

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ALBERT AND LINA NIGRI** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 828148  
New York State Personal Income Tax under Article 22 :  
of the Tax Law and the Administrative Code of the :  
City of New York for the Years 2012 and 2013. :  
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Petitioners, Albert and Lina Nigri, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2012 and 2013.

On June 27, 2017, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). Petitioner, appearing by Isaac Sternheim & Co. (Isaac Sternheim, CPA), filed no response to the Division of Taxation's motion by the due date of July 27, 2017, which date commenced the 90-day period for the issuance of this determination. After due consideration of the affidavits, documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of deficiency dated September 15, 2016.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioners' protest of a notice of deficiency (notice), bearing assessment ID number L-045454102-3, and dated September 15, 2016. Two identical copies of such notice were mailed to petitioners at two different addresses. One notice was addressed to petitioners, Albert and Lina Nigri, 1407 Broadway, RM 2310, New York, New York 10018-2665, and asserts additional personal income tax due in the amount of \$311,298.00, plus interest and penalty, for tax years 2012 and 2013. The second notice is also addressed to petitioners, but at 1950 E. 19<sup>th</sup> Street, Brooklyn, New York 11229-3540, for the same tax, interest and penalty amounts, and the same tax years.

2. Petitioners filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) requesting a conference for the periods October 1, 2012 through December 31, 2013. In addition, the request protested the assessment as arbitrary, not reflecting the correct amount due, and asserted that the taxpayers never received the original assessment. The request bears the address 1950 East 19<sup>th</sup> Street, Brooklyn NY 11229-3540, is dated March 2, 2017, and was date-stamped as received by BCMS on March 7, 2017. Included with the request and other documents is a copy of the envelope presumably used to mail the request, bearing a United States postmark of March 2, 2017, a certified mail form from the United States Post Office (USPS), and date-stamped as received by BCMS on March 7, 2017.

3. BCMS issued a conciliation order dismissing request (CMS No. 274031) to petitioners dated March 24, 2017, which concluded that petitioners' protest of the subject notice of deficiency was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on September 15, 2016, but the request was not mailed until March 7, 2017, or in excess of 90 days, the request is late filed.”

4. Petitioners filed a petition with the Division of Tax Appeals in protest of the conciliation order on March 30, 2017, bearing the E. 19<sup>th</sup> Street, Brooklyn, New York, address.

5. To show proof of proper mailing of the September 15, 2016 notice, the Division provided the following with its motion papers, along with the June 27, 2017 affidavit of Charles Fishbaum, Esq.: (i) an affidavit, dated May 25, 2017, of Deena Picard, a data processing fiscal systems auditor 3 (since February 2006), and the acting director of the Management Analysis and Project Services Bureau (MAPS) of the Division (since May 2017), who is familiar with the Case and Resource Tracking System (CARTS) and past and present procedures for generating statutory notices; (ii) an affidavit, dated May 31, 2017, of Melissa Kate Koslow, a mail room supervisor in the Division (since April 2010); (iii) the “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked September 15, 2016; (iv) a copy of the Division's notice to petitioners, dated September 15, 2016, bearing a cover letter with certified control number 7104 1002 9730 0030 5828, and petitioners' address at 1407 Broadway, RM 2310, New York, New York 10018-2665; (v) a copy of the Division's notice to petitioners, dated September 15, 2016, bearing a cover letter with certified control number 7104 1002 9730 0030 6283, and petitioners' address at 1950 E. 19<sup>th</sup> Street, Brooklyn, New York 11229-3540; (vi) two copies of the subject notice with certified control numbers 7104 1002 9730 0030 6801 and 7104 1002

9730 0030 6818, both bearing assessment ID number L-045454102, mailed to a former representative, Joseph A. Petriello, CPA, 30 Parkway Dr. South, Commack, New York 11725; (vii) the petition filed with the Division of Tax Appeals bearing a postmark of March 30, 2017, and date-stamped as received by the Division of Tax Appeals on April 10, 2017; and (viii) a representative copy of petitioner's e-filed resident income tax return (Form IT-201) for tax year 2014, with no filing date indicated.

6. Mr. Fishbaum's affidavit indicates that petitioners' 2014 tax return was filed on or about December 16, 2015, and it was "the last return filed before the Notice was issued." The return bears a mailing address of 1950 19<sup>th</sup> Street, Brooklyn, New York 11229.

7. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and 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."

Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing, allowing for a manual review of the notices prior to mailing.

Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to reflect the actual mailing date of "9/15/16."

8. According to the Picard affidavit, the CMR in the present matter consists of 16 pages and lists 172 certified control numbers along with the corresponding assessment numbers, names and addresses. In addition, Ms. Picard stated that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page. Ms. Picard notes that the portion of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, wrote "172" on page 16, and initialed the same page.

9. Page 1 of the CMR indicates that a statutory notice with certified control number 7104 1002 9730 0030 5828 and assessment ID number L-045454102 was mailed to petitioner Albert Nigri at 1407 Broadway, RM 2310, New York, New York 10018-2665.

10. Page 6 of the CMR indicates that a statutory notice with certified control number 7104 1002 9730 0030 6283 and assessment ID number L-045454102 was mailed to petitioner Lina Nigri at 1950 E. 19<sup>th</sup> Street, Brooklyn, New York 11229-3540.

11. Page 10 of the CMR indicates that two statutory notices with certified control numbers 7104 1002 9730 0030 6801 and 7104 1002 9730 0030 6818, both bearing assessment ID number L-045454102, were mailed to a former representative, Joseph A. Petriello, CPA, 30 Parkway Dr. South, Commack, New York 11725.

12. The affidavit of Melissa Kate Koslow, a mail room supervisor for the Division, describes the mail room's general operations and procedures as they related to the issuance of statutory notices. The mail room receives the notices in an area designated for "Outgoing Certified Mail." A staff member operates a machine that puts each notice and the associated documents into a windowed envelope so the addresses and certified numbers from the mailing cover sheet show through the windows. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature or initials on the CMR, indicating receipt by the post office. The mail room staff further request that the USPS employee either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR.

13. According to the Koslow affidavit relating to the CMR dated September 15, 2016, Ms. Koslow noted that the USPS employee initialed page 16 of the CMR and affixed a postmark dated September 15, 2016, to each page of the CMR. In addition, the USPS employee complied with the request to circle or write the number of pieces to verify such number by writing the number "172" on the last page next to the heading "Total Pieces Received at Post Office." Based upon her review, Ms. Koslow attested to the fact that an employee of the mail room delivered one piece of certified mail addressed to "NIGRI-ALBERT, 1407 BROADWAY RM 2310, NEW YORK, NY 10018-2665," one piece of certified mail addressed to "NIGRI-LINA, 1950 E 19<sup>TH</sup>

ST., BROOKLYN, NY 11229-3540,” and two pieces of certified mail addressed to “JOSEPH A. PETRIELLO CPA, 30 PARKWAY DR SOUTH, COMMACK, NY 11725,” to the USPS in Albany, New York, in sealed postpaid windowed envelopes for delivery by certified mail. The name of petitioners and petitioners’ former representative, and their respective addresses, as set forth on the statutory notices, would have been displayed in the windows of the envelopes. According to the Koslow affidavit, certified mail items were mailed to petitioners and their former representative on September 15, 2016, as claimed.

14. According to the Picard and Koslow affidavits, copies of the same subject notice of deficiency were mailed to petitioners on September 15, 2016, as claimed, to both their Brooklyn, New York and New York, New York, addresses, as well as to their former representative at his Commack, New York, address.

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

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b).

B. A motion for summary determination may be granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]).

C. Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact

from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 573 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], *citing Zuckerman*).

Petitioners failed to file a response to the instant motion; therefore, they are deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227 [3d Dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioners have presented no evidence to contest the facts set forth in the Picard and Koslow affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden; Whelan v. GTE Sylvania*).

D. Where, as here, the timeliness of a petitioner’s protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter*



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

E. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., September 15, 2016, to two addresses used by petitioners, one being petitioners' last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure, as well as the relevant mailing record, and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Also supporting the fact that such procedures were followed herein, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the listed address and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The facts concerning the CMR indicate that the proper mailing procedures were followed in this case. In addition, the address on one of the copies of the notice conforms with the address listed on petitioners' e-filed resident income tax return, filed for tax year 2014, the last return filed prior to the issuance of the notice, satisfying the "last known address" requirement of Tax Law § 681(a).

Accordingly, it is concluded that the Division has presented sufficient documentary proof to establish that the subject notice was mailed as addressed to petitioners on the date claimed and, thus, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on September 15, 2016 (Tax Law §§ 170[3-a][a]; 681[b]).

F. The documents show that the notice was mailed on September 15, 2016, but petitioners' request was not mailed until March 2, 2017, which is well beyond the 90-day period for a timely protest. Consequently, the Division of Tax Appeals must grant summary

determination in favor of the Division of Taxation (*see Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003).

G. Finally, it is observed that petitioners are not entirely without recourse. That is, petitioners may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 687[a]). If the claim for refund is disallowed, petitioners may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law §§ 689[c]; 170[3-a][a]; *see Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

H. The Division of Taxation's motion for summary determination is granted, and the petition of Albert and Lina Nigri is hereby denied.

DATED: Albany, New York  
October 19, 2017

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE