

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**LUIS SOTO** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 826033  
York State Personal Income Tax under Article 22 of the :  
Tax Law for the Year 2011. :

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Petitioner, Luis Soto, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2011.

On June 12, 2014, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Robert Tompkins, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on July 14, 2014, the due date for petitioner's response. After due consideration of the affidavits and documents presented, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Deficiency.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Deficiency dated June 5, 2013 issued to petitioner. The notice

assessed New York State income tax for the year 2011 in the amount of \$6,756.78, plus interest, for a balance due of \$7,356.66. By his request for conciliation conference, filed on December 9, 2013, petitioner protested the notice, numbered L-039113191.

2. On December 27, 2013, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on June 5, 2013, but the request was not mailed until December 9, 2013, or in excess of 90 days, the request is late filed.

Petitioner timely filed his petition on January 2, 2014, protesting the conciliation order.

3. In support of its motion, the Division submitted the following: (i) an affidavit, dated June 5, 2014, of Daniel A. Maney, a Taxpayer Services Specialist 4 and Manager of the Refunds, Deposits, Overpayments and Control Units, which includes the Division's Case and Resource Tracking System (CARTS) Control Unit; (ii) 33 pages comprising the "Certified Record for Presort Mail - Assessments Receivable" (CMR) each page postmarked June 5, 2013; (iii) an affidavit, dated June 5, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) a copy of the Notice of Deficiency L-039113191 issued to petitioner; (v) a copy of petitioner's Request for Conciliation Conference; and (vi) a copy of petitioner's 2012 New York resident income tax return, which is the last return petitioner filed with the Division before the issuance of the subject Notice of Deficiency.

4. The affidavit of Mr. 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.

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 page of the CMR in the present case to the actual mailing date of "6/5/13." 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 his 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.

5. 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."

6. According to the Maney affidavit, the CMR in the present matter consists of 33 pages and lists 352 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each page of the CMR and initialed or signed a page or pages thereof.

7. Each page of the CMR has a USPS postmark dated June 5, 2013. Pages 1 and 33 have a handwritten entry of "6/5/13" in the top right corner.

8. Page 8 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 1572 0531 and assessment ID number L-039113191, was mailed to petitioner at the Yonkers, 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, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. 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 envelopes are counted and the names and certified control numbers verified against 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 on the CMR, indicating receipt by the post office. Here, as noted, all of the 33 pages of the CMR contain such postmarks and on page 33 of the CMR are the initials of the USPS employee. 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 CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 353. This number has a line drawn through it and the employee wrote and circled 352 and initialed the page, confirming that all 352 notices were received<sup>1</sup>. The USPS postmark is from the Colonie Center branch and bears the date June 5, 2013, confirming that the notices were mailed on that date.

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<sup>1</sup>On page 30 of the CMR, one certified control number has a line through it indicating that this item was pulled from the preprinted CMR, resulting in one less item mailed than the preprinted number of 353.

10. Petitioner's Yonkers, New York, address on the CMR and Mailing Cover Sheet matches the address listed on his personal income tax return for 2012. This is the last return that petitioner filed with the Division before the issuance of the subject notice of deficiency. The same address is listed on petitioner's request for conciliation conference and petition.

11. As noted, the request for conciliation conference was received on December 11, 2013, as shown by the stamp indicating receipt by BCMS.

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

A. The Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). As the petition in this matter was filed within 90 days of the conciliation order (*see* Finding of Fact 2), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for a conciliation conference. This determination shall address the instant motion as such.

B. A motion for summary determination shall be granted:

if, upon all 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

C. Petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227 [1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Maney and Peltier affidavits; consequently, those facts may be

deemed admitted (*see Kuehne & Nagel v. Baiden*, at 544; *Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]).

D. There is a 90-day statutory time limit for filing a petition or request for conciliation conference following the issuance of a Notice of Deficiency (Tax Law § 681[b]; § 689[b]). In most cases, where, as here, the timeliness of such a protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 681[a])

E. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., June 5, 2013, to petitioner's last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's personal income tax return for 2012 which satisfies the "last known address" requirement in Tax Law § 681(a). Accordingly, the notice was properly mailed and, thus, 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 June 5, 2013 (Tax Law § 170[3-a][a]; § 681[b]).

F. Petitioner's request for conciliation conference was filed on December 9, 2013, well beyond the 90 days from the date of actual notice. The request was therefore untimely filed (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *see also* Tax Law §§ 689[b]; 170[3-a][a]). Consequently, the Division of Tax Appeals lacks jurisdiction to consider

the merits of petitioner's protest (*see Matter of Rotondi Indus.*, Tax Appeals Tribunal, July 6, 2006).

G. The Division of Taxation's motion for summary determination is granted, and the petition of Luis Soto is hereby denied.

DATED: Albany, New York  
October 2, 2014

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE