

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETER LEIDEL	:	DETERMINATION DTA NO. 827992
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2009 through 2013.	:	

Petitioner, Peter Leidel, filed a petition for revision of a deficiency or for refund of personal income tax under article 22 of the Tax Law for years 2009 through 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele M. Helm, Esq., of counsel), brought a motion dated September 14, 2017, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to Tax Law § 2006.6 and sections 3000.9 (a) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Michele M. Helm, Esq., dated September 14, 2017, and annexed exhibits supporting the motion. In opposition to the Division's motion, petitioner's representative, James S. Kaplan, Esq., by letter dated November 14, 2017, filed an affidavit, dated November, 2017, with attached exhibits.¹ The response was due on November 14, 2017, which, pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), commenced the 90-day period for the issuance of this determination. After due

¹In notarizing the affidavit, the notary public did not insert the day in November on which the affidavit was notarized.

consideration of the affidavits and exhibits submitted, James Connolly, 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 two notices 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 two notices of deficiency dated August 17, 2015, bearing, respectively, assessment identification numbers L-043492753 and L-043492747 (Notices). The Notices are addressed to petitioner and assert additional tax due under article 22 of Tax Law for the years 2009 through 2013.

2. The address for petitioner used on the Notices was as follows:

“Leidel-Peter A
C/O BARRY M. STRAUSS ASSOC
307 5TH AVE FL 8
New York, NY 10016-6517”

The address used on the cover sheets of the copies being sent to petitioner's representative, Mr. Barry M. Strauss, was as follows:

“BARRY M STRAUSS
C/O BARRY M STRAUSS ASSOC
307 FIFTH AVE 8 FL
NEW YORK, NY 10016”

3. Petitioner's request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) to protest the Notices is signed by petitioner's representative, Mr.

Strauss, and is dated September 28, 2016. The request is stamped as received by BCMS on October 3, 2016.

4. On October 21, 2016, BCMS issued a conciliation order dismissing request (Conciliation Order) to petitioner. The Conciliation Order, bearing CMS number 272015, determined that petitioner's protest of the Notices 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 notices were issued on August 17, 2015, but the request was not received until October 3, 2016, or in excess of 90 days, the request is late filed.”

5. Petitioner timely protested the Conciliation Order by filing a petition with the Division of Tax Appeals on December 21, 2016.

6. To show proof of proper mailing of the Notices, the Division provided the following, in addition to the affidavit of Michele M. Helm, Esq.: (i) an affidavit, dated September 12, 2017, of Marc Sorotsky, a tax auditor in the Division's Income/Franchise Tax Field Audit Bureau (IFAB) and employed with the Division since 1988; (ii) a certified mail record, PS Form 3877 (CMR), postmarked August 17, 2015; (iii) an affidavit of Fred Ramundo, a supervisor in the Division's mail room since December 2013; (iv) an affidavit, dated September 13, 2017, of Deena Picard, a Data Processing Fiscal Systems Auditor 3, and acting director of the Division's Management Analysis and Project Services Bureau (MAPS); (v) an affidavit, dated September 12, 2017, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (vi) six Requests for Delivery Information/Return Receipt after Mailing (PS Form 3811-A); (vii) the USPS responses to each such request; and (viii) a copy of petitioner's electronically filed nonresident and part-year

income tax return for the year 2013, dated September 25, 2014, listing his mailing address as “No 8th Floor, B Strauss Assoc 307 5th Ave AP New York, NY 10016 6517” and listing a Dime Box, Texas, address as his permanent home address. The 2013 return was the last return filed with the Division by petitioner before the Notices were issued. Thus, the address used for petitioner on the Notices deviates from the address shown on petitioner’s last filed return prior to the issuance of the Notices by omitting the “No” from the suite number (“No 307 8th Floor”) and the “AP” after “5th Ave.”

7. The affidavit of Marc Sorotsky sets forth the general practice and procedure for certified mailings of notices of deficiency by the Division’s IFAB. Mr. Sorotsky notes in his affidavit that he is employed by the Division as a Tax Auditor 2 in that bureau and that he has worked for the Division since May 1988. The affidavit states that “[t]his affidavit is based on my knowledge of the [IFAB] mailing procedures for the certified mailings of Notice(s) of Deficiency, as conducted for the regular course of business, in August, 2015.” The affidavit is silent, however, about whether Mr. Sorotsky worked for that bureau at the time of the issuance of the Notices or, more generally, how his employment at the Division allowed him to come by the information provided in the affidavit.

8. The affidavit explains that electronically generated notices of deficiency and other statutory notices from the Division’s electronic Case and Resource Tracking System (CARTS) are predated with the anticipated date of mailing and each statutory notice is assigned a certified control number. The certified number for each notice appears on a separate one page “Mailing Cover Sheet”(form DTF-997) that is generated by CARTS for each statutory notice. The mailing cover sheet also bears a bar code, the taxpayer’s mailing address, and a departmental return

address on the front and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice. Each notice, with accompanying mailing cover sheet and appropriate enclosures, is a discrete unit within the batch of notices. The mailing cover sheet is the first sheet in the unit.

In this case, the Division’s CARTS system prepared the two Notices to be issued to petitioner, dated August 17, 2015, with copies of each to be sent to his representative, Mr. Strauss, each with the accompanying mailing cover sheet. The following table details the notice numbers, certified control numbers, and tax periods for the Notices:

Addressee	Notice No.	Certified Control No.	Tax Years Assessed
Leidel-Peter A.	L-043492747	7104 1002 9730 0549 4817	2009, 2010, 2011
Leidel-Peter A.	L-043492753	7104 1002 9730 0549 4824	2012, 2013
Barry M Strauss	L-043492747	7104 1002 9730 0549 4794	2009, 2010, 2011
Barry M Strauss	L-043492753	7104 1002 9730 0549 4800	2012, 2013

9. On occasion, a statutory document is “pulled” for manual review if the auditor discovers alternate or additional addresses, in which case a clerk in the Division’s Audit Division would prepare the CMR. A CMR is a document that lists taxpayers to whom statutory documents are to be sent by certified mail on a particular day and is discussed further below. A copy of the CMR is kept by the Audit Division in the regular course of business. In this case, the four notices described in Finding of Fact 8 were pulled for review from a batch of notices that were scheduled to be mailed on August 17, 2015 and sent to the IFAB for review and preparation of a CMR for the mailing of the notices.

10. After review, the IFAB determined there were two additional addresses for petitioner. A clerk made two copies of each of Notice numbers L-043492747 and L-043492753. According to Mr. Sorotsky's affidavit, the clerk then placed each of the four notice of deficiency/cover sheet batches described in Finding of Fact 8 into three-window envelopes where the Division's return address, the certified control numbers, and the taxpayer's name and address and/or the taxpayer's representative's name and address were revealed through the envelope window openings.

11. Mr. Sorotsky's affidavit explains the preparation of the mailings containing the Notices to be sent to the two additional addresses found for petitioner as follows:

“The clerk then printed labels bearing the name of the taxpayer and his additional addresses and used those labels to cover up the address on the original mailings. After addressing the mailing envelopes, the clerk filled out the green U.S. Postal Service Domestic Return Receipts (PS Form 3811) and then affixed the certified number stickers from the Certified Mail Receipts (PS Form 3800) to the U.S. Postal Service Domestic Return Receipts (7007 3020 0003 0358 5270, 7007 3020 0003 0358 5300, 7007 3020 0003 0358 5294 and 7007 3020 0003 0358 5287).”

12. The clerk then prepared a CMR. Each page of a CMR is a separate and individual CMR for the notice(s) listed on that page only and each page contains spaces to record the “Total Number of Pieces Listed by Sender,” the “Total Number of Pieces Received at Post Office,” and “Postmaster, Per (Name of Receiving Employee)” for the notice(s) listed on just that page. The CMR for the Notices consisted of one page. The location of the unit preparing the CMR appears in the upper right hand corner of the document. The clerk then typed on to the CMR the information concerning the certified mail articles to be mailed out using that CMR. In this case, the clerk listed the four pieces of certified mail described in Finding of Fact 8, as well as the mailing of each of the Notices to two additional addresses for petitioner, one being in Dime Box, Texas, and the other being in Pound Ridge, New York, for a total of eight certified articles of

mail. As prepared by the clerk, and attached to the Sorotsky affidavit as exhibit A, the CMR reflected the following information:

Certified Control No.	Address	Notice No.
7104 1002 9730 0549 4800	Barry M. Strauss, c/o Barry M Strauss Associates, 307 Fifth Ave 8th Fl., New York, NY 10016	L-043492753
7104 1002 9730 0549 4794	Barry M. Strauss, c/o Barry M Strauss Associates, 307 Fifth Ave 8th Fl., New York, NY 10016	L-043492747
7104 1002 9730 0549 4817	Leidel-Peter A., c/o Barry M Strauss Associates, 207 5th Ave., 8th Fl, New York, NY 10016-6517	L-043492747
7007 3020 0003 0358 5270	Peter Leidel, 1422 Private Road #1173, Dime Box, Texas 77853	L-043492747
7007 3020 0003 0358 5300	Peter Leidel, 71 Old Stone Hill Road, Pound Ridge, New York 10576	L-043492747
7104 1002 9730 0549 4824	Leidel-Peter A., c/o Barry M Strauss Associates, 207 5th Ave., 8th Fl, New York, NY 10016-6517	L-043492753
7007 3020 0003 0358 5294	Peter Leidel, 1422 Private Road #1173, Dime Box, Texas 77853	L-043492753
7007 3020 0003 0358 5287	Peter Leidel 71 Old Stone Hill Rd., Pound Ridge, New York 10576	L-043492753

Mr. Sorotsky claims that the use of “207 Fifth Avenue” instead of “307 Fifth Avenue” on the third and sixth entries above was a “typo” in the preparation of the CMR, but that the proper address of “307 Fifth Avenue” was on the actual notices corresponding to those entries, which address would have appeared through the window opening with regard to those two mailings.

13. The clerk preparing the CMR printed out two copies. One was wrapped around the envelopes containing the notices of deficiency to be sent to the USPS. The envelopes wrapped in the CMR were placed in a designated bin to be retrieved by a mail room employee. The other copy of the CMR was retained within the IFAB office. The postage and fee was applied to the

envelopes by a member of the Department's Mail Processing Center. The USPS added the postage amount and fees to the CMR, and wrote in the total number of pieces received at the post office and signed or initialed the CMR, affixed a U.S. postmark to the CMR, and then returned it to the Department's Mail Processing Center, which returns the CMR to his unit.

14. The affidavit of Deena Picard states that she has been in her current position of Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. She has been a Data Processing Fiscal Systems Auditor 3 since 2006, prior to which she worked in the Division's Information Systems Management Bureau. As a result of the positions she has held with the Division, she is familiar with CARTS and the Division's past and present procedures as they relate to statutory notices. She affirms that, after reviewing Mr. Sorotsky's affidavit and the exhibits attached thereto, the four articles of mail addressed to petitioner and his representative, Mr. Strauss, identified in Finding of Fact 8 were, in fact, pulled and sent to the Audit Division for review and preparation of the CMR.

15. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December 2013, and currently a Stores and Mail Operations Supervisor, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail containing statutory notices to branch offices of the USPS. Statutory notices that are ready for mailing to taxpayers are "received" by the Mail Processing Center in an area designated for "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. According to his affidavit, a member of his staff operates a machine that puts each statutory notice into an envelope, weighs and seals the envelope, and places "postage" and "fee" amounts thereon. The clerk then performs a review of the piece(s) of

certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Once the review of the CMR and envelopes is completed, a member of the Mail Processing Center staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York, area. A USPS employee will then affix a postmark and/or his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The Mail Processing Center has requested that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. The CMR is then picked up at the USPS the following day by a member of his staff, whereupon it is delivered to other departmental personnel for storage and retention.

16. In this particular instance, the postal employee affixed a postmark dated August 17, 2015, on the single-page CMR, filled in the number "8" as to the number of articles received at the post office, and initialed the page.

17. Mr. Ramundo's affidavit explains that the CMR retrieved from the USPS is the Department's record of receipt by the USPS for the pieces of certified mail listed thereon. Mr. Ramundo states that, based on his review of that CMR and the affidavits of Marc Sorotsky and Deena Picard, as well as his knowledge of the procedures of the Mail Processing Center, on August 17, 2015, an employee of the Mail Processing Center delivered to the USPS in Albany, New York, the following: two pieces of certified mail addressed to Leidel-Peter A., c/o Barry M. Strauss Associates, 307 5th Ave., 8th Fl., New York, NY 10016-6517; two pieces of certified mail addressed to Barry M. Strauss, c/o Barry M. Strauss Associates, 307 Fifth Ave., 8th Fl., New York, NY 10016; two pieces of certified mail addressed to Peter Leidel at a Dime Box,

Texas, address; and two pieces of mail addressed to Peter Leidel at a Pound Ridge, New York, address. According to Mr. Ramundo, the names of Peter Leidel and Barry Strauss and their addresses, as set forth on the statutory notices for the original four pulled notices described in Finding of Fact 8 would have been displayed in the windows of the envelopes, and the addresses on the additional four certified mail articles were typed on a label affixed to each envelope.²

18. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on six of the eight certified mailings described in Finding of Fact 12. More specifically, using PS form 3811-A, Ms. Corina requested delivery information with respect to the articles of mail described in Finding of Fact 12, except for the two certified articles mailed to the Pound Ridge, New York address. The requests to the USPS are attached to the Corina affidavit. The USPS responses to the requests, also attached to the Corina affidavit, indicate that the certified articles addressed to petitioner bearing the Notices (certified control numbers 7104 1002 9730 0549 4817 and 7104 1002 9730 0549 4824) and the certified articles addressed to Mr. Strauss bearing the Notices (certified control numbers 7104 1002 9730 0549 4800 and 7104 1002 9730 0549 4794) were delivered on August 19, 2015, in New York, New York, with the scanned signature line showing the "Printed Name" of "Arye Ringel" and a scanned address line showing "307 5 A (8 F)" in handwriting.

19. The request for conciliation petitioner filed with BCMS shows an address for Mr. Strauss that is identical to the New York, New York, address used to send the Notices to him as shown in Finding of Fact 1, except that "of" is substituted for the "c/o" shown on the CMR.

²The Ramundo affidavit refers to a CMR "attached to the affidavit of James Connors as Exhibit A." The Division has not submitted any affidavit of James Connors in this matter. Presumably, the Ramundo affidavit is referring to Mr. Sorotsky's affidavit, exhibit A of which is a CMR.

20. In explaining petitioner's protest rights, both Notices contained the statements that **“[y]ou must file the Request for Conciliation Conference or a Petition for A Tax Appeals Hearing by 11/15/15”** and that **“[i]f we do not receive a response to this notice by 11/15/15: This notice will become an assessment subject to collection action”** (bold in original).

21. In his affidavit opposing the Division's motion, Mr. Kaplan states that petitioner and his representative, Mr. Strauss, received the Notices on August 17, 2015. He claims that he was told by the Division's auditor that the Notices would be withdrawn upon the representative supplying further information, and that “the time frame to answer would be extended.” Elsewhere, Mr. Kaplan describes the course of events as after the receipt of the Notices as follows:

“Mr. Strauss was assured by auditor that they should continue with the audit and if necessary the notices would be withdrawn. Mr. Strauss and the Petitioner continued to assemble documents in reliance on what they had been led to believe by the auditor.”

Attached to the Kaplan affidavit is a letter sent by Mr. Strauss to the auditor, dated June 23, 2016, supplying further information relating to petitioner's residency in New York City for the years at issue. Also attached is a letter from the Division's auditor, James Connors, dated October 19, 2016, to Mr. Strauss. That letter references the Notices and states that a “review has been conducted” of the documents and information supplied by letters from Mr. Strauss dated June 23, 2016 and September 29, 2016, which were “in response to [the Division's] letter dated May 16, 2016.” The October 19, 2016 letter requests that Mr. Strauss supply information still outstanding from IDRs issued “[i]n regards to the assessments listed above,” which are the notices of deficiency at issue herein.

CONCLUSIONS OF LAW

A. The Division brought 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). Because the petition in this matter was timely filed, 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 conciliation conference.

B. 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]).

C. Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. The standards applicable to summary judgment motions are clear. “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 judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [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 . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] citing *Zuckerman*).

D. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a notice of deficiency (Tax Law §§ 681 [b]; 170 [3-a] [a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. 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 (*id.*).

F. 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).

The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Balan*, Tax Appeals Tribunal, October 27, 2016; *Matter of Western Aries Constr. LLC*, Tax Appeals Tribunal, March 3, 2011). When a notice of deficiency 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, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v State Tax Commission*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

G. In this case the Division failed to establish the IFAB's standard procedure for mailing out notices of deficiency. The primary problem is that the Division did not show that Mr. Sorotsky, who explained a significant part of that procedure, had personal knowledge thereof because it failed to show the basis for Mr. Sorotsky's knowledge of the procedure (*see* Finding of Fact 7). Because the Division failed to show how Mr. Sorotsky's employment with the Division caused him to come by the knowledge of the IFAB's mailing procedure, Mr. Sorotsky's affidavit is not competent evidence on that issue (*see Matter of Peter Madoff*, Tax Appeals Tribunal, April 19, 2012 [in a timeliness case, Tribunal found inadequate proof of mailing where the affidavit of an employee in the Division's Mail Processing Center failed to note whether the affiant worked in that unit at the time the statutory notice was issued or give some other basis for his knowledge of that procedure]).

H. Moreover, there are flaws in the Division's explanation of the mailing procedure used where, as here, the IFAB prepares the statutory notices for mailing. First, the chain of possession

of the statutory notices is not clear, as Mr. Sorotsky's affidavit states that a mail room employee retrieves the completed CMR wrapped around the statutory notices, whereas Mr. Ramundo's affidavit implies that the CMR and notices are brought to the mail room (*see* Findings of Fact 13 and 15). Furthermore, the Sorotsky and Ramundo affidavits are inconsistent as to which unit puts the statutory notices into envelopes. The Sorotsky affidavit indicates that the clerk in the IFAB office who prepared the CMR and the copies of the Notices to be mailed to alternative addresses for petitioner also put the Notices into the envelopes (*see* Findings of Fact 10 and 13), whereas Mr. Ramundo's affidavit asserts that a member of his staff operates a machine that puts each statutory notice into an envelope (*see* Finding of Fact 15).

I. Another aspect of the Division's burden of showing that it properly mailed the Notices is that the Notices must be addressed to petitioner's "last known address," which is defined as "the address given in the last return filed by [the taxpayer], unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address" (Tax Law §§ 681 [a], 691 [b]). Here, petitioner's last filed return listed the address of his representative, Mr. Strauss, as the mailing address. However, the address used on the Notices and mailing cover sheets differs from that address in two ways, as it omits the "AP" after the "307 Fifth Avenue" street address and "NO" before the floor designation on that address (*see* Finding of Fact 6). Petitioner has not asserted that the address used on the Notices was incorrect and Mr. Strauss omitted both the "AP" and the "No" in giving his address on the request for conciliation. Accordingly, it is determined that those deviations are inconsequential and that the address used by the Division to mail those determinations to petitioner was petitioner's last known address (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

J. Where the Division fails to establish the exact date of mailing of a statutory notice, the 90-day period for filing a petition or request for conciliation conference is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Thus, here, the period within which to challenge the Notices commenced to run on the date of petitioner's actual receipt of the Notices (*see Matter of Agosto v Tax Commn. of the State of N. Y.*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Hyatt Equities, LLC*). Petitioner's representative's affidavit states that petitioner and Mr. Strauss received the Notices on August 17, 2015. The form 3811-A proof submitted through the Corina affidavit shows that the certified letters containing the Notices addressed to petitioner and Mr. Strauss, respectively, were received by the offices of Mr. Strauss on August 19, 2015 (*see* Finding of Fact 18). Even if the later of these dates is used, petitioner's request for conciliation, which was signed by Mr. Strauss on September 28, 2016, and in-dated by BCMS on October 3, 2016, would be untimely as filed more than 90 days after petitioner's receipt of the notice of deficiency (Tax Law §§ 681 [b]; 170 [3-a] [a]).

K. Petitioner argues that it would amount to "manifest injustice" for the Division to be granted summary determination here because, after issuance of the Notices, the Division's auditor led petitioner and his representative to believe that the Notices would be withdrawn when petitioner supplied further information. Therefore, petitioner argues, the Division should be estopped from enforcing the Notices.

The evidence does not support petitioner's argument that granting summary determination to the Division here would amount to a "manifest injustice." It is clear that, after

the Notices were issued, the parties continued to work on the audit, presumably with the idea that the amount determined to be due could be modified based on additional satisfactory documentation being supplied by petitioner. The evidence does not establish, however, that the auditor ever advised petitioner to not preserve his protest rights by responding to the issuance of the Notices by filing a request for conciliation with BCMS or a petition with the Division of Tax Appeals. Nor does it establish that the auditor promised that the additional audit work would necessarily result in the modification of the Notices (*see* Finding of Fact 21).

In any event, as the Tribunal has recently reaffirmed, ““deadlines for filing petitions are strictly enforced”” and ““extenuating circumstances do not provide a basis to excuse the late filing of a petition”” (*Matter of Tuohy*, Tax Appeals Tribunal, November 22, 2017, quoting *Matter of LaManna*, Tax Appeals Tribunal, March 13, 2003, and *Matter of Leibowitz*, Tax Appeals Tribunal, August 13, 2015). In *Matter of Tuohy*, the petitioner made the same argument that petitioner is making here; i.e., that his late-filed petition should not be dismissed because of his continued correspondence with the Division after the issuance of the notice of deficiency at issue. The Tribunal rejected that argument, noting that the notice of deficiency unambiguously advised petitioner that he needed to either file a request for conciliation with BCMS or a petition with the Division of Tax Appeals in a timely manner in order to preserve his hearing rights. Here, the Notices are also unambiguous that, unless petitioner timely filed a request for conciliation with BCMS or a petition with the Division of Tax Appeals, the Notices would become final and be subject to collection (*see* Finding of Fact 20). Thus, petitioner’s estoppel argument is rejected.

L. The Division of Taxation's motion for summary determination is granted, and the petition of Peter Leidel is denied, and the notices of deficiency issued August 17, 2015 are sustained.

DATED: Albany, New York
February 8, 2018

/s/ James Connolly
ADMINISTRATIVE LAW JUDGE