

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**NETESHA FEARON** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 828419  
York State Personal Income Tax Under Article 22 of the :  
Tax Law for the Year 2013. :

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Petitioner, Netesha Fearon, 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 for the year 2013.

The Division of Taxation, appearing by its representative, Amanda Hiller, Esq. (Peter Ostwald, Esq., of counsel), brought a motion dated November 21, 2018, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the Division of Taxation's motion. The 90-day period for issuance of this determination commenced on December 21, 2018. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, 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.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a notice of deficiency, dated March 22, 2017, and bearing assessment identification number L-046035622. The notice is addressed to petitioner, Netesha Fearon, at 63 Bokee Ct Apt 1K, Brooklyn, New York 11223-6102. The mailing cover sheet of the notice of deficiency contains the certified control number 7104 1002 9735 3424 1913.

2. On July 26, 2017, petitioner filed a request for conciliation conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The envelope in which the Request was mailed by United States Postal Service (USPS) certified mail bears a USPS postmark of July 26, 2017. BCMS received the Request on July 31, 2017. The Request lists petitioner's address as the Brooklyn, New York, address.

3. On August 11, 2017, BCMS issued a conciliation order dismissing request (conciliation order), CMS No. 276189, to petitioner. The conciliation order determined that petitioner's protest of the notice 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(s) was issued on March 22, 2017, but the request was not mailed until July 26, 2017, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on October 17, 2017.

5. To show proof of proper mailing of notice of deficiency number L-046035622, the Division provided the following with its motion papers: (i) an affidavit, dated October 11, 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); (ii) a copy of pages 1,

301, and 775 of a “Certified Record for - DTF-962-F-E - Not of Def Follow Up DTF-963-F-E - Not of Def Follow Up” (CMR); (iii) an affidavit, dated October 12, 2017, of Fred Ramundo, a supervisor in the Division’s mail room; (iv) a copy of the March 22, 2017 notice with the associated mailing cover sheet addressed to petitioner; (v) a copy of petitioner’s request for conciliation conference, filed with BCMS on July 26, 2017; (vi) an affidavit, dated October 10, 2018, of Julie Popo, a Legal Assistant 1 in the Office of Counsel for the Division; (vii) a Request for Delivery Information/Return Receipt After Mailing (USPS form 3811-A) and the USPS response to such request dated October 4, 2018; and (viii) a copy of petitioner’s 2015 New York State resident income tax return (form IT-201), electronically filed on April 18, 2016, which was the last return filed with the Division prior to the issuance of this notice.

6. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor 3 since February 2006, 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 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. 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 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.

7. 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. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying mailing cover sheet and appropriate enclosures, is a discrete unit within the batch of notices, and the mailing cover sheet is the first sheet in the unit.

8. The CARTS-generated CMR for each batch of notices lists each notice in the order the notices are generated in the batch. The certified control number is also listed on the CMR under the heading entitled "Certified No." 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 CMR and associated batch of statutory notices are forwarded to the Division's mail room together.

9. Each statutory notice is, as noted, predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. The CMR lists in its upper left corner the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR is conformed to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

10. The affidavit of Fred Ramundo, a supervisor in the Division's mail room and whose current title is Stores and Operations Supervisor, describes the general operations and procedures of the Division's mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information listed on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee then affixes his or her initials or signature and a USPS postmark to a page or pages of the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. 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. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day

after its initial delivery and is then delivered back to the Division for storage and retention in the regular course of its business.

11. The CMR for the batch of notices to be issued on March 22, 2017, including the notice addressed to petitioner herein, allegedly consisted of 775 cut sheet pages. As noted, the Division included herein only page “1” (the first page), page “301” (the page on which information pertaining to petitioner appears) and page “775” (the last page of the CMR). Each of these three pages includes in its upper left corner the preprinted year/day/time “run” listing of “20170750635.” Appearing in the upper right corner of the pages 1 and 775 is the handwritten date “3/22/17,” reflecting the manual change made by the Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. Each of the foregoing three pages includes a USPS postmark, dated March 22, 2017, of the USPS Albany, New York, General Mail Facility. Pages 1 and 301 include 15 and 14 entries, respectively, and page 775 includes 12 entries. Ms. Picard noted that the portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

12. Page 301 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 3424 1913 and reference number L-046035622 was mailed to petitioner at the Brooklyn, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

13. Appearing below the 12 entries on page 775 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS,” next to which the preprinted number “11,128,” and the

handwritten number “11,128” appear. Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” next to which the handwritten number “11,218” and the initials of the USPS employee appear.

14. Petitioner’s 2015 resident income tax return, electronically filed on April 18, 2016, reported her address as Bokee Court, Brooklyn, New York 11223. This was the last return filed by petitioner prior to the issuance of the subject notice of deficiency. This address corresponds with the address appearing on the CMR, the notice of deficiency, the Request and the petition.

15. The affidavit of Julie Popo, a Legal Assistant 1 in the Division’s Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, Ms. Popo filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9735 3424 1913 on March 22, 2017 from the Albany, New York, General Mail Facility branch office of the USPS to petitioner at 63 Bokee Ct Apt 1K, Brooklyn, NY 11223-6102. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9735 3424 1913 on March 28, 2017, at 2:27 P.M., in Brooklyn, NY 11223. The scanned image of the recipient’s signature as shown on the USPS response is “N. Fearon.” The scanned address of the recipient indicates “63 Bokee Ct Bklyn NY.”

### ***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). As the petition in this matter was filed within 90 days of

the conciliation order (*see* finding of fact 4), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9 (b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This determination shall address the instant motion as such.

B. A motion for summary determination "shall 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" (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, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).



D. Petitioner did not respond to the Division's motion. Accordingly, she is 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*, 99 AD2d 227 [1st Dept 1984] *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Picard, Ramundo, or Popo affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel, Inc. v Baiden* at 544; *Whelan v GTE Sylvania*).

E. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS "if the time to petition for such a hearing has not elapsed" (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In the case of a notice of deficiency, proper mailing requires mailing of the notice by registered or certified mail to the taxpayer's last known address (Tax Law § 681[a]),

and it is the Division's initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured.

F. The Division may meet its burden of proving proper mailing by providing 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). 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 the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Piccard and Mr. Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). However, the submission of a partial (or truncated) CMR, as here, is not sufficient to establish that the Division's standard mailing procedure was followed (*see Matter of Ankh-Ka-Ra Sma-Ntr f/k/a Andre Williams*, Tax Appeals Tribunal, April 14, 2016; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Hence, the proof submitted fails to establish that the notice of deficiency was properly mailed on March 22, 2017 and, thus, the period within which to file a protest was not triggered as of such date.

H. An inadequacy in the evidence of mailing, as in conclusion of law G, may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing, the 90-day period for

filing either a request or a petition is tolled until such time as the taxpayer actually receives the notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib. of State of N.Y.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest will commence (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v Tax Commn. of the State of N.Y.*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. Notwithstanding the described evidentiary failure with regard to the mailing of notice of deficiency L-046035622, the Division has nonetheless established, via the Popo affidavit and the accompanying USPS form 3811-A and USPS response thereto, that the notice of deficiency was mailed by certified mail and was, in fact, thereafter delivered to and accepted by petitioner on March 28, 2017 (*see* finding of fact 15). As a result, the period within which to challenge the subject notice of deficiency commenced to run on the date of such actual receipt, i.e., March 28, 2017, and in order to be timely, a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS, had to have been filed within 90 days thereafter (*see Matter of Agosto; Matter of Rosen*). In turn, 90 days after the date of actual receipt of the notice of deficiency was June 26, 2017. Petitioner's request for conciliation conference was filed with BCMS on July 26, 2017. This date falls after the 90-day period of limitation for the filing of such a request. Petitioner has offered no claim or evidence to meet her burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and

must grant summary determination in favor of the Division of Taxation (*see Matter of American Woodcraft, Inc.*).

J. Finally, it is observed that petitioner is not without recourse. That is, petitioner 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, petitioner 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]; *Matter of Rosen*).

K. The Division of Taxation's motion for summary determination is hereby granted, the petition of Netesha Fearon is denied and the August 11, 2017 Conciliation Order Dismissing Request is sustained.

DATED: Albany, New York  
March 14, 2019

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE