

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOHN E. FITZGERALD** : DETERMINATION  
for Redetermination of a Deficiency or for : DTA NO. 830419  
Refund of New York State and New York City :  
Personal Income Tax under Article 22 of the :  
Tax Law and the Administrative Code of the City :  
of New York for the Year 2016. :

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Petitioner, John E. Fitzgerald, 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 the Administrative Code of the City of New York for the year 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), brought a motion dated June 14, 2022, seeking an order of dismissal or, in the alternative, summary determination, in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) (1) (i); (vii) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not respond to the motion. The 90-day period for issuance of this determination commenced on July 14, 2022. 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 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 a request for conciliation conference (request) filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioner, John E. Fitzgerald, in protest of a notice of deficiency, dated November 25, 2020, and bearing assessment ID number L-052179290 (notice). The notice asserted \$134.76 in penalties and \$50.08 in interest for the year 2016. The notice is addressed to "FITZGERALD-JOHN E" at an address in Queens, New York. The mailing cover sheet of this notice contains certified control number 7104 1002 9735 0335 0073.

2. Petitioner filed a request with BCMS in protest of the notice. The request was signed by petitioner and was dated March 19, 2021. The request was faxed to and received by BCMS on March 19, 2021.

3. On April 9, 2021, BCMS issued a conciliation order dismissing request (conciliation order) (CMS No. 000328454) to petitioner. The conciliation order determined that petitioner's protest of the subject 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 November 25, 2020, but the request was not faxed until March 19, 2021, 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 April 27, 2021.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated June 14, 2022, of Colleen McMahon, Esq., the

Division's representative; (ii) an affidavit, dated May 19, 2022, 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 "Certified Record For – DTF-962-F-E – Not of Def Follow Up DTF-963-F-E – Not of Def Follow Up" (CMR) postmarked November 25, 2020; (iv) an affidavit, dated May 20, 2022, of Susan Ramundo, a manager in the Division's mail room; (v) a copy of the notice mailed to petitioner and the associated mailing cover sheet; (vi) a copy of petitioner's request for conciliation conference; (vii) a copy of petitioner's New York State resident income tax return (form IT-201) for the year 2016, electronically filed on September 3, 2020, which lists the same Queens, New York, address for petitioner as that listed on the notice, the request for conciliation conference, and the petition, except that petitioner's address on the notice includes an additional four zip code digits to petitioner's five-digit zip code and removes a hyphen between petitioner's street address number. The 2016 personal income tax return was the last return filed with the Division by petitioner before the notice was issued; and (viii) a United States Postal Service (USPS) Zip Code Lookup printout showing that when "29-24 COLD SPRING RD FAR ROCKAWAY NY 11691" is entered, USPS will more fully identify such address as "2924 COLDSRING RD FAR ROCKAWAY NY 11691-1736."

6. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is

produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case “20203240635.” 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 “11/25/20.” In addition, as described by Ms. Picard, generally 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 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. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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.”

8. The CMR in the present matter consists of 385 pages and lists 5,207 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 to 15 such entries with the exception of page 385 which contains 4 entries. Ms. Picard notes that the copy 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. A USPS employee affixed a postmark dated November 25, 2020 to each page of the CMR. On the last page of the CMR, the USPS employee handwrote “5207” on the line next to the preprinted heading “TOTAL PIECES AND AMOUNTS” and initialed or signed page 385. A handwritten “385” also appears on the line next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE”.

9. Page 209 of the CMR indicates that a notice with certified control number 7104 1002 9735 0335 0073, and reference number L-052179290 was mailed to petitioner, “FITZGERALD-JOHN E,” at the Far Rockaway, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Ramundo has been in this position since 2017 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Ramundo confirms that a mailing cover sheet precedes each notice. 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. As noted, each of the 385 pages of the CMR attached to the Picard affidavit as exhibit “A” contains a USPS postmark of November 25, 2020. On page 385, corresponding to “TOTAL PIECES AND AMOUNTS” is the preprinted number 5,207 and next to it is a preprinted line upon which is the handwritten entry “5207,” indicating 5,207 pieces of mail were received by the USPS. On page 385, corresponding to “TOTAL PIECES RECEIVED AT POST OFFICE” is a preprinted line upon which is the handwritten entry “385”. There is a set of initials or a signature on page 385.

11. According to the Picard and Ramundo affidavits, a copy of the notice was properly mailed to petitioner at his Far Rockaway, New York, address on November 25, 2020, as claimed.

12. Petitioner did not respond to the Division’s motion.

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

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) (1) (i) and (vii) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (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, 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, 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, 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*). Petitioner did not respond to the Division’s motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984] *appeal dismissed* 62 NY2d 942 [1984]).

D. 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 the date of mailing of such notice (*see 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).

E. Where, as here, the timeliness of a request for conciliation conference 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).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner’s last known address on November 25, 2020. 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). Though page 385 of the CMR does contain an unexplained, handwritten “385” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE,” the CMR has still been properly completed. The mail room 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 and initialing or signing. On page 385, corresponding to “TOTAL PIECES AND AMOUNTS” is the preprinted number 5,207 and next to it is a preprinted line upon which is the handwritten entry “5207,” and a set of initials or a signature, indicating 5,207 pieces of mail were received by the USPS. As the Division’s requirements for the USPS were fulfilled, the addition of the handwritten “385”, though unnecessary, is not improper.

G. Further, the address on the mailing cover sheet and CMR sufficiently conform with the address listed on petitioner’s 2016 personal income tax return filed, which satisfies the “last known address” requirement, although there were two variations. First, the Division added an additional four digits to petitioner’s five-digit zip code. However, the addition of those digits does not invalidate the notice at issue (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2011). Next, the Division removed the hyphen from the street number of the address provided on petitioner’s electronically filed 2016 tax return. The removal of the hyphen from the street number also does not invalidate the notice because both changes constitute inconsequential deviations (*see Matter of Rubinos*, Tax Appeals Tribunal, April 3, 2017). The United States Tax Court has held that a deviation in the address used in mailing a notice “is inconsequential where the error is so minor that it would not prevent delivery of the notice (citations omitted)” (*see Lee v C.I.R.*, T.C. Memo 2011-129 [2011]). Both changes are also supported by the USPS

Zipcode Lookup printout provided by the Division (*see* finding of fact 5 [viii]). The deviations between the address the notice was mailed to as compared to the address provided on the 2016 personal income tax return petitioner filed were inconsequential.

H. It is therefore concluded that the Division properly mailed the notice on November 25, 2020, 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 (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Petitioner's request for conciliation conference was filed on March 19, 2021. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the April 9, 2021 conciliation order issued by BCMS.

I. The Division of Taxation's motion for summary determination is hereby granted, the petition of John E. Fitzgerald is denied, and the April 9, 2021 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York  
October 13, 2022

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE