

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GREGG M. REUBEN : DETERMINATION
for Redetermination of Deficiencies or for Refund of : DTA NO. 827467
Personal Income Tax under Article 22 of the Tax Law for :
the Periods Ended June 30, 2013, December 31, 2013, :
March 31, 2014, and June 30, 2014. :
:

Petitioner, Gregg M. Reuben, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the periods ended June 30, 2013, December 31, 2013, March 31, 2014, and June 30, 2014.

On November 18, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel), filed a motion seeking summary determination of the proceeding pursuant to 20 NYCRR 3000.5 and 3000.9(b). Accompanying the motion was the affirmation of Linda A. Jordan, Esq., dated November 18, 2016, and annexed exhibits supporting the motion. On December 14, 2016, petitioner, appearing by Ballon Stoll Bader & Nadler, P.C. (Norman R. Berkowitz, Esq., of counsel) filed a letter brief in opposition to the motion of the Division of Taxation. The 90-day period for issuance of this order commenced on December 19, 2016 (Tax Law § 3000.5[b]). After due consideration of the motion papers and annexed exhibits, petitioner's response in opposition, and all pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely protest following the issuance of four notices of deficiency.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Gregg M. Reuben, Notice of Deficiency L-041957386, dated September 30, 2014, which asserted withholding tax penalty in the amount of \$72,007.12 for the tax period ended June 30, 2013. This notice is addressed to “REUBEN-GREGG M, 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247.” The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0282 0152.

This notice was issued because petitioner was determined to be an officer or responsible person of Alliance Parking Services, LLC (Alliance Parking), who was liable for a penalty equal to the tax not paid by the corporation pursuant to Tax Law § 685(g).

2. The Division issued to petitioner, at “555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247,” three notices of deficiency, each dated December 2, 2014, and asserting penalty due for withholding tax as follows:

Assessment ID Number	Tax Period Ended	Penalty
L-042249671	June 30, 2014	\$58,972.38
L-042249672	March 31, 2014	\$73,293.71
L-042249673	December 31, 2013	\$98,527.26

The mailing cover sheets of notices of deficiency L-042249671, L042249672 and L-042249673 bore certified control numbers 7104 1002 9730 0330 4415, 7104 1002 9730 0330 4422 and 7104 1002 9730 0330 4439, respectively.

Each of these notices of deficiency was issued because petitioner was determined to be an officer or responsible person of Alliance Parking, who was liable for a penalty equal to the tax not paid by the corporation pursuant to Tax Law § 685(g).

3. Petitioner's representative, Norman R. Berkowitz, Esq., filed a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of deficiency L-041957386, L-042249671, L-042249672, and L-042249673. Mr. Berkowitz hand-dated and signed the Request on December 9, 2015. The reasons given on the Request for protesting the four listed notices included, among others, that the notices were not received by the taxpayer, and that the notices were not mailed in accordance with the Tax Law. Attached to the Request was a "Consolidated Statement of Tax Liabilities" (Form DTF-967), dated October 6, 2015, and issued to petitioner, that listed a number of statutory notices, including the four notices being protested by the Request. On this Request, petitioner's address is listed as 555 West 59th Street, Apt 31-D, New York, NY 10019. The envelope in which the Request was mailed bears United States Postal Service (USPS) metered stamps dated December 9, 2015.

4. On December 31, 2015, BCMS issued a Conciliation Order Dismissing Request (Dismissal Order) to petitioner. Bearing CMS No. 268840 and referencing notice numbers L-041957386, L-042249671, L-042249672 and L-042249673, the Dismissal Order determined that petitioner's protest was untimely and stated, in part:

"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 September 30, 2014 and December 2, 2014, but the request was not until [date omitted in original], or in excess of 90 days, the request is late filed."

5. On February 1, 2016, the Division of Tax Appeals received a petition seeking revision

of the four notices of deficiency, L-041957386, L-042249671, L-042249672 and L-042249673. The envelope in which the petition was sent by certified mail bears a USPS metered stamp dated January 28, 2016. Petitioner's petition lists his address as 555 West 59th Street, Apt. 31-D, New York, NY 10019. In his petition, it was asserted, among other things, that "[t]he appropriate and required Notices were not served on the Petitioner in accordance with the Tax Law and are therefore invalid and void," and that the Conciliation Order Dismissing Request is ineffective and void because it is "imprecise in that the date the Petitioner's Request for a Conciliation Conference was received is missing."

6. On June 27, 2016, the Division filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i), and 3000.9(b). Petitioner, through his representative, filed a letter in opposition to the Division's motion on July 14, 2016. By order dated October 20, 2016, the undersigned denied the Division's motion to dismiss the petition or for summary determination.

7. On November 18, 2016, the Division filed the present motion for summary determination. In support of the motion and to prove proper and timely mailing of the four notices of deficiency under protest, the Division submitted the following: (i) an affirmation, dated November 18, 2016, of Linda A. Jordan, Esq., the Division's representative; (ii) an affidavit, dated November 2, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS) (first Nagengast affidavit); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated September 30, 2014; (iv) an affidavit, dated November 4, 2016, of Bruce Peltier, a stores and mail operations supervisor in the Division's mail room (first Peltier affidavit); (v) a Notice of Deficiency, dated September 30, 2014, and the accompanying mailing cover sheet; (vi)

a second affidavit, dated November 2, 2016, of Mary Ellen Nagengast (second Nagengast affidavit); (vii) a CMR, dated December 2, 2014; (viii) a second affidavit, dated November 4, 2016, of Bruce Peltier; (ix) three notices of deficiency, each dated December 2, 2014, and corresponding mailing cover sheets; (x) an affidavit, dated November 15, 2016, of Lori Schettine, a Taxpayer Services Specialist 3 in the Division's Office of Processing and Taxpayer Services, Enterprise Services Bureau (ESB); (xi) a copy of the Division's Online Services Account Terms and Conditions for Individuals (version 1 [modified October 5, 2010 at 2:08:09 PM] through version 15 [modified July 16, 2015 at 8:09:18 AM]); (xii) a printout of the "Steps to change an individual address through Online Services Change of address application;" (xiii) a copy of a notice dated November 20, 2012, sent to Gregg M. Reuben; (xiv) copies of two emails from IADR.EmailUtility to tax.sm.OTC.applications.IADR, dated November 13, 2013 and October 27, 2014, respectively, regarding "Change of Address application - Individual - PROD;" (xv) the Division's "e-MPIRE" printout documents related to petitioner; (xvi) a copy of petitioner's Request for Conciliation Conference, dated December 9, 2015, with the accompanying cover letter of petitioner's representative and a copy of the mailing envelope; (xvii) a copy of the Conciliation Order Dismissing Request, dated December 31, 2015; (xviii) a copy of petitioner's New York State Resident Income Tax Return (Form IT-201) for the year 2012, which was electronically filed on or about October 9, 2013; and (xix) a copy of petitioner's New York State Resident Income Tax Return (Form IT-201) for the year 2013, which was electronically filed on or about October 2, 2014.

8. As noted, the Division submitted four affidavits pertaining to the mailing of the subject statutory notices. The first Nagengast affidavit sets 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. Ms. Nagengast has been in her current position since October 2005.

9. Statutory notices are generated from CARTS and 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 pages of the CMR in the present case to the actual mailing date of "9/30/14." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. 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.

10. 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 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 "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."

11. The September 30, 2014 CMR relevant to Notice of Deficiency L-041957386 consists of 20 pages and lists 217 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 20, which contains 8 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 initialed or signed and affixed a postmark, dated September 30, 2014, of the Colonie Center, New York branch of the USPS to each page of the CMR, wrote and circled the number “217” on page 20 next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE.” Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 217.

12. Page six of the September 30, 2014 CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0282 0152 and reference number L-041957386, was mailed to “REUBEN-GREGG M,” at 555 W 59th St., Apt 31D, New York, NY 10019-1247, i.e., the same address listed on the Notice of Deficiency. The corresponding mailing cover sheet, attached to the first Nagengast affidavit as “Exhibit B,” bears this certified control number and petitioner’s name and address as noted above.

13. The first affidavit of Bruce Peltier, a supervisor in the Division’s mail room since 1999, describes the mail room’s general operations and procedures. The mail room receives the notices in an area designated for “Outgoing Certified Mail.” Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. 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 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 initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee affixed a postmark dated September 30, 2014 to each page of the CMR and initialed or signed on page 20. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, the USPS employee complied with this request by writing and circling the number “217” on the last page of the CMR.

14. The first Peltier affidavit states that the CMR is the Division’s record of receipt, by the USPS for pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the Division’s mail room, the CMR is picked up at the post office by a member of Mr. Peltier’s staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

15. With respect to the mailing of the three notices of deficiency, each dated December 2, 2014, the Division submitted a second set of affidavits from Mary Ellen Nagengast and Bruce Peltier. Each of the additional affidavits sets forth the same introductory paragraphs regarding the respective affiants’ titles and job duties and the standard mailing procedures of the Division.

16. Attached as an exhibit to Ms. Nagengast’s second affidavit is a 35-page CMR, on each page of which is listed an initial production date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division’s general practice, the date was manually changed on the first and last pages to “12/2/14,” to reflect the actual mailing date. This 35-page CMR lists 381 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 35, which contains 7 entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers.

17. Page two of this 35-page CMR indicates that two notices of deficiency, assigned certified control numbers 7104 1002 9730 0330 4415 and 7104 1002 9730 0330 4422 and reference numbers L-042249671 and L-042249672, respectively, were mailed to “REUBEN-GREGG M,” at 555 W 59th St., Apt. 31D, New York, NY 10019-1247, i.e., the same address listed on each Notice of Deficiency. The corresponding mailing cover sheets, attached to the second Nagengast affidavit as “Exhibit B,” bear these certified control numbers and petitioner’s name and address as noted above.

18. Page three of this 35-page CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0330 4439 and reference number L-042249673, was mailed to “REUBEN-GREGG M,” at 555 W 59th St., Apt. 31D, New York, NY 10019-1247, i.e., the same address listed on this Notice of Deficiency. The corresponding mailing cover sheet, attached to the second Nagengast affidavit as “Exhibit B,” bears this certified control number and petitioner’s name and address as noted above.

19. Review of this 35-page CMR indicates that a USPS employee initialed or signed and affixed a postmark, dated December 2, 2014, of the Colonie Center, New York, branch of the USPS to each page of the CMR. On the last page, page 35, the USPS employee wrote and circled the number “381” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE.”

20. The affidavit of Lori Schettine, a Tax Services Specialist 3 in the Division’s ESB Office of Processing and Taxpayer Services since November 2012, describes the general practice and procedure for creating and maintaining an online services (OLS) account. Ms. Schettine has been employed by the Division for approximately 32 years, and has held numerous positions within the Division, including with its Office of Information Technology Services. Her current

responsibilities include supervising the Account Summary and Online Services section of the ESB.

21. Since 2006, the Division has offered OLS accounts to provide New York State taxpayers with a secure portal to access their tax information and a number of Division supported web applications. To set up an OLS account, a taxpayer is required to visit the Division's website and click on the link "create account" for Online Services for Individuals. Once a taxpayer has chosen to create an OLS account, he or she is asked to input his or her social security number (SSN), and first and last name. The taxpayer is then required to authenticate his or her identity which can be done via one of two methods: an assessment ID or a shared secret from a recently filed return. To create an account using an assessment ID, the taxpayer must enter the assessment ID from a notice issued to him or her. To create an account using a shared secret, the taxpayer must enter a specific dollar amount from a previously filed New York State income tax return, such as federal adjusted gross income. Once all information is verified, the taxpayer is then directed to the Terms and Conditions.

22. The taxpayer must agree to the Terms and Conditions of an OLS account prior to activating their account. These Terms and Conditions have been updated various times throughout the existence of the OLS system. Among other things, these Terms and Conditions require the taxpayer "to provide true, accurate, current and complete information" and "to maintain and update this information to keep it true, accurate, current and complete." The taxpayer also agrees "that your username and password are to be used by you exclusively for the purposes of your own Online Services Account and no other." The Terms and Conditions also include a statement that

"DTF may change these Terms and Conditions of Use at any time. You are

responsible for checking these terms periodically for changes. If you continue to use an Online [Services] Account after we post changes, you are signifying your acceptance of the new terms.”

23. Once the taxpayer agrees to the Terms and Conditions, the account will be created.

The taxpayer must provide the first and last name of the person creating the account, a telephone contact number, and an email address. The taxpayer will also be directed to create a username and password. A notice confirming creation of the OLS account will be sent to the individual’s address of record via USPS, as well as an email to the email address entered during the account’s creation. Once an individual has created an account, he or she can access numerous online services offered by the Division such as individual change of address, submitting payments, and responding to Division notices. An individual also has the ability to disable his or her OLS account at any time.

24. An update of a taxpayer’s address of record may be done within the taxpayer’s OLS account using the change of address web service. Once logged into his or her account, from the Account Summary page, a taxpayer can view the mailing address the Division currently has on file. To change the address, the taxpayer can either click on the “change of address” link in the services menu or click on the link next to his or her current address that says “edit,” and then input the updated information. The taxpayer is then required to certify that the provided information is complete and that he or she is authorized to report the change. Once any changes are submitted, the taxpayer receives a confirmation page, and the new address is displayed at the bottom of the Account Summary page.

25. When an address is changed in a taxpayer’s OLS account, an internal email is automatically generated. This email includes the taxpayer’s name and ID as well as the updated information. It also includes “Environment: PROD” or “Environment: UTM.” If the email

includes the code “UTM,” it means the address change was made internally for testing enhancements or fixes to the Division’s applications. If, instead, the email includes the code “PROD,” it means the change was made using the change of address web service from within the taxpayer’s account. Lastly, the address change is automatically updated in the taxpayer’s e-MPIRE account address summary tab with the source of “WEB ADR CHG (N9)” indicating that the address change was initiated through the change of address web service. The taxpayer’s e-MPIRE account summary tab will be used by the Division to determine the taxpayer’s address for all mailings, including notices of deficiency.

26. Ms. Schettine avers that on November 15, 2012, an OLS account was created for petitioner using the email address XXXXXXXXXXXXXXXXXXXX.com and the telephone number 917-XXX-XXXX.¹ She further avers that to create this account, petitioner was required to follow all of the steps set forth in Findings of Fact 21 through 23, including authentication of his identity via one of the outlined methods, and agreement to the Terms and Conditions in effect in November 2012.

27. Ms. Schettine attests that the creation of petitioner’s account was confirmed by email as well as via a notice dated November 20, 2012 sent by USPS to Gregg M. Reuben at 4320 Broadway, New York, NY 10033, his address of record at the time of the notice. This Notice, issued by OPTS - SAT - eServices Management, stated, in pertinent part, as follows:

“[T]hank you for creating an online account with the New York State Department of Taxation and Finance. This letter is to confirm that on 11/15/2012 you or your authorized representative created an account through our Web site to use the applications provided through Online Services for your own account.

Your username, XXXXXXXXXXXXXXXXXXXX.COM, used in conjunction with the

¹Petitioner’s email address and telephone number have been redacted for confidentiality purposes.

password selected when creating your account will allow you to log in to Online Services. Please retain this letter for future reference.”

28. In her affirmation in support of the Division’s motion, Ms. Jordan avers that the Division maintains a record of all taxpayer data through its internal software, called e-MPIRE, which is maintained in the ordinary course of business and accessible by Division employees as needed. Each taxpayer has an internal e-MPIRE account which keeps track of, among other things, the taxpayer’s last known address.

29. The record includes petitioner’s resident income tax return (Form IT-201) for the year 2012, electronically filed on or about October 9, 2013 (*see* Finding of Fact 7). This return was the last return filed by petitioner prior to the issuance of Notice of Deficiency L-041957386, and it lists petitioner’s address as 555 West 59th Street, **Apt. No. 32D**, New York, NY 10019 (emphasis added).

30. Ms. Schettine, in her affidavit, states that on October 15, 2013, petitioner’s address was updated in his e-MPIRE account to 555 West 59th Street, Apt. No. 32D, New York, NY 10019, based upon petitioner’s electronically filed Form IT-201 for the year 2012. Ms. Schettine further states that on November 13, 2013, an address change was made through petitioner’s OLS account updating his address of record from “555 West 59th St Apt. No. 32D, New York, NY 10019” to “555 West 59th St Apt. No. 31D, New York, NY 10019.” When this address change was made, an internal email was automatically generated showing the address change and the code “Environment: PROD,” indicating the address change was made through petitioner’s OLS account using the change of address web service.

31. The record includes a copy of a one-page email, dated November 13, 2013 at 10:08 a.m., from IADR.EmailUtility to tax.sm.OTC.applications.IADR regarding a “Change of

Address application - Individual - PROD” for “REUBEN-GREGG.” On this November 13, 2013 email, the following code appears “Environment: PROD,” along with petitioner’s “New physical [and] mailing address of 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247, US,” as well as new contact information (i.e., telephone numbers). When petitioner’s address was updated through the OLS system, his address was automatically updated in the e-MPIRE system to reflect these changes.

32. The record includes a two-page e-MPIRE printout document, dated “11/02/2016 at 11:05:13” containing an “Address Summary” for petitioner’s taxpayer identification number, petitioner’s name, and an “Address” in Hoboken, New Jersey. This document shows petitioner’s address change history, including the change made on November 13, 2013, updating petitioner’s address to 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247, reflected on petitioner’s address summary tab as sequence #028. Review of the “Address Details” section of the e-MPIRE Address Summary indicates that the change of address to 555 W 59TH ST **APT 31D**, NEW YORK, NY 10019-1247, address sequence number 028, was initiated through “WEB ADR CHG (N9),” i.e., the change of address web service (emphasis added). This was the last known address of record prior to the issuance of Notice of Deficiency L-041957386.

33. The record includes petitioner’s resident income tax return for the year 2013 electronically filed on or about October 2, 2014 (*see* Finding of Fact 7). This return was the last return filed by petitioner prior to the issuance of notices of deficiency L-042249671, L-042249672, and L-04229673, and it lists petitioner’s address as 555 West 59th Street, **Apt. No. 32D**, New York, NY 10019 (emphasis added). Ms. Schettine, in her affidavit, states that on October 10, 2014, petitioner’s address was updated in his e-MPIRE account to 555 W 59th St Apt 32D, New York, NY 10019, based upon petitioner’s electronically filed Form IT-201 for the

year 2013, dated October 2, 2014. She further states that on October 27, 2014, an address change was made through petitioner's OLS account, updating his address of record from "555 West 59th St Apt. No. 32D, New York, NY 10019" to "555 West 59th S Apt. No. 31D, New York, NY 10019." When this address change was made, an internal email was automatically generated showing the address change and the code "Environment: PROD," indicating the address change was made through petitioner's OLS account using the change of address web service.

34. The record includes a copy of a one-page email, dated October 27, 2014 at 10:49 a.m., from IADR.EmailUtility to tax.sm.OTC.applications.IADR regarding a "Change of Address application - Individual - PROD" for "REUBEN-GREGG." On this October 27, 2014 email, the following code appears "Environment: PROD," along with petitioner's "New physical [and] mailing address of 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247," as well as new contact information (i.e., telephone numbers). When petitioner's address was updated through the OLS system, his address was automatically updated in the e-MPIRE system to reflect these changes.

35. The record includes a two-page e-MPIRE printout document, dated "11/02/2016 at 11:04:27" containing an "Address Summary" for petitioner's taxpayer identification number, petitioner's name, and an "Address" in Hoboken, New Jersey. This document shows petitioner's address change history, including the change made on October 27, 2014, updating petitioner's address to 555 W 59TH ST APT 31D, NEW YORK, NY 10019-1247, reflected on petitioner's address summary tab as sequence #030. Review of the "Address Details" section of the e-MPIRE Address Summary indicates that the change of address to 555 W 59TH ST **APT 31D**, NEW YORK, NY 10019-1247, address sequence number 030, was initiated through "WEB ADR CHG (N9)," i.e., the change of address web service (emphasis added). This was the last

known address of record prior to the issuance of notices of deficiency L-042249671, L-042249672, and L-04229673.

36. Ms. Schettine, in her affidavit, also avers that the Division's Office of Processing and Taxpayer Services has not received any notification or information that petitioner's OLS account "should be modified or discontinued."

37. In opposition to the motion, petitioner's representative submitted a letter brief, in which he asserts that the Division's motion for summary determination must be denied because the motion papers fail to establish that no material and triable issue of fact is presented, and that the Division has not established proper issuance of the four notices of deficiency. Petitioner's representative maintains that the proper address to which all four notices of deficiency should have been issued would include Apt. No. 32D, as set forth on the last returns filed by petitioner prior to the issuance of such notices of deficiency, and would not include Apt. 31D, as set forth on the notices of deficiency as mailed. He further contends that although the Division has submitted voluminous documents and materials with its second motion, it still has not provided "any credible evidence that the taxpayer/petitioner gave notice or requested that a change of address be entered for him with the [Division]."

CONCLUSIONS OF LAW

A. A motion for summary determination 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 and 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]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion

for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment 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” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary determination is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue of fact or where a material fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381 [2d Dept 1960]).

“To defeat a motion for summary judgment, the opponent must also 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 [1st Dept 1992], citing *Zuckerman* at 562).

C. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law § 681[b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals

Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the Division claims that a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance of the notice. Where a notice is found to have been properly mailed "a presumption arises that the notice was delivered or offered for delivery to the taxpayer 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 (*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). When a notice is found to have been properly mailed by the Division to a petitioner's last known address by certified or registered mail, the petitioner, in turn, bears, the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Malpica*; *see also Matter of Ruggerite, Inc. v. State Tax Commission*, 64 NY2d 688 [1984]).

E. The mailing evidence required 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 the particular instance (*Matter of United Water New York*, Tax Appeals Tribunal, April 4, 2004;

see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

G. The CMR for September 30, 2014 provides sufficient documentary proof to establish that a notice of deficiency L-041957386, dated September 30, 2014, was mailed as addressed to petitioner. The 20-page document lists 217 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated September 30, 2014 and the initials or signature of a USPS employee. Additionally, on the last page of the CMR, the postal employee wrote and circled the number “217” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE” to indicate receipt by the post office of all pieces of mail listed thereon. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

H. The CMR for December 2, 2014 provides sufficient documentary proof to establish that three notices of deficiency L-042249671, L-042249672 and L-042249673, each dated December 2, 2014, were mailed as addressed to petitioner. The 35-page document listed 381 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated December 2, 2014 and the initials or signature of a USPS employee. Additionally, on the last page of the CMR, the postal employee wrote and circled the number “381” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE” to indicate receipt

by the post office of all pieces of mail listed thereon. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*).

I. The only remaining issue on this motion is the question of whether the four notices of deficiency were addressed to petitioner at “his last known address” at the time they were mailed, so as to be considered “properly mailed.” The Division contends that petitioner notified it of changes to his address to include “Apt. 31D” through address changes made by him via his online services account on November 13, 2013 and October 27, 2014. As such, the Division maintains that the notices at issue were properly issued to petitioner at his last known address of record, i.e., 555 West 59th St. Apt. 31D, New York, NY 10019-1247. Petitioner’s representative asserts that there is no credible evidence that the taxpayer/petitioner gave notice or requested changes of address to include “APT 31D” to be entered for him via his online services account. He further asserts that the evidence on this motion only supports the conclusion that petitioner’s “last known address” was “Apt. No 32D,” as appearing on the last returns filed prior to the issuance of the notices of deficiency (*see* Findings of Fact 29 and 33).

J. As noted previously, Tax Law § 681(a) authorizes the Division to issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined. This section further requires that the notice “shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state.” A taxpayer’s last known address is “the address given on the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address” (Tax Law § 691[b]).

The Division has established that the four notices of deficiency were mailed to petitioner’s last known address of record, 555 West 59th Street, Apt. 31D, New York, NY 10019. The

affidavit of Ms. Schettine, who supervises the Account Summary and Online Services section of the ESB, adequately describes the procedures used by a taxpayer to create an online services account through the Division's public website and, thereafter, to access numerous online services such as individual change of address, submitting payments, and responding to Division notices. Her affidavit also sets forth the procedures for requesting a change of address in a taxpayer's online services account via the change of address web service in the Division's online services system, the internal email used by the Division to reflect such an update, and the confirmation that the address change was automatically updated in the taxpayer's e-MPIRE account on the individual's address summary tab with a source of "WEB ADR CHG (N9)." The record clearly shows that an online services account was created for petitioner via the Division's web site on November 15, 2012 (*see* Finding of Fact 27). It also shows that on October 15, 2013, petitioner's address was updated in his e-MPIRE account to 555 W 59th St. Apt. 32D, New York, NY 10019, based upon petitioner's electronically filed Form IT-201 for the year 2012, dated October 9, 2013 (*see* Finding of Fact 30). Additionally, the record shows that change of address requests were made through petitioner's online services account on November 13, 2013 and October 27, 2014. Specifically, a change of address to 555 West 59th Street, Apt. 31D, New York, NY 10019, was made via the change of address web service from within his account on November 13, 2013 (*see* Findings of Fact 30 - 32). This was petitioner's last known address prior to the issuance of Notice of Deficiency L-041957386 on September 30, 2014 (*see* Finding of Fact 32). The record also indicates that on October 10, 2014, petitioner's address was updated in his e-MPIRE account to 555 W 59th St. Apt. 32D, New York, NY 10019, based upon petitioner's electronically filed Form IT-201 for the year 2013, dated October 2, 2014 (*see* Finding of Fact 33). It also indicates that on October 27, 2014, an address change was made via the change of address web service

from petitioner's online services account updating his address of record from 555 West 59th St., Apt. 32D, New York, NY 10019 to 555 West 59th St., Apt. 31D, New York, NY 10019 (*see* Finding of Fact 33 - 35). This was petitioner's last known address prior to the issuance of notices of deficiency L-042249671, L-042249672 and L-042249673 on December 2, 2014. It is noted that petitioner's last known address prior to the issuance of the notices of deficiency on September 30, 2014 and December 2, 2014, i.e., 555 West 59th St., Apt. 31D, New York, NY 10019, was the same address listed for petitioner on the Request filed in protest of the four notices of deficiency at issue (*see* Finding of Fact 3).

In sum, it is concluded that the four notices of deficiency at issue were properly mailed to petitioner at his last known address (Tax Law § 681[a]).

K. With respect to Notice of Deficiency L-041957386, 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 September 30, 2014 (Tax Law §§ 170[3-a][a]; 681[b]). With respect to notices of deficiency L-042249671, L-042249672 and L-042249673, 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 December 2, 2014 (*id.*).

Petitioner mailed his Request in protest of all four notices of deficiency on December 9, 2015, a date beyond the 90-day periods of limitation for protesting such notices, i.e., for Notice of Deficiency L-041957386, the 90-day period ended on December 29, 2014; and for notices of deficiency L-042249671, L-042249672 and L-042249673, the 90-day period ended on March 2, 2015. As a matter of law, there is no jurisdiction to address the merits of petitioner's protest of the subject notices of deficiency (*Matter of Sak Smoke Shop*).

L. The Division of Taxation's motion for summary determination is granted, the petition of Gregg M.Reuben is hereby denied, and the notices of deficiency dated September 30, 2014 (L-041957386) and December 2, 2014 (L-042249671, L-042249672 and L-042249673) are sustained.

DATED: Albany, New York
March 16, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE