

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**MARK & EVELYN WALSH** : DETERMINATION  
 : DTA NO. 828343  
for Redetermination of a Deficiency or for Refund of New :  
York State and New York City Personal Income Tax Under :  
Article 22 of the Tax Law and New York City :  
Administrative Code for the Year 2014. :

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Petitioners, Mark and Evelyn Walsh, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and New York City administrative code for the year 2014.

On October 27, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition, pursuant to 20 NYCRR 3000.9 (a) (4), on the ground that the petition did not appear to be timely filed. By requests from both the Division of Taxation and petitioners, the 30-day period for both parties to respond to the notice of intent to dismiss petition was extended to February 26, 2018. On January 10, 2018, the Division of Taxation, by Amanda Hiller, Esq. (Ellen K. Roach, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing by Thaney & Associates (Edward F. Thaney, CPA), did not respond to the notice of intent. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this determination commenced on February 26, 2018. After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a notice of deficiency.

***FINDINGS OF FACT***

1. On August 22, 2017, petitioners, Mark and Evelyn Walsh, filed a petition with the Division of Tax Appeals protesting the issuance of a notice of deficiency, dated January 31, 2017, and bearing assessment identification L-046022849.<sup>1</sup> The notice is addressed to petitioners at an address in Walworth, New York.

2. On October 27, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued to petitioners a notice of intent to dismiss petition, on the basis that the petition did not appear to be timely filed. The notice of intent indicated that the notice appeared to be issued on January 31, 2017, but that the petition was not filed until August 22, 2017, or 203 days later. There were no other notices attached to the petition.

3. In response to the issuance of the notice of intent, the Division of Taxation (Division) submitted the affidavits of Deena Picard, dated January 8, 2018, and Fred Ramundo, dated January 9, 2018, both employees of the Division. The Division also submitted a copy of the notice of deficiency issued to petitioners, a copy of the certified mail record (CMR) containing a list of notices issued by the Division on January 31, 2017, and a copy of form IT-201 resident income tax return filed by petitioners for the tax year 2015, reflecting a Walworth, New York, address.

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<sup>1</sup>Although there is only one assessment at issue, L-046022849, petitioners were separately issued a notice bearing this assessment number; one notice was issued to Mark Walsh and the other to Evelyn Walsh.

4. The affidavit of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS), sets forth the Division's general practice and procedure for processing statutory notices. As the Acting Director of MAPS, the unit responsible for the receipt and storage of CMRs, she 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. 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 "1/31/17." 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 United States 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 "1" and are noted in the upper right corner of each page.

5. 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."

6. The CMR in the present matter consists of 24 pages and lists 253 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR contains 11 such entries with the exception of page 24, which contains no entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated January 31, 2017, to each page of the CMR, wrote and circled the number “253” on page 24 next to the heading “Total Pieces Received at Post Office,” and initialed page 24.

7. Page 21 of the CMR indicates that a notice with certified control number 7104 1002 9730 0091 6086 and reference number L-046022849 was mailed to Mark Walsh at the Walworth, New York, address listed on the notice. Page 22 of the CMR indicates that a notice with certified control number 7104 1002 9730 0091 6093 and reference number L-046022849 was mailed to Evelyn Walsh at the Walworth, New York, address listed on the notice. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bear these certified control numbers and petitioners’ names and address as noted. The Walworth, New York, address for petitioners is the same address used by petitioners on their form IT-201 filed with the Division for the tax year 2015, and on their petition. Page 22 of the CMR also indicates that two notices with certified control numbers 7104 1002 9730 0091 6123 and 7104 1002 9730 0091 6130, and both with reference number L-046022849, were mailed to petitioners’ representative, Edward F. Thaney, CPA, at a Rochester, New York, address. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bear these certified control numbers and Mr. Thaney’s name and address as noted.

8. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December of 2013, and currently a Stores and Mail Operations Supervisor, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, once a notice and accompanying mailing cover sheet is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff retrieves the notice and mailing cover sheet and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. A 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. Each of the CMRs has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in the Albany, New York, area. A postal employee is requested to affix a postmark, and sign or initial the CMR, indicating receipt by the post office.

9. In this particular instance, the postal employee affixed a postmark dated January 31, 2017, to each page of the 24-page CMR. The postal employee also wrote and circled the number "253" and initialed page 24 to indicate the total pieces of mail received at the post office.

10. Mr. Ramundo stated that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Ramundo's staff on the following day after its initial delivery and is then

delivered to the originating office. The CMR is maintained by the Division in the regular course of business.

11. Based upon his review of the affidavit of Deena Picard, the exhibits attached thereto and the CMR, Mr. Ramundo stated that on January 31, 2017, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Mark Walsh, a piece of certified mail to Evelyn Walsh, and two pieces of certified mail addressed to their representative to a branch of the USPS in the Albany, New York, area, in sealed envelopes for delivery by certified mail. He stated that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on January 31, 2017, for the records of the Division. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioners and their representative on January 31, 2017.

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

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

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. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a notice of deficiency (Tax Law §§ 681

[b]; 689 [b]). 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).

D. Where, as here, the timeliness of a taxpayer's protest of a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see 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). Where a notice of deficiency has been properly mailed, Tax Law § 681 (a) does not require actual receipt by the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. 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*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioners' last known address on January 31, 2017 and to their representative on the same day. 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 submitted 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 sheets and CMR conform with the address listed on petitioners' 2015 resident income tax return, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notice when it was delivered into the custody of the USPS on January 31, 2017. Since it was properly addressed with the requisite amount of postage affixed, 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 (Tax Law §§ 170 [3-a] [a]; 681 [b]).

G. In sum, the Division has established that notice of deficiency L-046022849 was properly mailed as addressed to petitioners at their last known address on January 31, 2017 and to their representative on the same day. Having established that the notice of deficiency was properly mailed to petitioners, it was incumbent upon petitioners to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter. Petitioners did not file a request for conciliation conference with BCMS, but rather opted to file a petition for a hearing before the Division of Tax Appeals in the first instance. However, the petition was not filed until August 22, 2017, a date that falls beyond 90 days after the date of



issuance of the notice. Accordingly, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The petition of Mark and Evelyn Walsh is dismissed.

DATED: Albany, New York  
May 24, 2018

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE