

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**JOHN GOUTOS** :

DECISION  
DTA NO. 828318

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax Under Article 22 of the Tax Law for the Periods Ended June 30, 2012 through June 30, 2014, and the Period Ended December 31, 2014.

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Petitioner, John Goutos, filed an exception to the determination of the Administrative Law Judge issued on April 5, 2018. Petitioner appeared by Neil Cohen, EA. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, 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 reply brief. Oral argument was heard on October 25, 2018, in New York, New York, which date began the six-month period for 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 petition with the Division of Tax Appeals following the issuance of notices of deficiency.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. We have also added

additional facts, numbered 12 through 14, to more fully reflect the record. The Administrative Law Judge's findings of fact and the additional findings of fact appear below.

1. On August 14, 2017, petitioner, John Goutos, filed a petition with the Division of Tax Appeals protesting the issuance of the following 11 notices of deficiency issued to petitioner by the Division:

Assessment ID Number	For Period Ending
L-043911854	September 30, 2014
L-043911855	December 31, 2014
L-043911856	June 30, 2014
L-043911857	March 31, 2014
L-043911858	December 31, 2013
L-043911859	September 30, 2013
L-043911860	June 30, 2013
L-043911861	March 31, 2013
L-043911862	December 31, 2012
L-043911863	September 30, 2012
L-043911864	June 30, 2012

2. On October 27, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition, on the basis that the petition did not appear to be timely filed. The notice of intent indicated that the notices were issued on November 3, 2015, but that the petition was not filed until August 14, 2017, or 650 days later. There were no other notices attached to the petition.

3. On December 19, 2017, petitioner submitted a copy of a conciliation order dismissing request, dated August 4, 2017, CMS No. 276137, issued by the Bureau of Conciliation and

Mediation Services (BCMS) for assessment number L-043911854, dismissing the request as untimely.<sup>1</sup>

4. In response to the issuance of the notice of intent, the Division submitted the affidavits of Deena Picard and Fred Ramundo, employees of the Division, dated December 6, 2017. The Division also submitted copies of the 10 notices of deficiency issued to petitioner remaining at issue, a copy of the certified mail record (CMR) containing a list of ten notices issued by the Division dated November 3, 2015, and a copy of form IT-201 resident income tax return filed by petitioner for the tax year 2014, reflecting an Astoria, New York, address.

5. The affidavit of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS), sets forth the Division's general practice and procedure for processing statutory notices. As the Acting Director of MAPS, the unit responsible for the receipt and storage of CMRs, she is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "11/3/15." In addition, as described by Ms. Picard, generally 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 the

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<sup>1</sup> The notice of intent to dismiss petition in this matter was rescinded as to notice L-043911854. Petitioner's challenge to L-043911854 has been severed, assigned DTA# 828364, and is not the subject of the decision herein. Any evidence submitted as to notice L-043911854 will therefore not be discussed in this decision.

Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with “1” and are noted in the upper right corner of each page.

6. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled “Certified No.” The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading “Reference No.” The names and addresses of the recipients are listed under “name of Addressee, Street, and PO Address.”

7. The November 3, 2015 CMR in the present matter consists of 212 pages and lists 2,324 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 confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated November 3, 2015, to each page of the CMR. Pages 78 and 79 of the CMR indicate that the ten notices of deficiency at issue, assigned the following certified control numbers and listed with their corresponding assessment numbers, were mailed to petitioner, at the Astoria, New York, address listed thereon:

Assessment ID Number	Certified Control Number
L-043911855	7104 1002 9730 0661 4450
L-043911856	7104 1002 9730 0661 4467
L-043911857	7104 1002 9730 0661 4474
L-043911858	7104 1002 9730 0661 4481

L-043911859	7104 1002 9730 0661 4498
L-043911860	7104 1002 9730 0661 4504
L-043911861	7104 1002 9730 0661 4511
L-043911862	7104 1002 9730 0661 4528
L-043911863	7104 1002 9730 0661 4535
L-043911864	7104 1002 9730 0661 4542

The corresponding mailing cover sheets bear these same certified control numbers and petitioner's name and address as noted. The Astoria, New York, address for petitioner is the same address used by petitioner on his form IT-201 filed with the Division for the tax year 2014, and on his petition. Pages 71 and 72 of the CMR indicate that the 10 notices of deficiency at issue, assigned the following certified control numbers and listed with their corresponding assessment numbers, were mailed to petitioner's then representative, at the New Hyde Park, New York, address listed thereon:

Assessment ID Number	Certified Control Number
L-043911855	7104 1002 9730 0661 3682
L-043911856	7104 1002 9730 0661 3699
L-043911857	7104 1002 9730 0661 3705
L-043911858	7104 1002 9730 0661 3712
L-043911859	7104 1002 9730 0661 3729
L-043911860	7104 1002 9730 0661 3736
L-043911861	7104 1002 9730 0661 3743
L-043911862	7104 1002 9730 0661 3750
L-043911863	7104 1002 9730 0661 3767
L-043911864	7104 1002 9730 0661 3774

8. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December of 2013, and currently a Stores and Mail Operations Supervisor, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, once a notice and accompanying mailing cover sheet is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff retrieves the notice and mailing cover sheet and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. A 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 the information contained on the CMR. The CMR has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in the Albany, New York, area. A postal employee is requested to affix a postmark, and sign or initial the CMR, indicating receipt by the post office.

9. In this particular instance, the postal employee affixed a postmark dated November 3, 2015, to each page of the 212-page CMR. The postal employee also wrote and circled the number "2324" and initialed page 212 to indicate the total pieces of mail received at the post office.

10. Mr. Ramundo stated 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. Ramundo's staff on the following day after its initial delivery and is then

delivered to the originating office. The CMR is maintained by the Division in the regular course of business.

11. Based upon his review of the affidavit of Deena Picard, the exhibits attached thereto and the CMR, Mr. Ramundo stated that on November 3, 2015, an employee of the Mail Processing Center delivered 10 pieces of certified mail addressed to John Goutos and 10 pieces of certified mail addressed to Mr. Goutos' representative to a branch of the USPS in the Albany, New York area, in sealed envelopes for delivery by certified mail. He stated that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on November 3, 2015, for the records of the Division. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner on November 3, 2015.

12. The notices of deficiency at issue assert penalties against petitioner under Tax Law § 685 (g) as a person responsible for unpaid withholding taxes due from Dellorso, Goutos & Olshanetskiy Physicians, P.C.

13. Petitioner attached to his petition letters from former employees of Dellorso, Goutos & Olshanetskiy Physicians, P.C. The letters indicate that Thomas D. Kelliher was CEO of the business and was in charge of its day-to-day operations. A form SS-4, application for employer identification number, is also attached to the petition. This form appears to have been signed on behalf of Dellorso, Goutos & Olshanetskiy Physicians, P.C. by Mr. Kelliher as executive director and is dated April 8, 2004.

14. In response to the notice of intent to dismiss petition, petitioner submitted a letter dated August 14, 2017 from the New York State Department of Labor addressed to Dellorso, Goutos & Olshanetskiy Physicians, P.C., to the attention of Mr. Kelliher, executive director. The letter requests a payment from the business for certain underpayments, liquidated damages, and penalties. The letter also indicates that the Department of Labor determined that Mr. Kelliher was the person responsible for the day-to-day operations of the business. Also in response to the notice of intent, petitioner submitted letters from his representative, dated November 20, 2017 and December 19, 2017. The letters argue that petitioner was not a responsible officer of the business entity; that petitioner was deceived by his former representative into accepting responsible officer status; and that the Division should have required that petitioner obtain an unconflicted representative.

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

The Administrative Law Judge observed that the standard of review in the present matter is the same as that of a summary determination motion. That is, that the petition may be dismissed as a matter of law if there is no material issue of fact.

The Administrative Law Judge noted that there is a 90-day statutory time limit for filing a petition following the issuance of a notice of deficiency. The Administrative Law Judge also 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 can meet this burden by establishing its standard mailing procedure and that such procedure was followed in this case.



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 November 3, 2015. Specifically, the Administrative Law Judge found that the Picard and Ramundo affidavits and the CMR establish both the Division's general mailing procedure and that such procedure was followed here.

The Administrative Law Judge concluded that, as the petition herein was filed after the expiration of the 90-day statutory time limit, the Division of Tax Appeals lacks jurisdiction in this matter. The Administrative Law Judge thus dismissed the petition.

***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioner does not contest the Division's evidence of mailing. Rather, as he did below, petitioner contends that he was misled by his former representative into not timely protesting the statutory notices. Petitioner asserts that his former representative was actually serving the interests of Mr. Kelliher; that the Division was aware of this conflict of interest; and that the Division should have made petitioner aware of the need to secure representation separate from Mr. Kelliher. Petitioner asserts that the Division violated its own policy in failing to require that petitioner have non-conflicted representation. Petitioner contends that he would have timely protested the notices of deficiency if his former representative did not mislead him. Accordingly, petitioner requests that his petition in the present matter be deemed timely. Petitioner also contends that he was not involved in the operations of Dellorso, Goutos & Olshanetskiy Physicians, P.C. beyond providing medical services as a physician.

Petitioner submitted documents on exception that were not part of the record before the Administrative Law Judge. Such documents consist of a Department of the Treasury-Internal

Revenue Service form 4181 dated September 11, 2010 and a letter dated June 5, 2018 from the Internal Revenue Service Office of Professional Responsibility.

The Division asserts that the Administrative Law Judge correctly determined that the Division demonstrated proper mailing of the relevant notices of deficiency on the date claimed and that the petition herein was thus late-filed and properly dismissed. The Division rejects petitioner's claims regarding his former representative as unsubstantiated. The Division opposes the receipt of the documents offered by petitioner on exception.

### ***OPINION***

The Administrative Law Judge's dismissal of petitioner's protest of the notices of deficiency at issue was made following the Supervising Administrative Law Judge's issuance of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for a notice of intent to dismiss is the same as that for a summary determination motion (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). That is, 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 proponent of a summary judgment [or determination] motion 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 (citations omitted)" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In contrast, the opponent of such a motion "must

. . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1992] *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the Division determines a deficiency of income tax, it may mail a notice of deficiency to a taxpayer (Tax Law § 681 [a]). Such a notice must be mailed by certified or registered mail to the taxpayer at his or her last known address (*id.*). With 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]). There is a similar 90-day time limit to file a request for conciliation conference with BCMS if the taxpayer so chooses (Tax Law § 170 [3-a] [a]). A notice of deficiency becomes an assessment subject to collection unless the taxpayer files a timely petition or a timely request for conciliation conference (Tax Law § 681 [b]). The Division of Tax Appeals and this Tribunal lack jurisdiction to consider the merits of a late-filed protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; Tax Law § 2006 [4]).

Where, as here, the timeliness of a taxpayer’s petition is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of proper mailing of the relevant statutory notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 681 [a]). 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 this burden by “producing affidavits from individuals with the requisite

knowledge of mailing procedures and a properly completed CMR (citations omitted)” (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

We agree with the Administrative Law Judge’s conclusion that the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Mr. Ramundo, Division employees involved in and possessing knowledge of the process.

We also agree with the Administrative Law Judge’s conclusion that the CMR relevant to this matter was properly completed. As noted, petitioner’s name and address, and corresponding certified control and assessment numbers are included thereon with respect to each of the ten notices of deficiency at issue. The CMR bears USPS postmarks dated November 3, 2015 on each page thereof. A USPS employee hand wrote and circled the total pieces listed number and initialed the last page of the 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 CMR is highly probative evidence of the fact and date of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

We further agree with the Administrative Law Judge that the Division used petitioner’s last known address in mailing the notices, as the address on the mailing cover sheet and the CMR conforms with the address listed on petitioner’s 2014 New York resident income tax return (*see* Tax Law § 691 [b]).

We note also that the CMR shows that copies of the notices of deficiency were mailed to petitioner’s former representative as required (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008).

Accordingly, we find that the Division properly issued the subject notices of deficiency to petitioner at his last known address on November 3, 2015. The petition herein, filed on August 14, 2017, was therefore untimely (Tax Law §§ 681 [b], 689 [b]).

We reject petitioner's contention that his protest should be deemed timely based on his claim that his former representative misled him into not timely protesting the statutory notices. As the Division rightly observes in its letter brief, the asserted facts underlying this contention are unsubstantiated. Indeed, the claimed facts are merely assertions made in letters submitted by petitioner's current representative in opposition to the notice of intent (*see* finding of fact 14). As noted previously, unsubstantiated assertions are insufficient to defeat a notice of intent to dismiss (*see Whelan v GTE Sylvania*, 182 AD2d at 449). Citing 20 NYCRR part 2600, petitioner argues that the Division violated its own policy in failing to require that petitioner have non-conflicted representation. The cited regulations describe certain duties and responsibilities of tax preparers with regard to conflicts of interest (*see* 20 NYCRR 2600-4.3 [g]). Such regulations, however, apply to individuals required to register as tax return preparers under Tax Law § 32 (*see* 20 NYCRR 2600-1.1 [a]) and there is no evidence in the record indicating that petitioner's former representative was such an individual. Hence, petitioner has failed to show that his former representative was subject to the cited regulations. Furthermore, even if the facts as claimed were established and petitioner's former representative was a tax return preparer registered under Tax Law § 32, the regulations provide no authority to waive the statute of limitations for the filing of a petition as petitioner requests.

By his contention that he was not involved in the management of Dellorso, Goutos & Olshanetskiy Physicians, P.C., petitioner essentially argues that he was not a responsible officer

of that entity of and thus not subject to penalties imposed under Tax Law § 685 (g). We may not consider this substantive argument, however, as we have no jurisdiction to consider the merits of an untimely petition (*see Matter of Lukacs*; Tax Law § 2006 [4]).

Finally, consistent with our longstanding practice, we do not accept into the record the documents submitted by petitioner on exception and have not considered such documents in the rendering of this decision (*see e.g., Matter of Sarmiento*, Tax Appeals Tribunal, December 20, 2018).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Goutos is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of John Goutos is dismissed.

DATED: Albany, New York  
February 28, 2019

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner