

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**DAVID S. PRICE** : DETERMINATION  
DTA NO. 825979  
for Redetermination of Deficiencies or for Refund of :  
New York State Personal Income Tax under :  
Article 22 of the Tax Law for the Period July 1, 2000 :  
through December 31, 2000. :  
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Petitioner, David S. Price, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the period July 1, 2000 through December 31, 2000.

On February 21, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. On May 6, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), having been granted an extension of time to do so, submitted an affidavit and documents in support of dismissal. Petitioner, appearing by Newton Buckley, CPA, filed a response on May 7, 2014.<sup>1</sup> Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on May 7, 2014. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

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<sup>1</sup> Petitioner filed an additional response on May 15, 2014. Pursuant to 20 NYCRR 3000.9(a)(4), parties have 30 days from the date of the Notice of Intent to Dismiss to submit written comments. This time was extended, upon request of the parties, to May 7, 2014. As petitioner's additional response was filed beyond the time allowed, including the extension granted, such response will not be considered.

***ISSUE***

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

***FINDINGS OF FACT***

1. On November 18, 2013, petitioner, David S. Price, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review notices of deficiency (assessment numbers L-021335344 and L-021335345), which were attached to the petition.<sup>2</sup>
2. The subject notices of deficiency, dated July 29, 2002, were addressed to petitioner at a New York, New York, address.
3. On February 21, 2014, the Petition Intake Unit 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 notices of deficiency issued to petitioner on July 29, 2002 and that the petition was not filed until November 18, 2013.
4. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the notices of deficiency under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated April 28, 2014, of Daniel A. Maney, a manager in the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) a "Certified Record For Non-Presort Mail" (CMR) postmarked July 29, 2002; (iii) an affidavit, dated April 28, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; and (iv) a copy of a consolidated transcript of petitioner's 2001 form IT-201 resident income tax return, filed on

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<sup>2</sup> The petition also sought an administrative hearing to review notices of deficiency numbers L-01710623 and L-019041586. A separate Division of Tax Appeals case number has been assigned to those notices and they are not addressed herein.

April 15, 2002, which reports the same New York, New York, address for petitioner as that listed on the subject notices of deficiency.

5. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR. In the present case, the production date of "07/18/02" was manually changed by personnel in the Division's Mail Processing Center, who crossed out that date and handwrote "7/29" in the upper left corner of the first page of the CMR. This change was made to ensure that the date on the CMR conformed with the actual date the statutory notices and CMR were delivered into the possession of the U.S. Postal Service (USPS). It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, 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 "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.”

7. The CMR relevant to the notices of determination under protest consists of 17 pages and lists 184 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 17, which contains 8 such entries. 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 July 29, 2002 to each page of the CMR and also wrote his or her initials on each page thereof, except page 16.

8. Page two of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9739 0108 2316 and assessment number L-021335344, was to be mailed to petitioner at the New York, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner’s name and address as noted.

Page two of the CMR also indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9739 0108 2323 and assessment number L-021335345, was to be mailed to petitioner at the New York, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner’s name and address as noted.

9. The affidavit of Bruce Peltier describes the mail room’s general operations and procedures. The mail room receives the notices in an area designated for “Outgoing Certified Mail.” The 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. 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 the 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 signature or initials on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed page 17 and affixed a postmark dated July 29, 2002 to each page of the CMR. The Center 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 last page of the CMR. Here, the USPS employee complied with this request by circling the number “184” on the last page next to the heading “Total Pieces Received at Post Office.”

10. Based upon his review of the affidavit of Daniel Maney and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on July 29, 2002, an employee of the Mail Processing Center delivered pieces of certified mail addressed to petitioner, in New York, New York, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Peltier stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on July 29, 2002 for the records of the Division’s CARTS Control Unit. He asserted that the procedures described in his affidavit were 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 July 29, 2002.

#### ***CONCLUSIONS OF LAW***

A. 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 (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

B. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). Where a notice of deficiency has been properly mailed, Tax Law § 681(a) does not require actual receipt by the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has met its burden of establishing proper mailing. Specifically, the Division was required to mail the statutory notices to petitioner at his last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Mr. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices, the

Division has offered adequate proof to establish the fact that the notices in issue were actually mailed to petitioner at his last known address by certified mail on July 29, 2002, the date appearing on the CMR. The affidavits described the various stages of producing and mailing notices and attested to the authenticity and accuracy of the copies of the notices and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Maney and Peltier affidavits were followed with respect to the notices issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the notices, appear on the CMR, which bears a USPS date stamp of July 29, 2002. There are 184 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "184" on the line stating "total pieces received at post office," that the post office received 184 items for mailing. In short, the Division established that it mailed the notices to petitioner by certified mail on July 29, 2002 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). Additionally, the Division established that the notices were mailed to petitioner's last known address, being the same address as that reported on petitioner's 2001 resident income tax return, which was filed on April 15, 2002.

E. A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the notices were properly mailed when they were delivered into the custody of the USPS on July 29, 2002, and it is this date that commenced the 90-day period within which a protest had to have been filed. Petitioner's protest was not filed until November 18, 2013, or 4,130 days later. As a matter of

law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. This determination, made pursuant to the notice of intent to dismiss petition and the evidence and arguments submitted by the parties, is the equivalent of a determination in favor of the Division on a motion for summary determination for failure to timely file a petition, and precludes petitioner from having a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, 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."

Petitioner submitted no evidence that the petition was filed within the time frame required, i.e., within 90 days from the date the statutory notice was issued. Moreover, petitioner has failed to challenge the Division's proof of mailing of the notices with any evidence. The proper mailing of a statutory notice, as in the present matter, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002) and petitioner has failed to present any evidence to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). Petitioner's mere allegation that he did not receive the notices is insufficient to rebut this presumption (*see Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97 [3d Dept 1986]; *Matter of 3410 Pons Food Corp.*). While petitioner alleges that he moved to Australia, he has presented no evidence of when he allegedly moved or that he provided notice of a change of address to the Division. Petitioner does not dispute that his 2001 resident income tax return reporting his New York, New

York, address was the last return filed with the Division prior to the issuance of the subject notices.

G. Without a timely filed petition, this agency does not have the jurisdiction to entertain the substantive issues presented in the petition. Therefore, it must be concluded that petitioner has failed to meet his burden of proof.

H. The petition of David S. Price is dismissed.

DATED: Albany, New York  
July 10, 2014

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE