

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
PETER GERACE, SR.
for Redetermination of a Deficiency or for Refund
of Personal Income Tax under Article 22 of the
Tax Law for the Years 2006 through 2008.

ORDER
DTA NO. 826468

Petitioner, Peter Gerace, Sr., filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2006 through 2008.

On March 30, 2010, the Division of Taxation (Division), by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, 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 3000.9(b). Accompanying the motion was the affidavit of Peter B. Ostwald, Esq., dated March 27, 2015, and annexed exhibits in support of the motion. On April 15, 2015, petitioner, appearing by the Law Office of Shelby, Bakshi & White (Justin S. White, Esq., of counsel), filed a response in opposition to the Division's motion, and an accompanying cross motion seeking summary determination in petitioner's favor pursuant to 20 NYCRR 3000.9(b). Accompanying petitioner's motion was the affidavit of Justin S. White, Esq., dated April 12, 2015, and annexed exhibits in support of the motion. All responses to the motion were due by April 29, 2015, and it is this date that commenced the 90-day period for issuance of this order. After due consideration of the affidavits and documents submitted, and all pleadings filed in this

matter, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely challenged the denial of his request for relief from joint personal income tax liability as an innocent spouse under Tax Law § 654.

FINDINGS OF FACT

1. Petitioner, Peter Gerace, Sr., filed a petition protesting two notices of deficiency identified thereon as notice/assessment numbers L-039443096-7 and L-036965671-6. The petition is dated as signed on August 20, 2014, and the envelope in which the petition was filed, by certified mail, bears a postmark dated August 22, 2014. The petition and the envelope are date stamped as received by the Division of Tax Appeals on August 25, 2014. The petition identifies the taxes in question to be personal income tax and sales and compensating use taxes.

2. Petitioner did not include with the petition copies of the foregoing two notices, but instead attached a Consolidated Statement of Tax Liabilities, dated July 1, 2014 and issued to petitioner's spouse, Linda Gerace. This consolidated statement sets forth information pertaining to seven individual tax assessments, and lists a total balance due (tax, penalties and interest, less payments and credits) of \$448,795.94. The petition indicates the "amount of tax contested" as \$448,795.94.

3. Five of the foregoing assessments are identified as sales tax assessments. The remaining two assessments are identified as income tax assessments, and list assessment numbers matching the two set forth on the petition. Specifically, the assessment numbered L-039443096-7 pertains to the tax period ended December 31, 2008, and reflects tax assessed in the amount of \$57,355.00, plus penalty (\$25,277.95) and interest (\$34,716.48) thereon (calculated to July 1,

2014), less assessment payments/credits (\$407.00), to arrive at a (then) current balance due of \$116,942.43. The assessment numbered L-036965671-6 pertains to the tax period ended December 31, 2010, and reflects tax assessed in the amount of \$321.00, plus penalty (\$53.20) and interest (\$72.12) thereon (calculated to July 1, 2014), less assessment payments/credits (\$446.32), to arrive at a current balance due of \$0.00. The petition makes no specific mention of the sales and use tax assessments, and includes no reference thereto by assessment number or otherwise, save for the indication that the “amount of tax contested” equals the total amount due as set forth on the Consolidated Statement of Tax Liabilities.

4. Included in the record is the first page (only) of Form IT-285 (Request for Innocent Spouse Relief [and Separation of Liability and Equitable Relief]) filed in the name of petitioner and indicating relief is requested for the years 2006, 2007 and 2008.¹ The one page in the record identifies petitioner’s spouse as Linda Gerace, and indicates their marital status as “Married and still living together.” This page reflects three handwritten items showing: a) the date “12/16/13,” b) the identifier “K-148813281,” and the assessment number “L-039443096,” and also reflects the Division’s Office of Counsel receipt stamp dated “Dec 08, 2014.” The record does not disclose when or by whom the handwritten items were placed on page one of Form IT-285, and the actual date on which Form IT-285 was initially filed with the Division is not known.

5. In response to the filing of Form IT-285, the Division issued two letters, each of which is titled “Relief from Joint Liability Determination Letter.” Each letter is dated January 31, 2014,

¹ Notice is hereby taken that Form IT-285 is a three-page form, includes 19 items to be completed, and is to be signed by the person requesting relief. The record herein only contains page one, plus a separate one-page sheet setting forth a short paragraph in explanation of the request for relief as called for at item number three of page one of Form IT-285.

and each references “Case ID#(s) K148813281,” and identifies “Tax Year(s): 2006, 2007 & 2008.” Each letter is described hereafter.

6. One of the foregoing letters is addressed to petitioner, and states:

“Our review of your request for Innocent Spouse Relief, Separation of Liability and/or Equitable Relief under section 654 of the Tax Law for the above tax year has been completed. We cannot grant your request for the reasons(s) indicated below.” This letter goes on to list the three bases upon which the requested relief was denied, to wit:

a) petitioner’s reported marital status (“married and still living together”) disqualified petitioner from receiving the requested relief.

b) petitioner did not show (by statement and/or supporting documentation) that paying the liability would result in economic hardship.

c) petitioner did not show (by statement and/or supporting documentation) that he did not know or have reason to know of the items giving rise to the deficiency or that the liability would not be paid.

The letter continued by advising petitioner that he must file either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a Petition for a Tax Appeals Hearing with the Division of Tax Appeals within 90 days from the date of the letter.

7. The other of the foregoing letters is addressed to petitioner’s spouse, Linda Gerace, and states:

“We have completed our review of the request for innocent spouse, separation of liability, and/or equitable relief by the individual who filed a joint tax return with you for the above tax year.

This is your notification that *Denied* status has been granted.

Your spouse, reflected on the joint filed return has been removed from the above referenced assessment. You are then solely responsible for the outstanding balance due.”

8. By a letter dated May 9, 2014, petitioner’s representative contacted the Division concerning the January 31, 2014 letter issued to petitioner’s spouse, Linda Gerace. Petitioner’s representative quotes the language from the third paragraph of that letter (as set forth above), noting that such language appears to absolve petitioner (Peter Gerace, Sr.) from liability, and requests contact to discuss resolution of the underlying issues affecting Ms. Gerace (petitioner’s spouse).

9. By a letter addressed to Linda Gerace dated June 30, 2014, presumably in response to the foregoing May 9, 2014 letter, the Division advised as follows:

“This is your notification that the review process for the individual who filed a joint return with you for the above tax year, requesting relief under Section 654 of the New York State Tax Law for Innocent Spouse, Separation of Liability and/or equitable Relif has been completed. This application has been denied and the assessment remains due. Penalty and interest will continue until the balance is full paid.”

10. Petitioner filed a Request for Conciliation Conference (Request) with the Division’s Bureau of Conciliation and Mediation Services (BCMS). The Request is dated as signed on July 14, 2014, bears a United States Postal Service (USPS) postmark dated July 15, 2014, and is date stamped as received by BCMS on July 17, 2014. The Request lists the taxes involved as “sales and income,” the tax years at issue as “2006 - 2008,” the date of notice as “1/31/14 + 6/30/14,” and the notice number as “K148813281 (2008).” The basis for the Request is stated as:

“The determination is contrary to law and the weight of the evidence.

Taxpayer had nothing to do with Assessee’s business or conducting Assessee’s business and would have had no knowledge of alleged underpayment of sales tax.”

11. The cover letter accompanying the Request notes and describes the foregoing letters, and the allegedly conflicting statements therein, as follows:

a) the January 31, 2014 letter to petitioner, indicating denial of innocent spouse relief as to him (*see* Finding of Fact 6).

b) the January 31, 2014 letter to petitioner's spouse, Linda Gerace, stating such requested relief status was "denied," but then included language indicating such relief status had been granted to her spouse (*see* Finding of Fact 7).

c) the May 9, 2014 letter from petitioner's representative set forth above (*see* Finding of Fact 8).

d) the June 30, 2014 letter to petitioner's spouse, Linda Gerace, stating that such requested relief (as to petitioner Peter Gerace, Sr.) had been denied (*see* Finding of Fact 9).

12. On August 8, 2014, BCMS issued to petitioner a Conciliation Order Dismissing Request (Dismissal Order--CMS No. 262853). The Order is captioned as pertaining to petitioner's request for "Relief from Joint Liability Determination dated: January 31, 2014," indicated that petitioner's Request was untimely, and states:

"The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on January 31, 2014, but the request was not mailed until July 15, 2014, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is dismissed."

13. Petitioner challenged this order by filing a petition with the Division of Tax Appeals, by certified mail, on August 22, 2014 (*see* Finding of Fact 1).

14. In response to the petition, the Division has brought the subject motion and has provided the following: (i) an affidavit, dated March 27, 2015, of Peter B. Ostwald, Esq.; (ii) an affidavit, dated December 23, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii)

an affidavit, dated December 29, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a copy of petitioner's Application for Automatic Six-Month Extension of Time to File for individuals (Form IT-370); (v) the 13-page "Certified Record for Presort Mail - Assessments Receivable" (CMR) for May 16, 2013, together with copies of the notices of deficiency issued against petitioner for the years 2006, 2007 and 2008, and the letters dated January 31, 2014 described above (*see* Findings of Fact 5, 6 and 7); (vi) three pages of Division computer printouts pertaining to various assessments concerning petitioner's spouse, including an assessment numbered L-036965671 for the year 2010; and (vii) page one of Form IT-285 and the instructions thereto (IT-285-I).

15. According to the affidavit of Ms. Nagengast, the process by which the Division generates and subsequently issues statutory notices, such as the notices of deficiency specified as at issue in the petition filed herein and other such notices, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). Ms. Nagengast attests to her use of and familiarity with the Division's CARTS system.

16. The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one page "Mailing Cover Sheet" generated for each such notice, and that sheet bears a bar code, the taxpayer's mailing address and a 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. The Mailing Cover Sheet is the first sheet in the unit.

17. The CARTS generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the columnar heading entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third columnar heading entitled "Name of Addressee, Street, and P.O. Address." Remaining columnar headings list appropriate postage and fee amounts. Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., PAGE: 1, PAGE: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded together when the documents are delivered to the mail room and remain banded together when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

18. 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).

19. 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 the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the windows. 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 contained on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes to a branch of the USPS in the Albany, New York, area for mailing. A USPS employee then affixes his or her initials or signature and/or 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 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.

20. The CMR for the batch of notices to be issued on May 16, 2013, includes the notice of deficiency addressed to petitioner herein, and to petitioner's former representative, Michael A Rizzo, CPA, pertaining to the tax period ended December 31, 2008 and bearing the assessment number L-039443096, as set forth in Finding of Fact 1. The CMR consists of 13 cut sheet pages, including page 12, the page on which information pertaining to petitioner and to petitioner's former representative appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20131291700" (*see* Finding of Fact 18). Appearing in the upper left corner of the first and last pages of the CMR (i.e., pages 1 and 13), is the handwritten date "5/16/13" reflecting the manual change made by 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 page of the CMR includes a USPS postmark dated May 16, 2013 and the initials of the USPS postal clerk. All pages of the CMR include 11 entries, with the exception of page 13, the last page of the CMR, which contains 4 entries.

21. In this case, certified control number "7104 1002 9730 1561 5554," pertaining to petitioner, was assigned to the notice of deficiency bearing assessment number L-039443096, and was to be mailed to petitioner at his Williamsville, New York, address. Certified control number "7104 1002 9730 1561 5530," pertaining to petitioner's previous representative, was likewise assigned to the notice of deficiency bearing assessment number L-039443096, and was to be mailed to petitioner's former representative at his Getzville, New York, address. This same information appears at Page 12 of the CMR to indicate that the notice of deficiency bearing

such certified control numbers and reference number was mailed to petitioner and to his previous representative at such addresses.²

22. Appearing on Page 13 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fee.” These columns reflect the preprinted number of pieces of mail for this CMR, here 136, as well as the postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office.” Appearing to the immediate right of this heading is the handwritten and circled number, 136. Appearing at the lower right side of page 13 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately above and to the right of this stamped instruction reflects the initials of the postal clerk and the aforementioned USPS postmark dated May 16, 2013. In fact, these same initials and USPS postmark appear on each page of the CMR. Thus, page 13 of the CMR indicates that a total of 136 pieces of mail were delivered into the custody of the USPS on May 16, 2013.

23. The facts set forth above as Findings of Fact 16 through 22 were established through the affidavits of Mary Ellen Nagengast, a Division employee and Director of its MAPS bureau, and Bruce Peltier, a Division employee and Supervisor in the Division’s mail room (*see* Finding of Fact 14), together with the documents submitted therewith. Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as the notice

² The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

of deficiency at issue herein, as well as their subsequent issuance by mailing via delivery to the USPS.

24. The record includes a copy of the (personal income tax) Notice of Deficiency bearing Assessment ID number L-039443096-7, addressed to petitioner and his spouse, Linda Gerace. The computation section of this Notice reveals that it pertains to the tax years 2006, 2007 and 2008 and asserts tax due in the amounts of \$12,719.00 (2006), \$27,977.00 (2007) and \$16,659.00 (2008), plus penalties and interest.

25. Petitioner's name and Williamsville, New York, address, as set forth on the Notice of Deficiency numbered L-039443096 and on the CMR, are the same as set forth on his Form IT-370 (Application for Six-Month Extension of Time to File for Individuals) filed on April 16, 2012, which was the last application filed by petitioner with the Division prior to issuance of the foregoing notice. However, certain other (subsequent) documents reflect a different address for petitioner. In the interest of completeness, the chronology of address changes is set forth hereafter:

a) Form IT-370, petitioner's last filing with the Division prior to the May 16, 2013 issuance of the notices of deficiency, lists petitioner's address as "53 *Autumview* Road" (italics added). In turn, the Notice of Deficiency remaining in question (L-039443096-7), as well as its accompanying mailing cover sheet, the CMR, the Nagengast affidavit, and the May 16, 2013 confirmation letter regarding petitioner's former representative all bear the same address.³

b) The Peltier affidavit erroneously states that review of the Nagengast affidavit and attached documents reflects the Division's delivery of a piece of certified mail to the USPS, addressed to petitioner at "53 *Autumnville* Road," on May 16, 2013.

³ Some of the documents reflect a slight spelling difference, i.e., "Autumview" versus "Autumnview," and "Autumville" versus "Autumnville." This distinction in spelling is clearly inconsequential.

c) Form IT-285 reflects petitioner's address as "53 *Autumview* Road." In contrast, Item 4 thereof lists petitioner's spouse's address as "53 *Autumville* Road." Notwithstanding the address difference, Item 5 of such Form lists Mr. And Mrs. Gerace as "Married and still living together" (*see* Finding of Fact 4). This distinction is not otherwise explained in the record.

d) The Division's January 31, 2014 letters in response to the filing of Form IT-285 were addressed as specified on such form (i.e., petitioner's letter to "53 *Autumview* Road," and his spouse's letter to "53 *Autumville* Road). In like fashion, the Division's June 30, 2014 letter to petitioner's spouse was also addressed to her at "53 *Autumville* Road."

e) Petitioner's BCMS Request lists his address as "53 *Autumnville* Road." The cover letter accompanying the BCMS Dismissal Order in response is likewise and consistently addressed to petitioner at "53 *Autumnville* Road." The petition in turn reflects petitioner's address as "53 *Autumnville* Road."

f) The zip code for "53 *Autumview* Road is listed as 14221, while the zip code for "53 *Autumnville* Road" is listed as 14051.

26. The name and Getzville, New York, address for petitioner's former representative, Michael A. Rizzo, as set forth on the CMR, matches such name and address as appearing on the above-referenced Form IT-370 and on a May 16, 2013 letter from the Division confirming Mr. Rizzo as petitioner's representative at the time, per a power of attorney then on file with the Division.

27. In addition, the Division provided CARTS printouts for assessments receivable pertaining to petitioner's spouse, Linda Gerace. These printouts reflect that the assessment numbered L-036965671-6 for the year 2010, assessing personal income tax in the amount of \$321.00 plus penalty and interest, was issued as a Notice and Demand for Payment, has been offset by "pymts/refunds" ultimately leaving a balance of \$3.00 due. In turn, the \$3.00 balance is shown as an "abatement," such that this assessment has been marked "closed-tolerance abated"

on the Division's records. Accordingly, although included by assessment number as protested under the petition herein, it is in fact no longer outstanding or at issue.

SUMMARY OF THE PARTIES' POSITIONS

28. The Division maintains, as above, that the assessment numbered L-036965671-6, while listed as challenged in the petition, is no longer outstanding or at issue. The Division further maintains that the foregoing evidence establishes that the other notice of deficiency specifically protested under the petition at issue herein, numbered L-039443096-7, was properly issued to petitioner and to petitioner's former representative on May 16, 2013. In turn, the Division asserts that the petition challenging such notice was filed more than 90 days after the May 16, 2013 date on which the notice was issued, thus leaving the same untimely and the Division of Tax Appeals without jurisdiction to review the substantive merits of the deficiency asserted therein. In addition, and in the same manner, the Division maintains that petitioner's July 15, 2014 Request for Conciliation Conference challenging the Division's denial of petitioner's request for innocent spouse relief was not filed within 90 days after the January 31, 2014 date of the Division's letter to petitioner notifying him of such denial. Accordingly, the Division maintains such challenge was untimely and the Division of Tax Appeals lacks jurisdiction to review the denial of innocent spouse status and relief on the merits.

29. Petitioner has cross moved for summary determination, seeking denial of the Division's motion and an order directing the Division to provide petitioner with a BCMS conciliation conference. In so doing, petitioner maintains that BCMS improperly dismissed petitioner's Request as untimely. Petitioner further alleges that the Division's response to his

request for innocent spouse relief, in comparison to its response to his spouse on the same issue, in the two letters dated January 31, 2014 was confusing (*see* Findings of Fact 5, 6 and 7).

30. The Division provided no documents or other evidence concerning the mailing of the letter dated January 31, 2014 specifically denying petitioner's request for innocent spouse relief.

CONCLUSIONS OF LAW

A. Petitioner challenged the Division's denial of his request for innocent spouse relief by filing a Request with BCMS. Since petitioner's July 15, 2014 Request was not filed within 90 days after the January 31, 2014 date set forth on the face of the Division's denial letter, the Request was dismissed by BCMS as not timely filed. In turn, petitioner challenged the August 8, 2014 BCMS Order of Dismissal by filing a petition with the Division of Tax Appeals. There is no dispute that the petition was filed on August 22, 2014, a date that falls well within the 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). 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). Since the petition in this matter was timely filed, 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 Order shall address the instant motion as such. Given the timely petition, the Division's motion to dismiss under section 3000.9(a) of the Rules is improperly brought.

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 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 [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. The petition and the Division’s motion in this matter present two questions, each of which turns on the issue of timeliness. First, the Division asserts and provides evidence in support of its claim that the Notice of Deficiency (Assessment ID No. L-039443096-7) was properly issued to petitioner on May 16, 2013, and that petitioner did not challenge the same within 90 days thereafter. Second, the Division admits that petitioner did file a request for innocent spouse relief.

However, the Division asserts it notified petitioner, by its letter dated January 31, 2014, that such request was denied. The Division maintains that since petitioner did not challenge this notice of denial until he filed his Request on July 15, 2014 (i.e., in excess of 90 days after January 31, 2014), such Request was untimely, was properly dismissed by BCMS and, therefore, the Division of Tax Appeals lacks jurisdiction to consider the substantive merits of petitioner's request for relief as an innocent spouse.

E. A taxpayer may protest a notice, including as relevant here, a Notice of Deficiency or a notice of denial of a request for innocent spouse relief, by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such a notice (Tax Law §§ 681[b]; 2006[4] [Tax Appeals Tribunal is authorized “[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter”]). Alternatively, a taxpayer may protest a notice, including ones such as those at issue herein, by filing a request for a conciliation conference with BCMS “if the time to petition for such hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that statutory time limits for filing either a petition or a request for a conciliation conference are 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 statutory notice, to which protest rights attach, becomes fixed and final and, consequently, BCMS and the Division of Tax Appeals are 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).

F. It is well settled that where the timeliness of a taxpayer's protest is at issue, the initial inquiry is whether the Division has given proper notice to the taxpayer. Specifically, the question presented is whether the Division has carried its burden of demonstrating the fact and date of proper mailing of the notice being protested (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, November 25, 1992). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Novar TV & Air Conditioner Sales & Serv.*). In the case of a notice of deficiency, proper mailing requires mailing of the notice by registered or certified mail (Tax Law § 681 [a]). In other cases, including a notice of denial of a taxpayer's request for innocent spouse relief, there is no specific statutory mandate that mailing by registered or certified mail is required in order to effect proper mailing. Nonetheless, it remains the Division's initial burden to demonstrate both the fact and date of mailing, for it is from such date that the limitations period within which a protest may be filed is measured.⁴

G. 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 mailing evidence is two-fold, and to prove the fact and date of mailing of the subject notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notices by one with knowledge of the relevant

⁴ The specific statutory requirement of mailing notices of deficiency by registered or certified mail provides an expedient method by which the Division may establish both physical delivery of the item allegedly mailed into the custody of the USPS and, via USPS Form 3811-A, garner subsequent delivery information (or confirmation) with respect to the item so mailed. Such information and confirmation does not result from the use of other methods of mailing (including, without more, simple mailing by first class mail).

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*).

H. With respect to the Notice of Deficiency at issue here (L-039443096-7), the Division has offered proof sufficient to establish proper mailing to petitioner’s last known address on May 16, 2013 (*see* Findings of Fact 16- 26). 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 Sheet and CMR conforms with petitioner’s last known address immediately prior to mailing of the notice, per Form IT-370, and with his then-representative’s address (*see* Finding of Fact 25[a]), and thus satisfies the “last known address” requirement (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008).⁵ The statement of petitioner’s address contained in the Peltier affidavit (*see* Finding of Fact 25[b]), though incorrect, is clearly harmless error in light of the balance of the address and mailing evidence provided.

I. Since the Notice of Deficiency was properly mailed to petitioner on May 16, 2013, and it was incumbent upon petitioner to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter. However, petitioner’s

⁵ The address for petitioner per Form IT-370 (53 *Autumview* Road), as opposed to the address specified for his spouse (53 *Autumville* Road) remains consistent through petitioner’s filing of Form IT-285. In turn the Division’s letters in reponse to Form IT-285 were appropriately addressed to reflect the different addresses specified on such Form (*see* Finding of Fact 25[c], [d]). Thereafter, petitioner’s address changes to match his spouse’s address (i.e., 53 *Autumville* Road) when he files his BCMS Request, and the Division’s response thereto, consistently, reflects this change (*see* Finding of Fact 25[e]).

BCMS Request was not filed until July 15, 2014, and the petition was not filed until August 22, 2014. Both of these dates fall well beyond the 90-day period of limitations within which a protest against the Notice of Deficiency, properly mailed on May 16, 2013, may be filed.

Consequently, to the extent the petition is construed as a challenge to the substantive merits of the deficiency asserted by the notice dated May 16, 2013 it is untimely, this forum is without jurisdiction to address the substantive merits of that Notice of Deficiency, and the Division's motion for summary determination is granted with respect thereto.

J. To the extent the petition and the instant motion address petitioner's request for innocent spouse relief, the Division seeks to deny the same here upon the allegation that the Request challenging such denial was not timely, because it was not filed within 90 days after the January 31, 2014 date on the face of the letter to petitioner denying such relief. On this argument, the Division's motion for summary determination is denied. First, as set forth above, where the Division seeks to preclude a taxpayer's right to a hearing on the basis of the timeliness of the taxpayer's protest, it is incumbent upon the Division to establish the point in time from which the period of timeliness is measured, i.e., the date of mailing of the statutory document giving rise to the right to a hearing. In this instance, that document was the denial letter dated January 31, 2014. However, the Division has offered no proof concerning the date on which such notice was actually mailed, nor does the record establish the date on which petitioner received the denial letter or otherwise received actual notice of the denial of his request for innocent spouse relief. As a consequence, the Division has failed to establish the date upon which the 90-day period within which petitioner was obliged to file either a Request, as he initially did in this instance, or a petition for a hearing was triggered. Thus, while such letter

clearly advised *petitioner* (as opposed to his spouse) that his request for innocent spouse relief had been denied, the date from which (and the time period within which) petitioner could initiate a challenge to such denial has not been established. Therefore, and solely as to the denial of innocent spouse relief, petitioner's challenge is timely and he may proceed to a hearing. However, the scope of such hearing will be limited only to the issue of whether the Division's denial of innocent spouse relief was correct.

K. It is noted that the Division's initial (January 31, 2014) letter to petitioner's spouse is confusing and might be read as indicating that innocent spouse relief had been afforded to petitioner (*see* Finding of fact 7). Further, the Division's issuance of a second (June 30, 2014) letter to petitioner's spouse could be read as indicating that the process of review concerning innocent spouse status as to petitioner was not finally concluded until issuance of that second letter, clearly indicating denial of such relief to petitioner (*see* Finding of Fact 9). Under this view (and assuming proof was provided that the letter was indeed issued on June 30, 2014), the 90-day protest time frame would have commenced at that point and petitioner's BCMS Request would thereunder have been timely.

L. In sum, the Division has established proper mailing of the Notice of Deficiency. In response, petitioner has not established that he filed any timely protest against such Notice. Accordingly, the same became fixed and final, is not subject to review on the merits herein, and the Division's motion for summary determination with respect thereto is granted. At the same time, the Division has not established proper mailing of its notice, by letter dated January 31, 2014, denying petitioner's request for innocent spouse relief. As a consequence, the time frame for petitioner to challenge such notice did not commence to run until such time as petitioner

received actual notice of such denial. Since the record does not disclose the date of petitioner's receipt of actual notice, his challenge thereto was improperly dismissed by BCMS as untimely. Accordingly, the Division's motion for summary determination with respect to the denial of innocent spouse relief is denied. Finally, petitioner's cross motion seeking an order requiring a BCMS conference is denied, and this matter shall proceed to a hearing on the merits of petitioner's request for innocent spouse relief.

M. The Division's motion for summary determination is granted in part and denied in part, petitioner's cross motion is denied, and the matter shall proceed to a hearing in accordance herewith in due course.

DATED: Albany, New York
July 23, 2015

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE