect to the subject notice and demand. The Administrative Law Judge thus properly dismissed the petition with respect to that notice.

Turning to the notices of deficiency, with certain exceptions not relevant here, there is a 90-day statutory time limit for filing a petition following the issuance of a notice of deficiency

(Tax Law §§ 681 [b], 689 [b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see e.g. Matter of Tuohy*, Tax Appeals Tribunal, November 22, 2017).

Where, as here, the timeliness of a taxpayer's protest against a notice of deficiency or conciliation order is in question, the Division must demonstrate the fact and date of mailing of such notice or conciliation order, by certified or registered mail, to the taxpayer's last known address (*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). To meet its burden, the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*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 (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

We agree with the Administrative Law Judge that the Division has established the existence of a standard mailing procedure during the relevant period through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency during the period at issue (*id.*). We also agree with the Administrative Law Judge that each of the CMRs relevant to this matter has been properly completed. We observe that these documents list certified control numbers and assessment numbers with corresponding names and addresses. Each such listing includes petitioner's name and address, and corresponding certified control and assessment numbers.

Additionally, the CMRs bear USPS postmarks dated March 7, 2012 and May 12, 2015, respectively and the initials of USPS employees. The USPS employees also circled the preprinted total pieces listed number on the last page of each CMR to indicate receipt by the post office of all pieces of mail listed thereon in accordance with the Division's standard mailing procedure. As so completed, the CMRs are highly probative evidence of the fact and date of mailing of the subject notices of deficiency (*see e.g. Matter of Quinn*, Tax Appeals Tribunal, November 22, 2017).

We also find that the Division mailed the notices of deficiency to petitioner at her "last known address" as required by using petitioner's address as indicated in her 2009 and 2013 New York income tax returns (*see* Tax Law §§ 681 [a], 691 [b]). We note that petitioner corroborated the accuracy of these addresses in her reply letter brief by noting that she lived at the Bayside, New York, address until June 2013, when she moved to the Bellerose, New York, address.

We thus agree with the Administrative Law Judge's conclusion that the Division properly mailed the notices of deficiency by certified mail on March 7, 2012 and May 12, 2015, respectively; that the 90-day time limit to file a petition with the Division of Tax Appeals commenced on those dates (Tax Law §§ 681 [b], 689 [b]); and that the petition, filed on June 7, 2016, was therefore untimely.

We also find that petitioner failed to prove her factual claim, made on exception, that she never received the May 12, 2015 notice. Even if proven, however, such a fact would not change the outcome in the present matter, as 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). This rule is premised on the language of Tax Law § 681 (a), which authorizes the Division to “mail” a notice of deficiency of income tax to a taxpayer at his or her last known address, and Tax Law § 681 (b), which provides that such a notice becomes an assessment subject to collection after 90 days from the “mailing” of the notice, unless timely protested. Given the use of the terms “mail” and “mailing” in the statutory language, it is clear that where, as here, notices of deficiency of income tax have been properly mailed, actual receipt by the taxpayer is not required. “[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]).

Finally, as noted, petitioner submitted some documents for the first time on exception. Such documents were not included in the record before the Administrative Law Judge. Our position on the submission of evidence on exception may be summarized as follows:

“We have held that a fair and efficient hearing process must be defined and final, and that the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record [citations omitted]’ (*Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *affd sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation and Fin.*, 116 AD3d 1176 [2014]). Accordingly, we reaffirm our longstanding policy against considering evidence that was not made part of the record below (*see Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991)” (*Matter of Shi Ying Tan*, Tax Appeals Tribunal, October 16, 2014).

We thus do not accept into the record the documents submitted on exception and have not considered such documents in the rendering of this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Terry Meltzer is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Terry Meltzer is dismissed.

DATED: Albany, New York  
March 29, 2018

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner