

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petitions :  
of : DETERMINATION  
**ROBERT TOWNLEY** : DTA NO. 827660  
for Redetermination of Deficiencies or for Refund of :  
Personal Income Tax under Article 22 of the Tax Law :  
and the Administrative Code of the City of New York :  
for the Years 2012, 2013 and 2014. :

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Petitioner, Robert Townley, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law and the administrative code of the City of New York for the years 2012, 2013 and 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda Jordan, Esq., of counsel), brought a motion dated October 24, 2016, for an order dismissing the petition or granting summary determination in favor of the Division pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and (b) of the Tax Appeals Tribunal's Rules of Practice. Petitioner, represented by Capell Barnett Matalon & Schoenfeld, LLP (Yvonne R. Cort, Esq.),<sup>1</sup> filed a response to the Division of Taxation's motion on March 20, 2017, after two extensions of time. The 90-day period for issuance of this determination began on March 21, 2017, the date that petitioner's response was due. After due consideration of the affidavits and documents submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of deficiency.

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<sup>1</sup> Capell Barnett Matalon & Schoenfeld, LLP no longer represents petitioner.

**FINDINGS OF FACT**

1. The Division of Taxation (Division) issued three notices of deficiency, all dated December 14, 2015, to petitioner, Robert Townley. The notices of deficiency refer to the detailed computation of additional amounts due as set forth in the associated statements of proposed audit changes, dated October 27 and 28, 2015. The explanation asserted the following:

“Based on our review, it does not appear that you are carrying on your Schedule E activity for profit. A review of our records indicates that you have been claiming a business loss for the last several years and do not appear to be operating for a profit. . .

\* \* \*

If your activity is not carried on for profit, allowable deductions cannot exceed the gross receipts for the activity. Based on the above we have disallowed your claimed business losses. . .”

Each of the statements of proposed audit changes disallowed the business losses for the corresponding tax year: \$196,593.00 for 2012, \$163,194.00 for 2013 and \$163,498.00 for 2014.

The asserted deficiencies of personal income tax were as follows:

Period Ended	Assessment No.	Tax	Interest	Penalty	Payments/ Credits	Balance Due
12-31-12	L-043884040-1	\$20,170.73	\$4,463.66	\$609.00	0.00	\$25,243.39
12-31-13	L-043884041-9	\$17,599.43	\$2,341.72	\$6.20	0.00	\$19,947.35
12-31-14	L-043875566-8	\$16,465.48	\$842.93	0.00	0.00	\$17,308.41

2. Petitioner mailed a request for conciliation conference dated April 4, 2016, to the Bureau of Conciliation and Mediation Services (BCMS). The request referred to each of the notices listed above. BCMS issued a conciliation order dismissing request, dated April 22, 2016, which stated:

“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 December 14, 2015, but the request was not mailed until April 4, 2016, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.”

3. On June 6, 2016, petitioner filed a timely petition before the Division of Tax Appeals challenging the conciliation order.

4. In support of its motion and to show proof of proper mailing of the three notices dated December 14, 2015, the Division provided, among other things: (i) the affidavit of Linda A. Jordan, dated October 21, 2016; (ii) a copy of the petition filed with the Division of Tax Appeals on June 6, 2016, with attachments, including the request for conciliation conference dated April 4, 2016, and a conciliation order dismissing request dated April 22, 2016; (iii) an affidavit, dated September 20, 2016, of Mary Ellen Nagengast, the Director of the Division's Management Analysis and Project Services Bureau since October 2005, who is responsible for the receipt and storage of certified mail records; (iv) an affidavit, dated September 21, 2016, of Bruce Peltier, a supervisor in the mail room of the Division since March 1999; (v) the "Certified Record for Presort Mail - Assessments Receivable" (CMR), each page date-stamped December 14, 2015; (vi) a copy of the notices of deficiency dated December 14, 2015, with the associated mailing cover sheets bearing certified control numbers 7104 1002 9730 0700 1303, 7104 1002 9730 0700 1310 and 7104 1002 9730 0700 1327; and (vii) a copy of petitioner's e-filed resident income tax return, Form IT-201, for tax year 2014, filed with the Division, according to its records, on March 14, 2015, which lists the same East 10<sup>th</sup> Street, New York, New York, address for petitioner as that listed on the subject notices.

5. The affidavit of Ms. Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing, i.e., 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 reflect the actual mailing date of "12/14/15."

In addition, Ms. Nagengast stated that 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 her office. The pages of the CMR stay banded together unless ordered otherwise. The page numbers of the CMR, starting with "PAGE 1," are noted in the upper right corner of each page.

6. All notices are assigned a certified control number. The certified control number for 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 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. Page 17 of the December 14, 2015 CMR shows that three notices of deficiency (L-043875566, L-043884040 and L-043884041) bearing that date were sent to petitioner at 220 E. 10<sup>th</sup> Street, Apt. 1R, New York, New York 10003-7774, by certified mail. The certified control numbers, assessment identification numbers and address as listed on the CMR all correspond to the information on the mailing cover sheets and the December 14, 2015 notices of deficiency.

8. The Peltier affidavit describes the general operations and procedures of the Division's mail room. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a mailing cover sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice and mailing cover sheet into a windowed envelope so that the addresses and certified number from the mailing cover sheet show through the windows. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of 30 or less pieces of certified mail listed on the

CMR by checking the envelopes against the information contained on the CMR. A member of the mail room then delivers the envelopes and the CMR to one of the various U.S. Postal Service (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. The mail room further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR.

9. A review of the CMR submitted by the Division confirms that a USPS employee affixed a postmark on each page. On the final page, corresponding to “Total Pieces and Amounts,” is the preprinted number 1,757. In addition, the USPS employee initialed the page and wrote and circled the number “1757.” The USPS postmarks are from the GMF Albany, New York, branch and each bears the date December 14, 2015. The affixation of the postmarks, the USPS employee’s initials, and the writing and circling of the number 1,757 indicating that all such pieces were received, confirms that the notices of deficiency dated December 14, 2015, were received by the USPS on that date.

10. Petitioner’s 2014 New York resident income tax return, dated March 4, 2015, reported petitioner’s address as 220 East 10<sup>th</sup> Street, Apt. 1R, New York, New York 10003. This was the last return filed by petitioner prior to the issuance of the subject notices. This address corresponds with the address on the CMR and on the notices that were sent to petitioner.

11. In his response to the motion, petitioner acknowledged receipt of the statements of proposed audit changes dated October 27, 2015, and contacted the audit division to object, but was told that the objection would not be effective until the notices of deficiency were issued. He asserted he did not receive the notices dated December 14, 2015. Petitioner claims to have become aware of the notices after his appeal rights had expired.

12. According to petitioner, a search of the post office records for the control numbers in issue indicate that notices of attempted delivery were left in each case (presumably at petitioner’s residence) on December 16, 2015, where there was “no authorized recipient available” at the

address. Petitioner suggests that this means that without a doorman at his building, a notice was left at the address that either blew away or was taken by a person passing by the building, leaving petitioner without proper notice. The USPS records further indicate that on January 13, 2016, the items were unclaimed and the maximum hold time had expired. Thereafter, they were forwarded to another destination.

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

A. A motion for summary determination may 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 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]).

B. Where the timeliness of a request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing by certified or registered mail to petitioner’s last known address (Tax Law § 681[a]; *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 (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show 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).

C. 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. In addition, the Division introduced sufficient proof to establish proper mailing of the three statutory notices at issue to petitioner’s last known address on the date claimed. The submitted affidavits and the CMR establish the Division’s standard mailing procedure and that the procedure was followed in this case (*see Matter of*

*DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, petitioner's address on the notices, the corresponding mailing cover sheets and the CMR conforms with the address he reported on his New York personal income tax return filed prior to the issuance of the subject statutory notices, thereby satisfying the requirements of Tax Law §681(a). Thus, it is concluded that the Division properly mailed the December 14, 2015 notices, and the statutory 90-day time limit to file a request for conciliation conference with BCMS commenced on this date (Tax Law § 170[3-a][a]; § 681[a]).

D. Petitioner did not dispute that the notices were mailed as addressed on December 14, 2015. Rather, petitioner contended that the notices were never received by him. Tax Law § 681(a) requires that a notice of deficiency "shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state." On the same point, Tax Law § 691(b) provides that a taxpayer's last known address shall be the address given in the last return filed by him unless a subsequent notice was given by the taxpayer of a change of address. Tax Law § 681(a) does not require actual receipt by a taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. Here, the record shows that petitioner's address as listed on his 2014 personal income tax return was 220 East 10<sup>th</sup> Street, Apt. 1R, New York, New York 10003. The 2014 return was dated March 4, 2015, and according to the Division's records, was e-filed on that date. There is no evidence before this forum that petitioner subsequently filed a change of address notice with the Division. Thus, his last known address prior to the issuance of the notices of deficiency on December 14, 2015, was that stated on the notices and the 2014 tax return. Accordingly, the Division has shown that it properly mailed the subject notices of deficiency to petitioner at his "last known address" consistent with Tax Law § 681(a) and § 691(b). Once deemed properly mailed, the risk of non-delivery is on the taxpayer, i.e., a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail (*Matter of Katz*).

Petitioner claims he did not receive the notices in a timely manner. More than a mere denial of receipt is needed to rebut the presumption of receipt (*see Matter of T.J. Gulf, Inc.*, 124 AD2d 314 [3rd Dept 1986]). The only evidence petitioner submitted to rebut the presumption of delivery to him in the normal course of the mail was the USPS record of the items being “unclaimed.” Given proper issuance of the notices, the indicated delays in delivery resulting from “no authorized recipient available,” and the three notices being “unclaimed,” affords petitioner no relief (*see Matter of Henry Street Superior Deli Corporation and Naifahmed Abad*, Tax Appeals Tribunal, February 21, 2017, citing *Matter of American Cars “R” Us*, 147 AD2d 797 [3rd Dept 1989]).

F. Petitioner’s request for conciliation conference was filed on April 4, 2016. This date falls after the 90-day period of limitations for the filing of such a request and petitioner’s request was, therefore, untimely filed. Accordingly, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner’s protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

G. The Division of Taxation’s motion for summary determination is granted, and the petition of Robert Townley is dismissed.

DATED: Albany, New York  
June 15, 2017

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE