STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PATRICIA MARRERO	:	DETERMINATION DTA NO. 828100
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2010 through 2012.	:	

Petitioner, Patricia Marrero, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the years 2010 through 2012.

A videoconferencing hearing via CISCO Webex was held before Barbara J. Russo, Administrative Law Judge, on February 4, 2021, with all briefs to be submitted by October 28, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared by Hodgson Russ LLP (Ariele R. Doolittle, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Ellen Krejci, Esq., of counsel).

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a notice of deficiency for the years 2010, 2011 and 2012.

FINDINGS OF FACT

1. On February 21, 2017, petitioner, Patricia Marrero, by her former representative Reinaldo Becerra, filed a petition with the Division of Tax Appeals challenging a notice of deficiency, assessment number L-045564631, dated October 20, 2016 (notice), issued by the Division of Taxation (Division) for New York State and City personal income tax for the years 2010, 2011 and 2012. The petition lists petitioner's address as "321 Monroe St. Hoboken NJ

07030." There are two power of attorney forms attached to the petition. The first is dated June 26, 2012, lists the representative's name as "R Becerra" with an address of "302 7TH Street, Hoboken, NJ 07030," and lists petitioner's address as 321 Monroe Street, Hoboken, NJ 07030. This form indicates that it is for personal income tax for the year 2008. The second power of attorney form attached to the petition is dated January 27, 2017, lists the representative's name as "Reinaldo Becerra" at the same address listed on the previous form, lists petitioner's address at a location in Delray Beach, Florida, and indicates that it is for "all tax matters" for the years 2010 through 2016.

2. On March 30, 2017, the Division of Tax Appeals issued a notice of intent to dismiss petition (notice of intent) to petitioner. The parties timely filed responses to the notice of intent.

3. In response to the issuance of the notice of intent, the Division submitted, among other documents, (i) an affidavit of Ellen K. Roach, a senior attorney employed in the Office of Counsel of the Division, dated June 13, 2017; (ii) an affidavit, dated May 10, 2017, of Mary Ellen Nagengast, who was a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS) at the time of the affidavit; (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked October 20, 2016; (iv) an affidavit, dated May 16, 2017, of Melissa Kate Koslow, who was a supervisor in the Division's mail room at the time of the affidavit; (v) a copy of a notice of deficiency, number L-045564631, dated October 20, 2016, and cover sheet addressed to petitioner at 321 Monroe Street, Apt 3, Hoboken, New Jersey 07030; (vi) a copy of a notice of deficiency, number L-045564631, dated October 20, 2016, and cover sheet addressed to R Becerra, as petitioner's then representative, at 302 7TH Street, Hoboken, New Jersey 07030; and (vii) a copy of petitioner's e-filed resident income tax return for the year 2015, dated April 13, 2016 and filed on April 16, 2016. Petitioner's 2015 return lists the same Hoboken, New Jersey, address for petitioner as

that listed on the subject notice. Petitioner's 2015 return also lists petitioner's then representative as Ray Becerra at the same address listed on the copy of the subject notice sent to the representative. Ms. Roach avers that petitioner's 2015 return was the last return filed with the Division by petitioner before said notice was issued and that the address listed thereon was petitioner's last known address.[1]

4. The affidavit of Mary Ellen Nagengast, states that at the time it was signed, she had been a Tax Audit Administrator 1 and Director of the Division's MAPS since October 2005. The affidavit sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast was 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. The affidavit sets forth the following: Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "10/20/16." In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the United State Postal Service (USPS) and remain so when returned to the Division. 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.

5. According to the Nagengast affidavit, all notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing

[1] The Division introduced the documents it had submitted in response to the notice of intent into the hearing record in this matter.

cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address." Additionally, according to the Nagengast affidavit, the remaining headings list appropriate postage and fees. A review of the subject CMR reveals that the headings for postage and fees appear on the last page, indicating postage and fees for the total pieces and amounts of certified mail.

6. The CMR attached to the Nagengast affidavit consists of 22 pages and lists 240 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 22, which contains 9 entries. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated October 20, 2016 to each page of the CMR, wrote and circled the number "240" on page 22 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 22. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 240.

7. Page 1 of the CMR attached to the Nagengast affidavit indicates that a notice of deficiency with certified control number 7104 1002 9730 0036 3491 and reference number L-045564631 was mailed to "MARRERO-PATRICIA" at the Hoboken, New Jersey, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit "B," bears this certified control number and the name "MARRERO-PATRICIA" and address as noted.

8. Additionally, page 1 of the CMR attached to the Nagengast affidavit indicates that a notice of deficiency with certified control number 7104 1002 9730 0036 3507 and reference number L-045564631 was mailed to "R BECERRA" at 302 7TH Street, Hoboken, New Jersey. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit "B," bears this certified control number and the name ""R BECERRA" and address as noted.

9. The affidavit of Melissa Kate Koslow describes the Division's mail room's general operations and procedures. The mailroom receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Koslow confirms that a mailing cover sheet precedes each notice. According to Ms. Koslow's affidavit, a staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR.

10. According to Ms. Koslow's affidavit, the CMR was delivered to the USPS by the Division's mail room staff on August 22, 2016.

11. Ms. Koslow's affidavit further states that based on her review of the Nagengast affidavit and exhibits attached thereto, and her personal knowledge of the procedures of the mail room, she can attest that on August 22, 2016, an employee of the mail room delivered one piece

of certified mail addressed to "MARRERO-PATRICIA, 321 MOROE STREET APT. 3, HOBOKEN, NJ 07030" and one piece of certified mail addressed to "R BECERRA, 302 7TH STREET, HOBOKEN, NJ 07030" to the USPS in Albany, New York, in sealed postpaid windowed envelopes for delivery by certified mail.

12. On October 12, 2017, the undersigned Administrative Law Judge issued an order rescinding the notice of intent because of an inconsistency in the Division's proof of mailing of the notice. Specifically, the affidavit of Ms. Koslow asserted that the notice was mailed on August 22, 2016. According to the affidavit, that assertion was expressly based on a review of the CMR and the affidavit of Ms. Nagengast regarding the Division's general practice and procedure for processing statutory notices, each of which indicated an October 20, 2016 mailing date. The October 12, 2017 order also directed the Division to file its answer within 75 days.

13. The Division filed an answer on December 6, 2017.

14. On December 15, 2017, petitioner, through current counsel, filed an amended petition and served the Division with a copy of the same by registered mail (return receipt requested).

15. On March 25, 2018, the Division filed an amended answer.

16. The Division brought a motion dated March 26, 2018, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9 (a) and 3000.9 (b).

17. In support of its motion and to show proof of proper mailing of the October 20, 2016 notice, the Division provided the following with its motion papers, among other documents, (i) an affidavit of Ellen K. Roach, dated March 26, 2018; (ii) an affidavit, dated March 9, 2018, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a CMR postmarked October 20, 2016; (iv) an affidavit, dated March 12, 2018, of Fred Ramundo, a supervisor in the

Division's mail room; (v) a copy of a notice of deficiency, number L-045564631, dated October 20, 2016, and cover sheet addressed to petitioner at 321 Monroe Street, Apt 3, Hoboken, New Jersey 07030; (vi) a copy of a notice of deficiency, number L-045564631, dated October 20, 2016, and cover sheet addressed to R Becerra, as petitioner's then-representative, at 302 7TH Street, Hoboken, New Jersey 07030; and (vii) a copy of petitioner's e-filed resident income tax return for the year 2015, dated April 13, 2016 and filed on April 16, 2016. Petitioner's 2015 return lists the same Hoboken, New Jersey, address for petitioner as that listed on the subject notice. Petitioner's 2015 return also lists petitioner's then representative as Ray Becerra at the same address listed on the copy of the subject notice sent to the representative. Ms. Roach avers that petitioner's 2015 return was the last return filed with the Division by petitioner before said notice was issued and that the address listed thereon was petitioner's last known address.[2]

18. The affidavit of Deena Picard, who has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and has been Acting Director of MAPS since May 2017, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs and is familiar with the Division's CARTS and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "10/20/16." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together

[2] The documents presented by the Division in support of its motion were also introduced into hearing record by the Division.

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.

19. According to the Picard affidavit, all notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address." Additionally, according to the Picard affidavit, the last page of the CMR lists the total number of pieces of mail, as well as the total amount of postage and fees.

20. The CMR attached to the Picard affidavit consists of 22 pages and lists 240 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 22, which contains 9 entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated October 20, 2016 to each page of the CMR, wrote and circled the number "240" on page 22 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 22. Ms. Picard adds that the total number of statutory notices mailed pursuant to the CMR was 240.

21. Page 1 of the CMR attached to the Picard affidavit indicates that a notice of deficiency with certified control number 7104 1002 9730 0036 3491 and reference number L-045564631 was mailed to "MARRERO-PATRICIA" at the Hoboken, New Jersey, address listed

on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and the name "MARRERO-PATRICIA" and address as noted.

22. Additionally, page 1 of the CMR attached to the Picard affidavit indicates that a notice of deficiency with certified control number 7104 1002 9730 0036 3507 and reference number L-045564631 was mailed to "R BECERRA" at 302 7TH Street, Hoboken, New Jersey. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and the name "R BECERRA" and address as noted.

23. The affidavit of Fred Ramundo, a supervisor in the mail room since 2013 and currently a Stores and Mail Operations Supervisor, describes the Division's mail room's general operations and procedures. Mr. Ramundo attests that he is familiar with the Division's present and past office procedures as related to statutory notices, and that these procedures have remained essentially unchanged since approximately 1992. The mailroom receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. According to the Ramundo affidavit, a staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. The CMR has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." 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. The mail room

further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. Each page of the CMR in exhibit "A" of the Picard affidavit contains a USPS postmark dated October 20, 2016. In addition to the date, the postmark stamp reads "Colonie Center, NY" and "USPS 12205." On page 22, corresponding to "Total Pieces and Amounts," is the preprinted number 240 and next to "Total Pieces Received At Post Office" is the handwritten and circled entry "240." There is a set of initials or a signature on page 22.

24. Mr. Ramundo further states that based on his review of the Picard affidavit and exhibits attached thereto, and his personal knowledge of the procedures of the mail room, he can attest that on October 20, 2016, an employee of the mail room delivered one piece of certified mail addressed to "MARRERO-PATRICIA, 321 MOROE STREET APT. 3, HOBOKEN, NJ 07030" and one piece of certified mail addressed to "R BECERRA, 302 7TH STREET, HOBOKEN, NJ 07030" to the USPS in Albany, New York, in sealed postpaid windowed envelopes for delivery by certified mail.

25. Petitioner filed a response to the Division's motion and filed a cross-motion for summary determination in her favor pursuant to 20 NYCRR 3000.5 and 3000.9.[3] In support of her response and cross-motion, petitioner submitted, among other items, a printout purporting to show USPS tracking information for the certified control number associated with the October 20, 2016 notice (tracking number 71041002973000363491). The printout indicates, in part, that an item arrived at a USPS facility in Albany, New York 12288 on October 20, 2016; arrived at USPS facility in Hartford, CT 06101 on October 21, 2016; departed USPS facility in Hartford CT 06101 on October 22, 2016; arrived at USPS facility in West Palm Beach, FL 33416 on

[3] Petitioner introduced into the hearing record the affirmation of Ariele R. Doolittle, Esq., dated May 1, 2018, in opposition to the Division's motion for dismissal or summary determination and in support of petitioner's cross-motion for summary determination, and the exhibits attached thereto.

October 23, 2016; on October 24, 2016, "Notice Left (No Authorized Recipient Available)" at an address in Delray Beach, Florida 33446; on November 22, 2016, the item was "Unclaimed" at an address in Delray Beach, Florida 33446, and "Being Returned to Sender;" and that "Your item has been delivered to the original sender at 2:55 pm on December 1, 2016 in Brooklyn, NY 11201." Petitioner did not present an affidavit or testimony regarding the document from a USPS representative.

26. In support of her response and cross-motion, and presented as an exhibit at the hearing, petitioner also submitted, among other items, a copy of a Freedom of Information Law (FOIL) request made by her present representative to the Division requesting records relating to petitioner's audit, and portions of the Division's response. Included with those documents was a copy of a Tax Field Audit Record (audit log) and Report of Audit indicating that the Division commenced a personal income tax audit of petitioner for the years 2010, 2011 and 2012 (the audit period).

27. The audit log indicates, in part, the following: On October 1, 2013, the Division's auditor, Jenkay Chung, sent an audit appointment letter to petitioner. Petitioner responded to the Division's letter on November 4, 2013 and requested an extension of time. On November 12, 2013, the Division received a power of attorney form, federal returns and W-2 forms from petitioner's then-representative, Reinaldo Becerra.[4] On December 2, 2013, the auditor called Mr. Becerra, left a message with instructions to correct the power of attorney form and requested that he return the call. Also on December 2, 2013, the auditor mailed a waiver to petitioner by certified mail. On December 12, 2013, the auditor received the confirmation on the delivery of

[4] Included with the Division's exhibits is a copy of a power of attorney form signed by petitioner and Mr. Becerra on June 26, 2012, authorizing Mr. Becerra to represent petitioner for personal income tax for the year 2008. The form lists the representative's name and address as "R Becerra, 302 7TH Street, Hoboken, NJ 07030" and lists petitioner's address as 321 Monroe Street, Hoboken, NJ 07030. It is unclear from the record whether this was the initial power of attorney form sent to the Division

the certified mail sent to petitioner. On December 13, 2013, the auditor called Mr. Becerra, left a message requesting he return the call, and requested a corrected power of attorney form. Also on December 13, 2013, the auditor called petitioner and left a message requesting that she call back, and mailed instructions to her regarding correcting the power of attorney form. On December 30, 2013, the auditor again called petitioner and left another message requesting that she return the call. On January 6, 2014, the auditor called and spoke with Mr. Becerra and again requested a corrected power of attorney form. On January 13, 2014, the auditor mailed a second information document request (IDR) to petitioner by certified mail. On January 17, 2014, the auditor again called Mr. Becerra and requested a corrected power of attorney form. The Division received the corrected power of attorney form that same day, authorizing Mr. Becerra to represent petitioner for the audit period.[5] Over the course of the audit, between January 21, 2014 and March 30, 2016, the Division's auditor and Mr. Becerra exchanged communications and correspondence regarding the audit. During that time, Mr. Becerra did not inform the Division that petitioner had a new address.

The audit log further indicates that on May 2, 2016, May 20, 2016, May 23, 2016, May 24, 2016, and June 7, 2016, the Division's auditor attempted to call Mr. Becerra and left telephone messages for him to call back. Mr. Becerra did not return the calls. On June 8, 2016, the auditor called and reached Mr. Becerra. However, Mr. Becerra's telephone reception was bad and he told the auditor he would call back that Friday, June 10, 2016. Mr. Becerra did not call the auditor back as stated, and on June 10, 2016 the auditor called him and left a voice mail messaged requesting that he call back. On June 27, 2017, July 13, 2016, July 25, 2016, August 1, 2016, August 2, 2016, August 3, 2016, August 31, 2016, September 19, 2016, and September 20, 2016, the auditor called Mr. Becerra but was unable to reach him and left messages

[5] The corrected power of attorney form sent to the Division was not introduced into the record.

requesting that he return the calls. Mr. Becerra did not return the auditor's calls.

The audit log also indicates that, during the course of the audit, some correspondences mailed by the Division directly to petitioner were received by her, while others were returned. Specifically, as noted above, on November 4, 2013, petitioner responded to audit appointment letter, dated October 1, 2013, that was mailed to her address, and on December 12, 2013, the Division received confirmation of delivery of the certified mail sent to petitioner on December 2, 2013. The audit log contains the following entry for February 20, 2014:

> "The auditor and supervisor held a phone conference for the POA [Mr. Becerra]. The POA explained that the t/p worked in NYC and held an apartment in NYC. The POA said that he disagreed with the adjustment received and he would appeal in court or at the BCMS. Prepared a case summary for this disagreed case and emailed the case summary to the supervisor. Researched on the tax laws and filing instructions regarding statutory residency. The tax laws and filing instructions on statutory residency would be sent to the POA. The letter mailed to the t/p on 12/13/2013 was returned as it was unclaimed. The section head, supervisor, and auditor held a phone conference with the POA. Explained to the POA about the waiver and the tax law on statutory residency. The POA said that he did not know the tax law on statutory residency before listening to the explanation on statutory residency. He explained that he would talked [sic] to his client on Monday and get back to the auditor on Tuesday. For those days he claimed that the taxpayer were [sic] not in NY, he had to provide supporting documents."

An audit log entry dated March 3, 2014 indicates that "The certified mail sent to the t/p on 1/13/14 was returned as it was not claimed." An audit log entry dated July 6, 2016 states, "By mail received the returned letter, which contained a yellow sticker explaining, 'Return to sender not deliverable as addressed unable to forward,' sent on 5/25/2016 by certified mail." An audit log entry dated August 22, 2016 states, "By mail received the returned certified mail sent out on 8/15/2016 as the mail was unable to forward." An audit log entry dated August 29, 2016 states, in part, "[m]ailed out the adjustment with regular mail after the supervisor signed it. The original adjustment was sent to the POA Becerra and a copy was sent to the t/p. The requested response is 9/26/16." The audit log indicates that on August 31, 2016, the auditor called both the landline telephone and mobile telephone of Mr. Becerra and left a message requesting that he

return the call as soon as he receives the message. On September 19, 2016 the auditor called Mr. Becerra and was informed by his receptionist that he would be in the office the following day. On September 20, 2016 the auditor called Mr. Becerra and was informed by the receptionist that "he was not available at the moment" and would call back in about five minutes. Mr. Becerra did not call the auditor back.

28. In opposition to the Division's motion and in support of her cross-motion, and during the hearing in this matter, petitioner presented into the record copies of 21 letters sent by the Division to Mr. Becerra. A letter dated January 22, 2014 is addressed to Mr. Reinaldo Becerra, 302 7th Street, Hoboken, NJ 07030. The other letters in the record, dated February 4, 20, and 27, 2014, March 25, 2014, August 29, 2014, November 26, 2014, December 31, 2014, June 16, 2015, July 22, 2015, September 21, 2015, October 22, 2015, December 1, 2015, January 13, 2016, February 4, 2016, March 22 and 25, 2016, May 25, 2016, July 13, 2016, August 9, 2016, and August 29, 2016 are addressed to Mr. Reinaldo Becerra, Becerra & Associates, P.A., 302 7th Street, Hoboken, NJ 07030. The letter dated May 25, 2016 states, in part:

> "On these days 5/2/2016, 5/20/2016, 5/23/2016, 5/25/2016, you were contacted by phone. However, you were not available to answer the phone. Voicemails requesting you to return my calls were left to you.
>
> As of today, no return call has been received from you.
>
> Please response [sic] by 6/15/2016. If there is no reply from you by the mentioned date, the final statement of audit change, based on available records, will be issued. The case will be closed as disagreed."

The letter dated July 13, 2016 states, in part:

> "On these days 5/2/2016, 5/20/2016, 5/23/2016, 5/25/2016, 6/7/2016, 6/27/2016 and 7/13/2016, you were contacted by phone. However, you were not available to answer the phone. Voicemails requesting you to return my calls were left to you.
>
> As of today, no return call has been received from you.
>
> Please response [sic] by 7/27/2016. If there is no reply from you by the mentioned date, the final statement of audit change, based on available records, will be issued. The case

will be closed as disagreed."

The letter dated August 9, 2016 states, in part:

> "On these days 5/2/2016, 5/20/2016, 5/23/2016, 5/25/2016, 6/7/2016, 6/27/2016, 7/13/2016, 7/25/2016, 8/1/2016, 8/2/2016, and 8/3/2016, you were contacted by phone. However, you were not available to answer the phone. Voicemails requesting you to return my calls were left to you.
>
> As of today, no return call has been received from you.
>
> Please response [sic] by 8/19/2016. If there is no reply from you by the mentioned date, the final statement of audit change, based on available records, will be issued. The case will be closed as disagreed."

29. In opposition to the Division's motion and in support of her cross-motion, and during the hearing in this matter petitioner introduced into the record an affidavit signed by her, dated July 17, 2017, in which she states that, "I have not received a copy of the Notice of Deficiency from the 2010-2012 Audit by certified or registered mail."

30. The notice issued to petitioner on October 20, 2016 was returned to the Division as "unclaimed."

31. The notice was addressed to petitioner at 321 Monroe Street, Apt 3, Hoboken, NJ 07030. Petitioner stated in her affidavit that she sold the Hoboken apartment on or about May 2, 2016. However, the petition filed in this matter, signed by petitioner on February 23, 2017, lists petitioner's address as "321 Monroe St., Hoboken, NJ 07030."

32. On August 30, 2018, Administrative Law Judge Russo issued a determination that found that the Division's motion to dismiss, as opposed to its motion for summary determination, was the proper procedure, granted the Division's motion to dismiss, denied petitioner's cross-motion, and denied the petition.

33. Petitioner filed a timely exception with the Tax Appeals Tribunal.

34. On May 21, 2020, the Tax Appeals Tribunal issued a decision which partly granted petitioner's exception by reversing the administrative law judge's determination and remanding

the matter "for further proceedings on the issue of the timeliness of the petition, and if determined to be appropriate, a determination on the merits" (***Matter of Marrero***, Tax Appeals Tribunal, May 21, 2020).

35. The Tribunal's decision focused on just one issue raised in petitioner's exception, namely that the Division has not offered any evidence to directly explain the references to August 22, 2016 in the Koslow affidavit and concluded that reversal was required on that basis alone. The Tribunal did not address the other arguments raised in petitioner's exception.

36. The hearing on remand was held on February 4, 2021. The hearing was limited strictly to the timeliness issue.

37. During the hearing, the Division introduced into the record, among other items, the following:

a) its response to the issuance of the notice of intent to dismiss petition, including, in part, the affidavit of Ms. Roach, dated June 13, 2017; the affidavit of Ms. Nagengast, dated May 10, 2017; the CMR postmarked October 20, 2016; the affidavit of Ms. Koslow, dated May 16, 2017; a copy of the notice, dated October 20, 2016, and cover sheet addressed to petitioner at 321 Monroe Street, Apt 3, Hoboken, New Jersey 07030; a copy of the notice, dated October 20, 2016, and cover sheet addressed to R Becerra, as petitioner's then representative, at 302 7TH Street, Hoboken, New Jersey 07030; and a copy of petitioner's e-filed resident income tax return for the year 2015 (***see*** findings of fact 3 through 11).

b) The Division's documents submitted in support of its motion for dismissal of the petition or for summary determination, including, among other items, the affidavit of Ms. Roach, dated March 26, 2018, the affidavit of Ms. Picard, dated March 9, 2018, the affidavit of Mr. Ramundo, dated March 12, 2018, the CMR, copies of the subject notice and cover sheets addressed to petitioner and Mr. Becerra, and petitioner's 2015 return (***see*** finding of facts 16

through 24).

c) An affidavit of Ms. Roach, dated June 7, 2018, originally submitted in opposition to petitioner's cross-motion. Attached to the affidavit, among other items, are copies of petitioner's nonresident and part-year resident income tax returns for 2010, 2011, and 2012, each listing the preparer's name and firm's name as "R Becerra" at an address of 302 7TH Street, Hoboken, NJ 07030.

38. The affidavits submitted by the Division as evidence were all notarized by Heidi Corina.

39. The first page of each of the affidavits submitted by the Division as evidence bears, in part, the caption of this case, the state and county where the affidavits were taken (New York and Albany, respectively), the affiant's name and the clause "being duly sworn deposes and says." At the end of each affidavit, below the affiant's signature is the printed legend "sworn to before me this [date] day of [month, year]" and the signature and stamp of the notary public.

40. The affidavits do not contain an explicit statement attesting to the truth of the contents under the penalty of perjury.

41. During the hearing, petitioner introduced into the record her documents previously submitted in opposition to the Division's motion for dismissal or summary determination and in support of her cross-motion, including the affirmation of Ms. Doolittle, dated May 1, 2018, and exhibits attached thereto, and the affidavit of petitioner, dated July 17, 2017, and exhibits attached thereto (***see*** findings of fact 25 through 29).

42. During the hearing the Division called Heidi Corina as a witness. Petitioner called Melissa Kate Koslow and Mary Ellen Nagengast as witnesses.

43. Ms. Corina testified that she is currently a Legal Assistant 2 with the Division's Office of Counsel and has worked as a legal assistant there for approximately 21 years. She has

been a notary for approximately 20 years and has been notarizing documents as part of her regular duties as a legal assistant in the Office of Counsel for that time period. Ms. Corina testified that she generally notarizes affidavits for motions and notices of intent.

44. Ms. Corina described her general responsibilities as a legal assistant as drafting responses to notices of intent to dismiss petitions for timeliness and drafting motion papers for timeliness cases, including affidavits for mailing and attorney affidavits, and also assembling the exhibits such as the CMR and notices. Ms. Corina drafted the affidavits in this case, except for the affidavit of Ms. Roach dated June 7, 2018. Ms. Corina testified that when preparing motion papers and affidavits, she uses previously drafted ones as a template. She uses the original CMR, which she redacts, and the notice of deficiency or determination that pertains to the matter when drafting affidavits. Ms. Corina further testified that it is part of her job duties when she requests CMRs to review them and determine whether they contain postmarks on each page, a signature or initials of a postal clerk on the last page, and whether the total number of pieces received at the post office has been written or circled.

45. Ms. Corina testified that she drafted the Nagengast affidavit and further testified regarding the CMR dated October 20, 2016, attached to that affidavit. Ms. Corina testified that the CMR includes the notices that were mailed to petitioner and her representative at the time, Mr. Becerra. She testified that on the left column of the CMR are the certified numbers that would be on the first page or the cover sheet of the notice that was mailed to petitioner and her representative. In the second column of the CMR, Ms. Corina explained that "reference number" is the assessment number. Ms. Corina further testified that the October 20, 2016 CMR lists all the notices that were sent out on that date, but information not related to this matter has been redacted. She testified that the CMR contains a postmark and initials from the postal service, and that each page of the CMR contains a USPS postmark. She further testified that a

postal clerk initialed the last page of the CMR and indicated that total number of pieces received at the post office by writing and circling the number on the last page of the CMR. Ms. Corina identified the copy of the notice of deficiency mailed to petitioner, dated October 20, 2016, that was attached to the Nagengast affidavit and testified that the same certified mail number and assessment number on the notice appear on the first page of the CMR. Ms. Corina also identified the copy of the notice of deficiency, dated October 20, 2016, that was mailed to petitioner's then-representative, and testified that the same certified mail number and assessment number that appear on that notice also appear on the first page of the CMR.

46. Ms. Corina testified that she used another affidavit that she had previously drafted as a template for drafting the Nagengast affidavit and used the original CMR and copy of the notice of deficiency in this matter. Ms. Corina further testified, in part, regarding the drafting of affidavits as follows:

"Q: [H]ow do you decide which Division personnel to draft the affidavits for?

A: Well, at the time, Mary Ellen Nagengast was our designated person.

* * *

Q: After you drafted the affidavit, what would you do with it?

A: Once I drafted the affidavit, Mary Ellen puts the exhibits together. And then I would draft Katie Koslow's or Melissa Kate Koslow's affidavit, I would put them together and then bring them to Mary Ellen for review.

Q: Thank you. And then once Mary Ellen reviews them, what happens?

A: Then I would meet with her, I'd notarize her signature, and then I would take them and I would either drop them off to Katie - - I don't recall at the time. I believe I may have dropped them off because they were in the same building, or if I had them in my possession, I would let Katie know I had them for review, and she could come review them.

Q: After Katie had reviewed them, then what would you do?

A: After she reviewed them, then I would notarize her signature."

47. Ms. Corina drafted the Koslow affidavit after the Nagengast affidavit. She testified that she referred to the Nagengast affidavit and the CMR and notice of deficiency attached thereto when drafting the Koslow affidavit. Ms. Corina further testified that she made a mistake in her drafting of the Koslow affidavit when she put the date of August 22, 2016 in the paragraphs of the affidavit regarding the date the certified mail was delivered to the USPS office. She testified that there was nothing in the records or the Nagengast affidavit that referred to August 22, 2016. Ms. Corina explained that she included the mistaken date in the Koslow affidavit because she used a template in drafting the affidavit and never changed the date in the template.

48. Ms. Corina does not have a set script that she uses when notarizing a signature on an affidavit. She testified that before signing affidavits, the affiants review the documents and exhibits. She asks the affiants "if everything in the affidavit was good" and "whether its [sic] correct and whether it looks right" or if any changes needed to be made before they sign the affidavit. She testified that she always asks if the affidavit is correct; sometimes she would ask "is it true to the best of your knowledge, do you swear that this is . . . ." Ms. Corina further testified that affiants always sign the documents in front of her and she confirms their identity.

49. Petitioner called Mary Ellen Nagengast as a witness. Ms. Nagengast has worked for the Division for over 25 years. Her current title is Tax Audit Administrator in the Office of Real Property Tax Services (ORPTS) and has been there since mid-May of 2017. Prior to her position with ORPTS, and at the time she signed the affidavit in this matter dated May 10, 2017, Ms. Nagengast was employed as a Tax Audit Administrator and Director of the Division's MAPS Bureau and was the records management officer and files manager for the Division. As the records management officer, she developed retention schedules for the Division's electronic and physical records, worked with counsel in physically acquiring records, and maintained files,

including the certified mail log and mailing records. She testified that during her employment as the Director of MAPS, she used the Division's CARTS, which is a centralized system with the Division's records for taxpayers, assessment information and organizational structure. Ms. Nagengast explained that all of the Division's billing records come out of CARTS.

50. Ms. Nagengast identified her affidavit and signature thereon dated May 10, 2017, and Ms. Corina's signature as notary.

51. Ms. Nagengast testified that during her tenure as Director of MAPS she regularly signed affidavits similar to the one she signed in this matter and estimated that she had signed hundreds over the years. Ms. Nagengast further testified that during her time as Director of MAPS, she only received affidavits from Ms. Corina.

52. Ms. Nagengast described the procedure for reviewing and signing affidavits during her employment as the Director of MAPS. She testified that usually Ms. Corina would drop off a secured envelope with documents for her to review, including the affidavit, CMR, and notice. On occasion, Ms. Nagengast would go to Ms. Corina's office to review the documents if the CMR was very large; on other occasions where Ms. Corina needed an affidavit signed immediately, she would bring the documents and wait for Ms. Nagengast to review them. Before Ms. Nagengast signed an affidavit, Ms. Corina would ask her "does everything look okay, does everything match up, did I miss anything" and they would have a conversation to "make sure that everything looked okay, true and correct, make sure there wasn't any – wasn't anything that needed to be updated." Ms. Nagengast testified that she would not sign an affidavit unless she was comfortable knowing that she had addressed the dates and any of the control numbers or reference numbers and that the affidavit matched up with the documents including the CMR and the notice. She further testified that she understood the importance of signing the affidavit and that "I knew what I was swearing to without someone telling me what I

was swearing to . . . just by reading it." When asked whether Ms. Corina ever asked her to raise her right hand as part of the affidavit signing process, Ms. Nagengast responded, "[m]aybe the first time . . . I really don't remember" and that once they established a working relationship "it became more of a casual conversation, make sure that everything looked okay, true and correct" and that no changes needed to be made. She also testified that while she could not recall whether she was ever asked to swear to the contents of an affidavit after the first time she went through the process, "[t]he words swear I don't think were used, but it would be like, does everything look okay on this one, is this one okay to sign, that kind of thing. With the underlying intent, meaning you're swearing that it all looks true and accurate to you . . . I wouldn't sign it if I did not feel confident in what I was attesting to. So making sure the dates were right, making sure the certified mail stamps were on the pages . . . checking dates, checking names, spellings, addresses. I took the - - I took the responsibilities very seriously."

53. Ms. Nagengast testified that she signed the affidavit in front of Ms. Corina after thoroughly reviewing the documents to confirm that the statements were correct and that Ms. Corina notarized the affidavit in front of her. Ms. Nagengast further testified that she, too, had been a notary and would not put Ms. Corina in a situation where she signed an affidavit outside of Ms. Corina's presence.

54. Petitioner called Mary Kate Koslow as a witness. At the time of the hearing, Ms. Koslow worked for the Office of the State Comptroller and had been working there since July 2017. Prior to that, Ms. Koslow worked for the Division as a mail room supervisor for ten years, until June 2017.

55. Ms. Koslow testified that she signed approximately 20 affidavits in timeliness cases during her tenure with the Division, all of which were prepared and notarized by Ms. Corina.

56. In describing the procedure for reviewing and signing affidavits during her

employment with the Division, Ms. Koslow testified that usually she would go to Ms. Corina's workstation to review the documents; occasionally Ms. Corina would bring them to her. Ms. Corina would give her the documents and allow her time to review them. Ms. Koslow testified that she would look at all the documents to verify that the information in the affidavit matched the mail log. Ms. Corina would ask her if any corrections needed to be made or if she saw anything that was "off." Ms. Corina never asked Ms. Koslow to raise her right hand when signing an affidavit and Ms. Koslow could not recall whether she was asked "do you solemnly swear that the contents of this affidavit subscribed by you are correct and true." Ms. Koslow testified that she signed the affidavits in front of Ms. Corina after reviewing the documents.

57. Ms. Koslow testified that she was aware that the affidavits could be used at a hearing.

58. Ms. Koslow identified her affidavit and signature thereon dated May 16, 2017.

59. Ms. Koslow testified that the date of August 22, 2016 that appears in her affidavit is incorrect. When asked how the mistake occurred, Ms. Koslow responded:

> "A: I think what I was doing - - I don't know. I don't remember, honestly. But I think maybe in the affidavit that I had, I just reviewed that the August 22nd, 2016 date was consistent throughout the document, instead of referring to Mary Ellen Nagengast's date.
>
> Q: Okay. So - -
>
> A: That's what I would have to guess is what I did.
>
> Q: So it sounds like that date, you would have just taken from this particular affidavit itself, the one that's in your name, not from the Nagengast affidavit?
>
> A: Right. I probably reviewed the name, the address and the L numbers, but neglected to really review the date."

60. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 56 proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), proposed findings of fact 3 through 6, 10 through 13, 17, 23, 25 through 27, 29 through 31, 35 through 38, 45 through 48, 51, and 52 are supported by the record, and have been consolidated, condensed, combined,

renumbered and substantially incorporated herein. Proposed findings of fact 1, 2, 7 through 9, 14 through 16, 18 through 21, 24, 28, 32 through 34, 39 through 44, 49, and 53 have been modified to more accurately reflect the record and/or accepted in part and rejected in part as conclusory, argument, irrelevant, repetitive, and/or not supported by the record; to the extent accepted they have been consolidated, condensed, combined, renumbered and substantially incorporated herein, as modified. Proposed findings of fact 22, 50, and 54 through 56 are rejected as conclusory, irrelevant, argument, and/or not supported by the record.

SUMMARY OF PETITIONER'S POSITION

61. Petitioner argues that the record contains conflicting affidavits that were not reconciled during the hearing on remand. Petitioner further argues that the affidavits offered by the Division are defective and should not be given any evidentiary value, contending that the oath was inadequate. Petitioner additionally raises the same remaining arguments originally made in her opposition to the Division's motion to dismiss, which were found to be unavailing by the administrative law judge (***see Matter of Marrero***, Division of Tax Appeals, August 30, 2018) and not addressed by the Tax Appeals Tribunal, specifically, that the Division failed to properly mail the notice to her last known address, that the Division failed to properly issue the notice to petitioner's former representative, and that the Division did not follow its standard mailing procedures.

CONCLUSIONS OF LAW

A. As noted above, the Tax Appeals Tribunal remanded this matter for further proceedings initially on the issue of the timeliness of the petition. 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 statutory notice, including the notice at issue here (Tax Law §§ 170 [3-a] [a]; 689; 2006 [4]). 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).

Where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is on the mailing of the statutory notice 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.***). 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).

B. 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 of proof to show its standard mailing procedure and that such procedure was followed by "producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR" (***Matter of Balan***, Tax Appeals Tribunal, October 26, 2016). As noted by the Tribunal, "[e]mployee affidavits are generally, a necessary component of the Division's proof in a timeliness case to show that it has a standard mailing procedure and that such procedure was followed in each case (***Matter of Marrero***, Tax Appeals Tribunal, May 21, 2020, citing ***Matter of Balan***).

In this case, the Division initially submitted employee affidavits from Ms. Nagengast and

Ms. Koslow in support of the notice of intent. This administrative law judge then issued an order withdrawing the notice of intent, due to a contradiction between the Nagengast and Koslow affidavits regarding the date of mailing (***see*** finding of fact 12). The Division subsequently brought a motion seeking an order dismissing the petition, or in the alternative granting summary determination. In support of its motion, the Division submitted the affidavits of Ms. Picard and Mr. Ramundo. The administrative law judge granted the Division's motion, finding that the Picard and Ramundo affidavits, together with the CMR, established the Division's standard mailing procedures, that such procedures were followed, that the notice was issued to petitioner and her representative at their last known addresses on October 20, 2016, and that petitioner's protest was untimely.

On exception, petitioner asserted that the contradiction between the Nagengast and Koslow affidavits remained unreconciled. As noted by the Tribunal, petitioner did not raise such argument in its opposition to the motion to dismiss. Nevertheless, the Tribunal found that such argument was a legal issue raised by petitioner on exception, and addressed it in its decision, stating:

> "The Division has not offered any evidence to directly explain the references to August 22, 2016 in the Koslow affidavit. Rather, the Division's argument requires that we infer from other evidence in the record that the Koslow affidavit's August 22, 2016 references are erroneous. The Division thus urges us to resolve the contradiction by discounting the Koslow affidavit. 'The function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist' (***Castlepoint Ins. Co. v Command Sec. Corp.***, 144 AD3d 731, 733 [2d Dept 2016]). We acknowledge that the contradiction in the Division's evidence might well be the result of a clerical error, considering particularly that the CMR appears to have been properly completed (***Matter of Modica***, Tax Appeals Tribunal, October 1, 2015 [properly complete CMR is highly probative evidence of the fact and date of mailing]). It is inappropriate, however, to resolve this question in the context of a motion to dismiss. Employee affidavits are, generally, a necessary component of the Division's proof in a timeliness case to show that it has a standard mailing procedure and that such procedure was followed in each case (***Matter of Balan***). Here, the Division's employee affidavits are contradictory and the Koslow affidavit does not accurately describe the CMR. Hence, there is at

> least a doubt as to the material and triable issue of whether the Division's standard mailing procedure was followed in this case (***Moskowitz v Garlock***, 23 AD2d 943, 944 [3d Dept 1965] [summary judgment should not be granted where there is any doubt as to the existence of a triable issue]).
>
> We not also that the affidavits submitted in support of the Division's motion to dismiss do not solve the Division's proof problem, as the Koslow affidavit remains part of the record and its references to August 22, 2016 remain unexplained" (***Matter of Marrero***).

The Tribunal remanded the matter to the administrative law judge for further proceedings on the issue of timeliness of the petition, and a hearing was held to address the issue of the conflicting dates in the affidavits.

The testimony presented at the hearing established that the conflicting date in the Koslow affidavit was due to a clerical error. Ms. Koslow, Ms. Nagengast, and Ms. Corina each testified at the hearing. The hearing testimony of Ms. Corina and Ms. Koslow explained the contradictions in the affidavits and established that the date of August 22, 2016 in the Koslow affidavit was, indeed, merely the result of a clerical error and a failure of the affiant to thoroughly review the affidavit and exhibits. Both the drafter of the affidavit, Ms. Corina, and the affiant, Ms. Koslow, credibly testified that the date of August 22, 2016 referenced in the Koslow affidavit is incorrect. Ms. Corina credibly testified that she made a mistake in referencing the date of August 22, 2016 when drafting the Koslow affidavit. She explained that the error occurred because she failed to change the date in the template she used to draft the Koslow affidavit, and testified that nothing in the Nagengast affidavit, which she also drafted, referred to the August 22, 2016 date. Ms. Koslow also acknowledged that a mistake was made in her affidavit and testified that the August 22, 2016 date was incorrect. Ms. Koslow admitted that she "probably reviewed the name, the address and the L numbers, but neglected to really review the date" and just reviewed that the August 22, 2016 date was consistent throughout her affidavit without referring to the date in the Nagengast affidavit.

While it is thus clear that August 22, 2016 date referenced in the Koslow affidavit is incorrect, it is also clear, based on the admissions made by Ms. Koslow, that her affidavit in this matter is unreliable. Ms. Koslow's testimony shows that she did not carefully review her affidavit nor the Nagengast affidavit and the exhibits referenced therein. Accordingly, Ms. Koslow's affidavit cannot be given any weight for purposes of establishing the Division's mailing procedures and whether those procedures were followed in this case. Moreover, although Ms. Koslow's hearing testimony was credible, she did not testify regarding the mailing procedures outlined in her affidavit and whether the procedures were followed in this instance.

The Nagengast, Picard, and Ramundo affidavits, on the other hand, are consistent with the CMR, the notice, and with each other, have not been refuted and are found to be reliable. They adequately describe the Division's general mailing procedure as well as the relevant CMR and establish that the general mailing procedure was followed in this case (***see Matter of DeWeese***, Tax Appeals Tribunal, June 20, 2002). Additionally, Ms. Nagengast's affidavit is further supported by her testimony. Ms. Nagengast identified her affidavit and testified that before signing the affidavit, she reviewed the dates, control numbers and reference numbers, names and addresses, and made sure that the affidavit matched up with the CMR and the notice. Ms. Nagengast further testified that she would not sign an affidavit unless she was comfortable knowing that she had addressed the information to the best of her knowledge and that she would make sure that everything looked true and correct and that no changes needed to be made.

Petitioner argues that the Division has not reconciled the inconsistent affidavits, contending that Division's counsel took no steps to reconcile the inconsistency because she declined the opportunity to cross-examine Ms. Koslow and only addressed the issue in her direct examination of Ms. Corina. Petitioner is correct that the testimony of Ms. Corina, alone, would not have been sufficient to resolve the inconsistency because she was only the drafter and not the

affiant of the affidavit. While Ms. Corina's testimony established the error in drafting the affidavit, Ms. Koslow's testimony was necessary to establish how or why she signed the affidavit containing the error. However, contrary to petitioner's argument, the conflict in the dates contained in the affidavits and the error Ms. Koslow made in averring to the incorrect date was fully explained in Ms. Koslow's direct testimony elicited by petitioner's counsel. Since petitioner called Ms. Koslow as a witness and she testified as to her error, such conflict has been resolved. Contrary to petitioner's argument, the conflict in the dates contained in the affidavits has been reconciled by the hearing testimony which fully explains that the contradiction was due to a clerical error in Ms. Corina's drafting of the Koslow affidavit and Ms. Koslow's failure to thoroughly review her affidavit. The evidence in the record establishes that the August 22, 2016 date referred to in the Koslow affidavit is erroneous and due to a clerical error, and thus the issue of fact for which the Tribunal remanded this matter has been resolved. While the Division's sloppy drafting and failure to review the Koslow affidavit caused a question of fact which required a hearing, the question of the conflicting dates has now been resolved and the facts in the record show that the date of August 22, 2016 was erroneous. Having now resolved the conflict based on the facts in the record, the clerical error in the faulty affidavit cannot negate the jurisdictional defect of the petition where the other evidence in the record establishes the proper mailing of the subject notice on October 20, 2016.

C. Having resolved the issue of the conflicting date contained in the Koslow affidavit, it is concluded that the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's and her former representative's last known address on October 20, 2016. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (***see Matter of Rakusin***, Tax Appeals Tribunal, July 26, 2001). The affidavits of Ms. Picard and Mr. Ramundo, and the affidavit and testimony of

Ms. Nagengast presented by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (***see Matter of DeWeese***, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheet and CMR conforms with the address listed on petitioner's 2015 resident income tax return, which satisfies the "last known address" requirement. Additionally, the address on the mailing cover sheet and CMR of the notice mailed to petitioner's former representative conform with the address listed for the former representative on petitioner's 2015 return. It is thus concluded that the Division properly mailed the notice on October 20, 2016, and 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 that date (***see*** Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]).

The petition was filed on February 21, 2017, which was more than ninety days after the issuance of the notice at issue. As discussed above, the Division has presented sufficient proof to establish that the notice was properly mailed to petitioner and petitioner's representative on October 20, 2016. Accordingly, the Division of Tax Appeals lacks jurisdiction to consider the merits of the petition (***see Matter of Voelker***; ***Matter of Sak Smoke Shop***).

D. Petitioner argues that the affidavits presented by the Division are defective and should not be given any evidentiary value, contending that the oath was inadequate. Contrary to petitioner's argument, there are no specific words or phrases that must be uttered in taking an affidavit (***see Furtow v Jestrow Enters., Inc.***, 75 AD3d 494, 494 [2d Dept 2010], quoting ***Feinman v Mennan Oil Co.***, 248 AD2d 503, 504 [2d Dept 1998] ["There is no specific form of oath required in this State, other than that it be calculated to awaken the conscience and impress the mind of the person taking it in accordance with his or her religious or ethical beliefs"]; ***Collins v AA Trucking***, 209 AD2d 363 [1st Dept 1994] ["There is no specific form of oath

required in this state"]; ***People v Coles***, 141 Misc 2d 965, 974 [Sup Ct, Kings Co 1998] ["It is not necessary to raise one's hand . . . or to be asked 'to solemnly swear' or words to that effect to constitute an oath" (citations omitted)]; ***see also People v Holmes***, 93 NY2d 889 [1999] [verified information was duly sworn to where the instrument itself read "being duly sworn, deposes and says" and the document indicated that the person signing understood and appreciated the significance of their actions; no requirement that complainant raise his hand and orally recite an oath]; ***People v Stewart***, 92 NY2d 965 [1998] [holding waiver of immunity was valid even though defendant did not take a verbal oath as to the validity of its contents, where the document contained the oath and was signed in the presence of an individual empowered by statute to administer oaths]).

The Tribunal's Rules of Practice and Procedure allow for affidavits to be accepted as evidence. "Affidavits as to relevant facts may be received, for whatever value they may have, in lieu of the oral testimony of the persons making such affidavits" (20 NYCRR 3000.15 [d] [1]; ***see also Matter of Balan*** [the Division may meet its burden of proof to show its standard mailing procedure and that such procedure was followed by producing affidavits from individuals with the requisite knowledge of mailing procedures]; ***Matter of Marrero***).

"The terms oath and affidavit include every mode authorized by law of attesting the truth of that which is stated. The term swear includes every mode authorized by law for administering an oath" (General Construction Law § 36). An affidavit is sworn to "before any officer authorized by law to take the acknowledgment of deeds in this state, unless a particular officer is specified" (General Construction Law § 12). Section 2309 (b) of the Civil Practice Law and Rules (CPLR) provides that an oath or affirmation "be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs."

Courts have found the language of CPLR § 2309 (b) to be met where the document contains a sworn to clause and is signed in the presence of an individual empowered to administer oaths (***see People v Hethington***, 258 AD2d 919 [4th Dept 1999]; ***Matter of Quintyne v Canary***, 104 AD2d 473 (2d Dept 1984); ***People v Lyon***, 82 AD2d 516, 528-529 [2d Dept 1981]. For example, in ***Matter of Quintyne v Canary***, the court found that although the notary public did not ask the signatories to swear, he complied with the requirements of administering an oath pursuant to CPLR § 2309 (b). The court held that the notary administered an oath "in a form 'calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious and ethical beliefs' (CPLR 2309, subd [b])" where the signature sheets contained the required notarial statement and the signatories read the statement and understood that they were affirming the statement as true.

In this case, the Picard, Ramundo, Nagengast, Koslow, and Roach affidavits all contain the clause "being duly sworn, deposes and says," as well as the jurat "sworn to before me this __ day of ___." There is no dispute that the affidavits were signed before a duly licensed notary public. Ms. Corina testified that the affiants each appeared before her to review the affidavits and attachments and placed their signatures on the affidavits, and signed them in front of her. She further testified that she asked the affiants if any changes needed to be made to the affidavits and if the information was correct or true. Moreover, Ms. Nagengast and Ms. Koslow both acknowledged that they signed the affidavits in front of Ms. Corina after reviewing the documents to aver that the statements were correct. Ms. Koslow testified that she was aware that the affidavit could be used at a hearing. Ms. Nagengast testified that she understood the importance of signing the affidavit, that she was aware the affidavit was a sworn statement just by reading it, and that "I knew what I was swearing to without someone telling me what I was swearing to" by reading the document. Such facts show that the affidavits were duly sworn to

and the affiants' signatures on the documents bearing the clause "being duly sworn" and the printed legend "sworn to before me" evinced an intention that the documents operate as sworn statements, so that by signing the affidavits in the presence of the notary public the affiants took upon themselves the obligation of an oath (***see People v Holmes***; ***People v Lyon***; ***People v Hethington***; ***People v McMillen***, 152 Misc2d 918 [County Court, Schoharie Co 1992]).

Petitioner's reliance on ***Bookman v City of New York***, 200 NY 53 (1910) and a publication of notary guidelines from the New York Department of State in support of her argument that a notary must speak particular phrases for the administration of an oath when taking an affidavit is unavailing. The issue in ***Bookman*** was whether a commissioner of deeds was entitled to payment from the City of New York for taking affidavits of the commissioner of jurors and the jury servers under sections 845, 846 and 847 of the now obsolete New York Code of Civil Procedure.[6, 7] Contrary to petitioner's argument, the Court in ***Bookman*** did not invalidate the affidavits where specific words were not spoken by the notary. Notably, the court did not rule on the validity of the affidavits and explicitly declined to opine as to whether the affiants could be subject to perjury: "Whether or not the persons alleged to have been sworn by

---

[6] NY Code of Civil Procedure (NYCCP) (enacted 1880, repealed 1920). In 1920, NYCCP was revised and recodified as the Civil Practice Act (1920 NY Law ch. 925 [repealed 1962]), which was subsequently replaced with the CPLR (L.1962, c.308. Amended 1964, c.252) (***see generally*** *The CPLR at Fifty, Its Past, Present and Future*, 16 N.Y.U.J Legis. & Pub. Policy 643-88 [2013]; William Nelson, *Remarks: The History of New York Civil Procedure*, 16 N.Y.U.J Legis. & Pub. Policy 659 [2013]).

[7] In ***Bookman***, the Court discussed the following sections of the NYCCP: "Section 845 of the Code of Civil Procedure provides: 'Except as otherwise specially prescribed in this article, when an oath is administered, the witness shall lay his hand on the gospels and express assent to the oath, and it shall be according to the present practice except that the witness need not kiss the gospels.' 'The present practice,' which has existed from a time whereof the memory of man runneth not to the contrary, is to the effect that you do solemnly swear that the contents of this affidavit subscribed by you is correct and true. Section 846 provides that 'The oath must be administered in the following form, to a person who so desires, the laying of the hand upon the gospels being omitted: "You do swear, in the presence of the ever-living God." While so swearing, he may or may not hold up his hand, at his option.' Section 847 provides that 'A solemn declaration or affirmation, in the following form, must be administered to a person who declares that he has conscientious scruples against taking an oath, or swearing in any form: "You do solemnly, sincerely, and truly, declare and affirm."' Other forms are permitted to be adopted by other provisions of the Code where the court or officer is satisfied that the same would be more solemn or obligatory, or in accord with the religious views of the affiant" (***Bookman v City of New York***, 200 NY 53, 55-56). It is noted that the language of CPLR § 2309 (b) vastly differs from the repealed NYCCP sections.

the plaintiff could be charged with perjury is not now before us for determination. The question now is, has the plaintiff performed his duties as commissioner of deeds by administering oaths in accordance with the spirit and intent of the statute so as to entitle him to the fee allowed therefor" (***Id.*** at 57). The court held that the plaintiff failed to show that he earned his fees, finding that he failed to administer oaths in accordance with the spirit and intent of the statute and further that any such fees for administering an oath is primarily charged against the person asking to have the oath taken, rather than the City (***Id.*** at 57, 58).

Furthermore, contrary to petitioner's argument, the Court in ***Bookman*** did not require specific phrases or words be uttered for an oath; rather, the court held that whatever form of oath adopted "it must be in the presence of an officer authorized to administer it, and it must be an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath" (***Id.*** at 56). Courts have found the requirements stated in ***Bookman*** to be satisfied where the document at issue contains written language that it is sworn to and is signed in front of an authorized individual, holding that by signing such document in the presence of one authorized to take oaths, the signatory takes upon himself the obligation of an oath (***see People v Lyon***, 82 AD2d at 528-529 ["In our view, the first *Bookman* requirement was satisfied in the case at bar by the signing of the waiver instrument in the presence of the Grand Jury foreman . . . In addition, we believe the defendant's signature on a document bearing the printed legend 'Subscribed and Sworn to Before Me This _____ Day of _____, 19__' evinces an intention that the document in question operates as a sworn statement, so that by the signing of the instrument in the presence of the Grand Jury the defendant satisfied the second *Bookman* requirement of taking upon himself 'the obligation of an oath'"]; ***see also People v Hethington***, 172 Misc 2d 840, 844 [Onondaga Co Ct 1997] ***affd*** 258 AD2d 919 [4th Dept 1999] [holding that ***Bookman*** requirements were satisfied where document contained "I swear to" clause and was

executed in the presence of the Grand Jury]; ***People v McMillen***, 152 Misc2d at 920-21). As such, petitioner's argument that the affidavits offered by the Division are invalid is rejected.

E. Petitioner's argument that the Division failed to issue the notice to her last known address is not supported by the record. Contrary to petitioner's argument, the Division mailed the notice to her last known address in accordance with Tax Law § 691 (b), which provides that the "last known address" is the "address given in the last filed return by him, unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address." The Division mailed the notice to the address given in petitioner's 2015 return, which was the last return filed by petitioner before the issuance of the notice. Petitioner has presented no evidence that she notified the Division of a change of address prior to the issuance of the notice. Further, contrary to petitioner's argument that the Division "knew, or should have known" of petitioner's alleged new address, Tax Law § 691 (b) clearly places the burden on the taxpayer to inform the Division of a change of address (***see Matter of Carotenuto***, Tax Appeals Tribunal, March 17, 2016). There is no evidence in the record that petitioner notified the Division of a different address than that reported in her 2015 return prior to the date the notice was issued.

Petitioner contends that the Division did not exercise reasonable diligence to confirm petitioner's address. Petitioner's reliance on ***Terrell v Commr*** (625 F3d 254 [5th Cir 2010]) in support of her argument is misplaced. In discussing what constitutes a "last known address" for purposes of mailing an Internal Revenue Service (IRS) notice pursuant to Internal Revenue Code (IRC) (26 USC) § 6015 (e) (1) (A), the Court stated that: "'[L]ast known address' is a term of art and refers to that address which, in light of all relevant circumstances, the IRS reasonably may consider to be the address of the taxpayer at the time the notice of deficiency is mailed . . . . This Court has interpreted *Mulder* as standing for the rule that 'absent a subsequent, clear and concise

notification of an address change, the IRS is entitled to consider the address on the taxpayer's most recently filed return as the taxpayer's 'last known address.' . . . This rule, however, does not dispense with the requirement that the IRS must use 'reasonable diligence' to determine the taxpayer's address in light of all relevant circumstances." (***Terrell v Commr***, 625 F3d at 259 [citations omitted]). Unlike the Court's finding in ***Terrell*** that for purposes of mailing an IRS notice, what constitutes a last known address is a term of art open to judicial interpretation, under article 22 of New York's Tax Law "last known address" is explicitly defined by statute as the "address given in the last filed return 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 plain language of Tax Law § 691 (b) clearly requires a different result than that reached in ***Terrell*** (***see*** Tax Law § 607 [a]). The clear language of the statute places the burden squarely on the taxpayer and it was incumbent upon her to notify the Division if a different address should be used other than the one listed on the last return filed (***see*** Tax Law § 691 [b]). Petitioner here did nothing to affirmatively notify the Division of a different address. A notice is properly sent to a taxpayer's last known address, being the one listed in the last filed return, even if prior correspondence sent to that address was returned to sender, where the taxpayer failed to provide clear and concise notification of a new address before the notice was issued (***see Gyorgy v CIR***, 799 F3d 466 [7th Cir 2015] [holding that the IRS was not required to do more to find the taxpayer through its own investigation before mailing a notice to the address it had on file from his most recent tax return, even though the postal service had returned a prior notice sent to the same address as undeliverable]; ***Gille v United States***, 33 F3d 46 [10th Cir 1994] [upholding validity of deficiency notice sent to the address on petitioner's last filed return, even though prior correspondence sent by the IRS to the same address was returned by the postal service as

undeliverable]; ***Whitney v United States***, 2015 WL 11197828, at *3 [CD Cal Dec. 9, 2015] [“‘unclaimed’ or ‘undelivered’ mail does not conclude that the IRS failed to effectuate notice”]). As petitioner has not provided any evidence that she clearly notified the Division of a new address, petitioner’s argument that the Division did not mail the notice to her last known address is without merit (***see Matter of Feliciano***, Tax Appeals Tribunal, August 24, 2017 [“our prior decisions have held that the Division may rely on the address given in the last tax return filed . . . . As petitioner has not provided any proof of her clearly informing the Division of a change of address, we conclude that the notice of deficiency . . . was mailed to petitioner . . . at her last known address”]; ***Matter of Carotenuto***).

Petitioner’s reliance on ***Terrell*** is further unpersuasive because other courts have declined to follow that decision’s requirement that the IRS conduct a search as to the taxpayer’s current whereabout, finding that it is at odds with the text of Treas. Reg. § 301.6212–2, which defines last known address as “the address that appears on the taxpayer’s most recently filed and properly processed Federal tax return, unless the Internal Revenue Service (IRS) is given clear and concise notification of a different address” (***see Gyorgy v C.I.R.***, 779 F3d 466, 479 [7th Cir 2015] [“There is a tension between these two decisions [***Terrell*** and ***Mulder v Commr***, 855 F2d 208 (5th Cir 1988)] and the applicable Treasury regulation, which requires a new tax return or clear and concise notification to change the last known address, *see* Treas. Reg. § 301.6212–2(a), and which provides that a new address obtained from a third party (other than the NCOA database) is not sufficient, *see id.* § 301.6212–2(b)(1).”]; ***United States v Feldman***, 439 FSupp3d 946 [ED Michigan 2020] [“there is some tension between, on the one hand, requiring the IRS to conduct a search into the taxpayer's current whereabouts, and, on the other hand, the text of the statutes and regulations. . . . the statute says that notice sent to a taxpayer's ‘last known address’

suffices and the implementing regulation says that the "last known address" is one of three things: the address on the most recently filed, properly processed tax return, the address provided to the IRS via "clear and concise" notice, or the address in the NCOA database (if the NCOA database name and address matches that in IRS records). Arguably then, the statute and implementing regulation specify the single address to which the IRS is required to send notices and they provide that sending notices to that address is enough"]. ***See also Whitney v United States*** ["the IRS is not required to 'keep track of every taxpayer's whereabouts' . . . Rather, the IRS's reasonable diligence is 'satisfie[d] . . . if the notice is sent to the taxpayer's last known address,' . . . and the last known address can only be changed (for the purpose of providing a clear and concise notification) through leaving a forwarding address with the United States Postal Service, filing a tax return bearing a different address, sending the IRS a Form 8822 or a written statement requesting a change of address, calling the IRS, and updating the address through the IRS's website" (citations omitted)]).

Finally, in ***Gyorgy*** the Court held that even if they were inclined to follow the decision in ***Terrell*** that the IRS was required to do more to confirm the taxpayer's address, a taxpayer cannot claim that the taxing authority failed to use reasonable diligence in obtaining an address if the taxpayer does not have "clean hands" (***Gyorgy v CIR***, 779 F3d at 479). "[T]he IRS's duty of reasonable diligence is rooted in equity. . . . It therefore matters whether the taxpayer claiming its protection has 'clean hands" (***Id.*** at 479 [citations omitted]). The court found that where the taxpayer moved frequently and "left the IRS in the dark concerning his whereabouts" he "is in no position to complain that the IRS should have done more to track him down. The IRS properly relied on the address listed on his most recently filed tax return" (***Id.*** at 479, 480). The Court further noted that, "even assuming *arguendo* that the IRS had a duty to conduct further

investigation for Gyorgy's address, he does not identify what reasonable steps it could have taken to find him. There is no evidence that the IRS had record – let alone clear and concise notification – of an address where he could have been reached" (***Id.*** at 480). The Court concluded that "the IRS cannot be expected to keep track of an itinerant taxpayer" who moved around frequently, did not file returns with a new address, and never notified the IRS of his new address (***Id.***).

Here the record shows that not only did petitioner fail to give the Division notice of a new address, petitioner, through her representative at the time, refused to return to the Division's multiple calls and essentially avoided attempts to be contacted for several months after the audit had commenced. Petitioner was fully aware on or about November 4, 2013 that she was under audit by the Division and both she and her then-representative initially communicated with the Division but made no indication of an address change during those contacts. Communications from petitioner's then-representative ended at the beginning of May 2016, when he stopped taking the Division's calls, failed to return the auditor's messages, and ignored the Division's correspondence. The tax field audit record introduced by petitioner shows a repeated pattern of avoidance behavior by her then-representative whereby from May 2, 2016 to the conclusion of the audit at the end of September 2016 and issuance of the notice on October 20, 2016, he would not take the auditor's calls or return messages from the auditor and did not respond to written correspondence from the Division. The Division's auditor made several attempts to reach petitioner's representative. If petitioner wanted the Division to use a different address than the one listed on her last filed return, she or her duly authorized representative had the obligation to notify the Division during the audit of the new address and they cannot be shielded by their avoidance tactics. Their failure to notify the Division of a different address does not place the

obligation on the Division to track down petitioner (***Id.*** at 479, 480). Petitioner "is in no position to complain" that the Division should have done more to track her down, and it properly relied on the address listed on her most recently filed tax return (***Id.***). Accordingly, petitioner's argument is rejected.[8]

F. Petitioner also argues that the notice was not properly mailed to her former representative. Petitioner contends that the address for the representative was improper, in that it did not include "Becerra & Associates" and only listed the representative as "R Becerra" at the address listed on the notice. Contrary to petitioner's argument, the Division used the same address listed for her former representative on the 2015 return, which, as noted, was petitioner's last filed return before the issuance of the notice. Specifically, petitioner's last filed return reports the address of petitioner's former representative as "302 7TH Street, Hoboken, NJ, 07030." This same address was listed on the subject notice. Moreover, the return lists the representative's name as "Ray Becerra" and does not list "Becerra & Associates." To the extent that the Division used the representative's first initial and full last name, "R Becerra" rather than "Ray Becerra," such difference is found to be harmless (***see Lee v C.I.R.***, 101 TCM (CCH) 1634 [TC 2011]; ***U.S. v Sirico***, 247 FSupp 421 [SD NY 1965]). Petitioner did not provide clear and concise notice that a different name or address should be used for her representative than that listed on her last filed return. As such, petitioner's argument that the notice was not properly mailed to petitioner's former representative is without merit.

G. Petitioner further argues that the Division did not follow its standard mailing procedures for delivering mail to a USPS branch. Petitioner contends that the items of certified

[8] It is also noted that petitioner has provided no explanation as to why her affidavit states that she sold her apartment at the Hoboken, New Jersey address on or about May 2, 2016, yet the petition filed in this matter and signed by her on February 23, 2017 still lists the same Hoboken, New Jersey address.

mail "first arrived" at a USPS facility with a different zip code than that indicated on the CMR, based on a printout purportedly from a USPS website. The Division, in response, argues that the printout was properly rejected in the administrative law judge's determination on the motion to dismiss, that this matter is distinguishable from ***Matter of Tilton*** (Tax Appeals Tribunal, January 25, 2021), and that petitioner's assumption that "the CMR and the piece of certified mail were apparently received at two different USPS locations" is not supported by the evidence." In her reply brief, petitioner argues that the "rebuttable presumption of receipt does not arise in this case" based on the alleged "defective affidavits" (addressed above in conclusion of law D) and on the USPS printout, and that the printout constitutes probative evidence that the Division did not follow its own procedures.

Petitioner's argument that the "rebuttable presumption of receipt" does not arise here mistakenly conflates the notice provision for sales tax assessments under Tax Law § 1147 with those for income tax assessments under Tax Law § 681. However, there are distinct differences between the two.

Tax Law § 681 (a) requires the Division to send notice by certified or registered mail when it determines that there is a deficiency in income tax. Tax Law § 681 (b) provides that "[a]fter ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice" unless the taxpayer has filed a petition "within such ninety-day period." The statute does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (***see Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990; ***Matter of Kenning v State Tax Commn.***, 72 Misc 2d 929 [1972], ***affd*** 43 AD2d 815 [3rd Dept 1973], ***appeal dismissed*** 34 NY2d 667 [1974]). "In effect, if the notice is properly mailed, the

statute places the risk of nondelivery on the taxpayer" (***Matter of Malpica***). Petitioner's failure to receive the subject notice is "immaterial" (***Matter of Townley***, Tax Appeals Tribunal, January 25, 2018; ***Matter of Kenning v Department of Taxation & Fin.***, 72 Misc 2d 929, 930 [Sup Ct Albany Cty 1972], ***affd*** 43 AD2d 815 [3rd Dept 1973], ***appeal dismissed*** 34 NY2d 667 [1974]). Thus, for income tax purposes, there is no "rebuttable presumption" because receipt is simply not required.

In contrast, for sales tax purposes, Tax Law § 1147 (a) (1) creates a rebuttable presumption of receipt:

> "Tax Law § 1147 (a) (1) provides that the proper mailing of a notice of determination 'shall be presumptive evidence of the receipt of the same by the person to whom addressed.' Receipt is thus 'a part of the procedural equation [in sales tax cases] and by characterizing mailing as only "presumptive evidence" establishes the taxpayer's right to rebut the presumption' (***Matter of Ruggerite v State Tax Comm., Dept. of Taxation & Fin. of State of N.Y.***, 64 NY2d 688, 690 [1984]). However, a successful rebuttal 'must consist of more than a mere denial of receipt' (***Matter of T. J. Gulf v New York State Tax Commn***., 124 AD2d 314, 315 [3rd Dept 1986]).
>
> Here, petitioner asserts that the USPS tracking information shows that neither he nor his representative received the subject notice from the USPS. Even construing this evidence in a light most favorable to petitioner, as we must (***see Matter of Guffin***), we find that the tracking information is insufficient as a matter of law to rebut the presumption of receipt.
>
> Under certain circumstances, a properly mailed notice of determination may be deemed constructively received and thus evidence of actual non-receipt may be insufficient to rebut the presumption. One such circumstance occurs when a taxpayer refuses to accept delivery of a notice (***Cars 'R' Us v Chu***, 147 AD2d 797 [3rd Dept 1989]). Here, the USPS tracking information indicates that the notice of determination addressed to petitioner was offered for delivery and refused (***see*** finding of fact 18). Another such circumstance occurs when a notice is offered for delivery, but it is subsequently returned to the Division as unclaimed (***Matter of New York City Billionaires Constr. Corp.***). The tracking information pertaining to the notice mailed to petitioner's representative indicates that this notice was offered for delivery, but was unclaimed" (***Matter of Ahmed***, April 10, 2018).
>
> It is important to note that in its decision in ***Matter of Ahmed***, the Tribunal specifically

inserted the bracketed phase "[in sales tax cases]" in its quote of ***Ruggerite***: "Receipt is thus 'a part of the procedural equation [*in sales tax cases*] . . .'" (***Id.***, emphasis added), thus recognizing the important distinction between the sales tax and personal income tax provisions. Contrary to petitioner's argument, for income tax purposes, receipt of the notice is simply not part of the equation.

Additionally, the USPS tracking information offered by petitioner is unpersuasive. The argument in petitioner's brief that the certified mail was "first received" by the USPS at a branch located in a zip code that does not match the postmark on the CMR is not supported by the evidence in the record. Petitioner has offered no evidence as to what USPS branch location the mail was "first received" and merely assumes from the website printout that the first zip code appearing on it was where the mail was "first received." However, this is mere speculation as petitioner has not offered testimony or affidavits from anyone with knowledge of USPS procedures or the meaning of the information in the printout. The printout itself does not indicate where the certified mail was "first received" and petitioner has offered no testimony or evidence to explain what the various entries and zip codes appearing on the printout mean. Instead, petitioner merely speculates in her brief that "the CMR and the piece of certified mail were *apparently* received at two different USPS locations" (emphasis added). Petitioner's unsubstantiated allegations and assertions interpreting the printout and the meaning of the various entries are insufficient to overcome the Division's mail proof (***see Whelan v GTE Sylvania***, 182 AD2d 446 [1st Dept 1992]). In contrast, the Division offered affidavits from employees with knowledge of the Division's mailing procedures and a properly completed CMR on which the USPS employee affixed a postmark to each page and certified that the pieces of mail were received by the USPS for mailing (***see*** USPS Domestic Mail Manual § 503 [5.1.1]

"Certificates of Mailing . . . including USPS-approved privately printed versions . . . may be presented only at the time of mailing and provide evidence that individual mailpieces have been presented to the USPS for mailing. . . . Each individual Form 3817 or each sheet of the Form 3665 (firm sheet) (or USPS-approved privately printed form) is postmarked (round-dated) at the time of mailing; the form(s) are then returned to the mailer and become the mailer's receipt").

As such, I find that the Division has presented credible and persuasive evidence, including the Division's affidavits from Ms. Nagengast, Ms. Peltier and Mr. Ramundo, and the properly completed CMR which is consistent with the USPS Domestic Mail Manual § 503, and has met its burden of proving that it properly mailed the notice. Petitioner's USPS printout is not persuasive and does not refute the Division's evidence (***see Matter of Tilton*** ["The USPS tracking information submitted by petitioner will not necessarily preclude a decision in favor of the Division at the hearing. The ultimate decision on that issue will depend on the credibility and persuasiveness of what petitioner and the Division offer into evidence"].

H. The petition of Patricia Marrero is denied and the notice of deficiency dated October 20, 2016 is sustained.

DATED: Albany, New York
April 28, 2022

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE