

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| REYSON ARACENA | : | DETERMINATION |
| | : | DTA NO. 831265 |
| 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 2018. | : | |

Petitioner, Reyson Aracena, 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 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Emil M. Kambala), brought a motion on February 3, 2025, seeking dismissal of the petition or, in the alternative, summary determination in this matter pursuant to sections 3000.5 and 3000.9 (a) and (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 by March 5, 2025, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers, the affidavits and attached documents, and all pleadings submitted in connection with this matter, Anita K. Luckina, 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 Division of Taxation's (Division's) motion is the timeliness of petitioner Reyson Aracena's protest of a notice of deficiency for tax year 2018, dated October 30, 2019, bearing assessment identification number L-050514152 (notice). The notice was addressed to petitioner at an address in Baldwin, New York.

2. On December 12, 2022, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On January 6, 2023, BCMS issued a conciliation order dismissing request, CMS No. 000348055, 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 October 30, 2019, but the request was not faxed until December 12, 2022, or in excess of 90 days, the request is late filed.”

4. On March 17, 2023, petitioner timely filed a petition with the Division of Tax Appeals in protest of the conciliation order.

5. To show proof of proper mailing of the notice, the Division, by affidavit of Emil M. Kambala, sworn to on February 3, 2025, submitted the following with its motion papers: (i) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS), sworn to on June 10, 2024; (ii) a 30-page copy of a “CERTIFIED RECORD FOR - DTF-962-F-E - Not of Def Follow Up” (CMR), postmarked October 30, 2019; (iii) a copy of the notice with the associated mailing cover sheet addressed to petitioner; (iv) an affidavit of Susan Ramundo, a manager of the Division's mail room, sworn to on June 11, 2024; (v) a copy of petitioner's request for conciliation conference, showing the same Baldwin, New York, address for petitioner as that

shown on the notice, and the conciliation order issued by BCMS on January 6, 2023; and (vi) a copy of petitioner's electronically filed form IT-201, New York State resident income tax return, for tax year 2018, filed on April 1, 2019, showing the same Baldwin, New York, address for petitioner as that shown on the notice. The Division asserts that the Baldwin, New York, address was petitioner's last known address when the notice was issued.

6. Ms. Denier has served as the Director of MAPS since July 2022. Prior to that, she was a supervisor in MAPS since October 2004. She is also a Principal Administrative Analyst and has held that position since August 2022. Prior to this position, Ms. Denier was a Supervisor of Administrative Analysis from July 2019 through August 2022. In performing her duties, Ms. Denier has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of deficiency. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Denier is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Denier's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices.

7. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with its accompanying mailing cover sheet and any enclosures referenced in the body of that notice, is a discrete unit within the batch of notices.

8. Each batch of statutory notices is accompanied by a CMR. The CMR lists each notice in the order it is generated in the batch. The certified control numbers are listed on the CMR under the heading entitled “CERTIFIED NO.” The statutory notice numbers are listed under the heading “REFERENCE NO.” The names and addresses of the recipients are listed under “NAME OF ADDRESSEE, STREET, AND P.O. ADDRESS.” Each CMR and associated batch of statutory notices are forwarded to the mail room together. All pages of the CMR are banded together when the documents are delivered to the Division’s mail room and remain so when returned to the Division after mailing. 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.

9. The CMR for the batch of statutory notices to be issued on October 30, 2019, including the notice addressed to petitioner, consists of 30 pages and 390 notices. Each of these pages includes in its upper left corner a preprinted “run” date that is approximately 10 days in advance of the anticipated mailing date. Appearing in the upper right corner of pages 1 and 30 is the handwritten date “10/30.”¹ Following the Division’s general practice, the date on the first and last page of the CMR was manually changed to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the United States Postal Service (USPS). Each page of the 30-page CMR includes a USPS postmark, dated October 30, 2019. Ms. Denier noted that the copy of the CMR attached to her

¹ As set forth in Ms. Denier’s affidavit, the preprinted “run” date signifies the original date and time the CMR was produced by year, Julian day of the year and military time of day. The original date and time of “20192970635” was the date and time that the entire CMR was printed. The run date signifies that the CMR was printed on the 297th day of 2019, or October 24, 2019. Given the relationship of the run date to the handwritten date and considering the postmark on each page of the CMR, it is concluded that the handwritten date of “10/30” was intended to refer to October 30, 2019 (*see Matter of Sarmiento*, Tax Appeals Tribunal, December 20, 2018).

affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

10. Page 22 of the CMR indicates that a notice with certified control number 7104 1002 9735 5220 6727 and reference number L 050514152 was mailed to petitioner at the Baldwin, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Denier affidavit with a copy of the notice as exhibit "B," bears this same certified control number and petitioner's name and address as noted.

11. Appearing below the preprinted heading "CERTIFIED NO" on page 30 of the CMR is the preprinted heading "TOTAL PIECES AND AMOUNTS," next to which is the preprinted number "390." Immediately beneath this heading is the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE," next to which appears the handwritten number "390." A USPS postmark, dated October 30, 2019, appears on this page, as well as the initials or signature of a USPS employee.

12. Ms. Denier states that the notice was mailed on October 30, 2019, as indicated by the CMR, as well as the USPS postmark on each page of the CMR.

13. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on October 30, 2019.

14. Ms. Ramundo, a manager of the Division's mail room, describes the mail room's general operations and procedures as they relate to statutory notices. Ms. Ramundo has been a manager of the mail room since 2017. As a mail room manager, Ms. Ramundo is knowledgeable regarding past and present office procedures as they relate to statutory notices. Ms. Ramundo's official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the USPS.

15. The mail room receives statutory notices that are ready for mailing in an “Outgoing Certified Mail” area. The mail room also receives the corresponding CMR for each batch of notices. A staff member receives the batch of notices and associated mailing cover sheets and operates a machine that puts each notice and its mailing cover sheet into a windowed envelope. That staff member then weighs, seals and places postage on each envelope. A clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A clerk will also perform 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. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area.

16. A USPS employee affixes a postmark and writes his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. The mail room also 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 picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division’s record of receipt by the USPS for the pieces of certified mail listed thereon.

17. Ms. Ramundo avers that each page of the CMR contains a postmark and that a USPS employee hand wrote the number of mail pieces received and initialed or signed page 30. A review of the CMR confirms Ms. Ramundo’s assertions.

18. Ms. Ramundo attests that, based on her review of the Denier affidavit and attached exhibits and her personal knowledge of the mail room procedures, on October 30, 2019, an employee of the mail room delivered to the USPS one piece of certified mail addressed to

petitioner at petitioner's Baldwin, New York, address in a sealed postpaid envelope for delivery by certified mail. She also states that the CMR delivered to the USPS on October 30, 2019, was returned to the Division. Ms. Ramundo further attests that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on October 30, 2019.

19. Petitioner did not file a response 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) 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 (*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 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 Civil Practice Law and Rules 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]). “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 v City of New York*, 49 NY2d at 562). 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” (see *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village 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]).

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 of deficiency 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 conciliation conference is strictly enforced and that protests filed even one date 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 met its burden of demonstrating the fact and date of mailing of the notice 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 issuing 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. If it is found that the notice has been properly mailed by the Division to petitioner's last known address by certified or registered mail, petitioner then has the burden of proving that a timely protest of the notice was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

G. Petitioner did not respond to the Division's motion. As such, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged by the Division, and those facts are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d at 449, citing *Kuehne & Nagel v Baiden*, 36 NY2d at 544).

H. In this case, the Division has introduced sufficient proof of its standard mailing procedure through the affidavits of Ms. Denier and Ms. 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).

I. The Division has also established that its standard mailing procedure was followed here. Specifically, the CMR provides documentary proof sufficient to establish that a notice, dated October 30, 2019, was mailed to petitioner at petitioner's last known address. The 30-page document lists 390 certified control numbers with corresponding names and addresses, including on page 22 a certified control number corresponding to petitioner and petitioner's Baldwin, New York, address (*see* finding of fact 10). Each page of the CMR bears a USPS postmark, dated October 30, 2019. On page 30, a USPS employee hand wrote the number "390" next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE" to indicate receipt of all the pieces of mail listed and initialed or signed thereon. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing of the notice to petitioner's last known address (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

J. As a result, the time period within which to challenge the notice commenced to run on October 30, 2019 and, in order to be timely, petitioner's protest of the notice—either a petition with the Division of Tax Appeals or a request for conciliation conference at BCMS—had to be filed within 90 days thereafter (*see* Tax Law §§ 681 [b]; 689 [b]; 170 [3-a] [a]). Petitioner's BCMS request was not filed until December 12, 2022 (*see* finding of fact 2), a date that falls well beyond the statutory period within which a timely protest was required to be filed. As a matter of law, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*Matter of Lukacs*; *Matter of Sak Smoke Shop*).

K. The Division of Taxation's motion for summary determination is granted, the petition of Reyson Aracena is denied, and the conciliation order dismissing petitioner's request, dated January 6, 2023, is sustained.

DATED: Albany, New York
May 29, 2025

/s/ Anita K. Luckina
ADMINISTRATIVE LAW JUDGE