

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ARMANDO D. PONS : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 827945
New York State Personal Income Tax under Article :
22 of the Tax Law for the Year 2006. :

Petitioner, Armando D. Pons, 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 2006.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel), brought a motion filed on May 9, 2017, seeking summary determination in the above-referenced matter pursuant to Tax Law §2006(6), and sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Linda A. Jordan, Esq., dated May 5, 2017, and attached exhibits. Petitioner, appearing pro se, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this order began on June 8, 2017, the due date for petitioner's response. Based upon the motion papers, attached affidavits and annexed exhibits, and all pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following order.

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 Armando Pons's protest of a notice of deficiency dated April 27, 2016 and addressed to Armando Pons, "75 South Broadway Suite 467 White Plains, NY 10601." This notice of deficiency, notice number L-044493710-7, asserted additional New York State personal income tax due for the year 2006 in the amount of \$3,359.00, plus interest and penalty, for a current balance due of \$9,261.98. The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0823 2270.

2. Petitioner protested the notice of deficiency by filing with the Division's Bureau of Conciliation and Mediation Services (BCMS) a request for conciliation conference (Request), dated as signed by petitioner on October 11, 2016. The envelope in which the Request was sent to BCMS bears a "USA non-machineable surcharge" butterfly stamp, but does not bear a United States Postal Service (USPS) postmark.

3. On October 28, 2016, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. The Order determined that petitioner's protest of the subject notice of deficiency 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 April 27, 2016, but the request was not received until October 14, 2016, or in excess of 90 days, the request is late filed."

4. In response to the dismissal, petitioner filed a petition with the Division of Tax

Appeals. The petition is dated as signed by petitioner on November 16, 2016, and the envelope in which the petition was mailed bears a USPS First Class Mail postage paid stamp dated November 16, 2016. The petition listed petitioner's address as "75 S. Broadway, Ste. 467, White Plains, NY 10601."

5. On December 21, 2016, the Division filed its answer to the petition affirmatively alleging, among other things, that:

(a) a letter, dated August 24, 2011, was sent to petitioner notifying him that the Division had not received his 2006 New York State income tax return and the Division's records indicated that he filed a federal income tax return for the year 2006 and he was a New York resident;

(b) an estimated assessment was issued due to petitioner's failure to respond to the Division's notice;

(c) on January 11, 2016, petitioner filed a Resident Income Tax Return for the year 2006 reporting zero income;

(d) the filing of the 2006 return superseded the estimated assessment, causing it to be canceled;

(e) petitioner's late filed 2006 return was selected for review and on March 11, 2016, a Statement of Proposed Audit Changes was sent to petitioner detailing the proposed changes to his 2006 return based upon federal information, along with a proposed late filing penalty, and proposed penalties pursuant to Tax Law § § 685(b)(1) and (2);

(f) a Notice of Deficiency was issued to petitioner on April 27, 2016;

(g) by Order dated October 28, 2016, petitioner's Request was dismissed due to being filed beyond 90 days from the mailing date of the statutory notice; and

(h) the Division of Tax Appeals lacks jurisdiction to consider the petition because

petitioner failed to either file a Request, or a petition with the Division of Tax Appeals within 90 days of the issuance of the notice of deficiency.

6. In support of its motion and to prove mailing of the notice of deficiency under protest, the Division submitted, among other documents, the following: (i) an affirmation of Linda A. Jordan, Esq., the Division's representative, dated May 5, 2017; (ii) an affidavit, dated February 27, 2017, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated April 27, 2016; (iv) a copy of notice of deficiency L-044493710-7, and associated mailing cover sheet; (v) an affidavit, dated March 7, 2017, of Melissa Kate Koslow, a head mail and supply clerk and supervisor in the Division's mail room since April 2010; (vi) an affidavit, dated April 19, 2017, of Stephen Addo, a Tax Compliance Representative I in the Division's Civil Enforcement Division (CED); (vii) an affidavit, dated May 5, 2017, of Anthony Grab, a Tax Services Administrator 2 and the Acting Director of the Processing and Shared Services Bureau within the Division's Office of Processing & Taxpayer Services (OPTS); (viii) copies of petitioner's address summary from the Division's e-MPIRE database; (ix) a copy of petitioner's Resident Income Tax Return (Form IT-201) for the year 2015; and (x) a copy of petitioner's Request received by BCMS on October 14, 2016, along with a copy of the envelope in which it was sent to BCMS.

7. The affidavit of Ms. Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the 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 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. Nagengast, 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.

8. 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.

9. 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 are also listed on the CMR under the heading "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 P.O. Address." Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together.

10. 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).

11. The affidavit of Ms. Koslow, a supervisor in the Division's mail room since April 2010 and currently a head mail and supply clerk, describes the mail room's general operations and procedures. 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 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 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.

12. The CMR relevant to the notice of deficiency under protest consists of 39 cut sheet pages, including page 9, the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20161111700." Appearing in the upper right corner of the first and last pages of the CMR is the handwritten date "4/27," 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. Pages 1 through 9 of the CMR bear an erroneous USPS postmark dated April 25, 2016, and an overlapping, corrected USPS postmark dated April 27, 2016. The remaining pages, i.e., pages 10 through 39, include a USPS postmark dated April 27, 2016. The postal employee also initialed each page of the CMR directly beneath the USPS postmark affixed thereon. All pages of the CMR include 11 entries, with the exception of page 39, on which eight entries appear. Ms. Nagengast noted that 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.

13. Page 9 of the CMR indicates that notice of deficiency assigned certified control number 7104 1002 9730 0823 2270, and reference number L-04449710, was mailed to "PONS-ARMONDO" at the 75 South Broadway, Suite 467, White Plains, NY 10601 address listed thereon. The corresponding mailing cover sheet attached to the Nagengast affidavit as "exhibit B," bears this certified control number and petitioner's name and address as noted.

14. Appearing on page 39 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS,” to the right of which appear preprinted columns headed “PIECES,” “POSTAGE,” “FEE @ 3.45,” and “RR FEE @ .00.” These columns reflect the preprinted number of pieces of mail for this CMR, here 426, 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,” next to which appears the circled handwritten number “426.” The area above and to the right of the heading “TOTAL PIECES AND AMOUNTS,” reflect the initials of the USPS employee and the aforementioned USPS postmark dated April 27, 2016. Thus, page 39 of the CMR indicates that a total of 426 pieces of mail were delivered into the custody of the USPS on April 27, 2016. Ms. Koslow states, based upon her knowledge of the Nagengast affidavit and the exhibits attached thereto, and upon her personal knowledge of the procedures of the mail room, that on April 27, 2016, an employee delivered a piece of certified mail addressed to petitioner, in White Plains, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of mail to petitioner on April 27, 2016.

15. In support of its motion for summary determination, the Division also submitted the affidavit of Stephen Addo, who has been a Tax Compliance Representative I in the Division’s CED since 2005. As a Tax Compliance Representative I in CED, Mr. Addo’s job duties and responsibilities include “handling inbound and outbound calls which include explaining the tax debt and collection process, updating relevant information in the [Division’s] system, setting up installment payment agreements, taking payments, and issuing tax warrants, levies, and income

executions.” On March 16, 2016 at 10:48 A.M., Mr. Addo received a telephone call from petitioner regarding his outstanding tax liabilities. In response to Mr. Addo’s request that petitioner verify his identity, petitioner provided his name, social security number, address, phone number and date of birth. When Mr. Addo initially asked petitioner how he could help him, petitioner stated that he would first like to update his address. After telling Mr. Addo that his new address was “75 South Broadway, Suite 467, White Plains, NY 10601,” petitioner was placed on hold by Mr. Addo while he updated this address on petitioner’s e-MPIRE account. According to Mr. Addo, when he updates an address in a taxpayer’s e-MPIRE account, he is required to select the reason for the update from a drop down menu. For an address change made over the telephone, Mr. Addo should select “Taxpayer (N3).” However, at the time he updated petitioner’s address, Mr. Addo accidentally selected the option “Post Office (OU).” Mr. Addo avers that “[t]his selection was made in error, but the address itself was correct.”

16. Attached to Mr. Addo’s affidavit is a one-page printout document, dated “04/18/2017” at “13:26:06,” containing an “Address Summary” for petitioner’s taxpayer identification number, petitioner’s name, and an “Address” of “75 S BROADWAY STE 467, WHITE PLAINS, NY 10601-4413.” This document shows petitioner’s address change history, including the notification and posting of the address change made on March 16, 2016, updating petitioner’s address to “75 SOUTH BROADWAY SUITE 467, WHITE PLAINS, NY 10601,” reflected on petitioner’s address summary tab as sequence #009. Review of the “Address Details” section of petitioner’s e-MPIRE Address Summary indicates that the source of the change of address to “75 SOUTH BROADWAY SUITE 467, WHITE PLAINS, NY 10601,” address sequence number 009, was “POST OFFICE (OU),” and that the “Effective Date / Time Stamp” of such change was “03/16/2016 10.52.24.”

17. The affidavit of Anthony Grab, a Tax Services Administrator 2 and the Acting Director of the Division's Processing and Shared Services Bureau within OPTS since March 2016, sets forth the general process for processing paper filed personal income tax returns. Mr. Grab has been employed by the Division for approximately 31 years. As a Tax Services Administrator 2 and the Acting Director of the Processing and Shared Services Bureau in OPTS, his job duties and responsibilities include overseeing the paper tax return and remittance processing for the Division at two site locations in the Albany region.

18. On a daily basis, the Division picks up the mail from the USPS and delivers it directly to both tax return processing sites. Upon receipt, the contents of each envelope are extracted and batched based upon predetermined criteria. All personal income tax (PIT) returns, other than Form IT-204, are sent to the Division's processing sites for front end processing. Each PIT return is scanned to both create an image of the return and capture data from the return. Then, from the image of the return, tax technicians key in any additional data that was not captured during the scanning process, including address information. All checks that are remitted with tax returns are also scanned, which both creates an image of the check and captures data. Thereafter, images of checks are electronically submitted to the Division's bank for deposit.

19. Once the front end processing is complete, the data and images from both the return and the check are posted to each individual's e-MPIRE account and are sent to the back end processing systems. Additional information is posted to the taxpayer's account at this time as well, e.g., when the return was received. An image of the envelope is processed only if the return is considered late filed. At this point in time, determinations as to whether the Division should issue a refund, a bill for underpayment or if the account is even, are made. During this process other updates to the taxpayer's account will be made as a result of the filed return, such as an

address change.

20. According to Mr. Grab, the Division receives approximately 1.4 million paper filed PIT returns annually, with approximately 800,000 returns processed during the peak months of March and April. Returns requesting refunds or including payments are prioritized to provide timely issuance of refunds and timely deposit of payments. The Division's first priority is to deposit checks, that are usually deposited within three business days. Its second priority is to process returns requesting refunds; a timely filed refund return is usually processed through front end processing within 7 business days. Finally, the Division processes remittance returns, i.e., returns that included a check, which are usually processed through the front end processing within 14 days.

21. Mr. Grab avers that in "the 2015 tax year/2016 filing season," the Division processed 1,348,270 paper filed PIT returns, 417,878 of which were processed during April 2016. Mr. Grab further avers that in the 2016 processing season overall, a paper PIT return was processed through the front end processing, on average, in seven business days, but the average time for paper filed PIT returns received around April 15, 2016 to complete front end processing was nine business days.

22. In preparation of his affidavit, Mr. Grab reviewed petitioner's e-MPIRE account that was updated in the ordinary course of business as his 2015 tax return was processed. Mr. Grab, in his affidavit, asserts that petitioner's paper PIT return for the year 2015 was processed through the Division's standard procedure in April 2016. He further asserts that petitioner's return was considered timely filed, as it was postmarked on April 18, 2016, and the Division received it on April 20, 2016. Because petitioner's 2015 return requested a refund of \$23.00, Mr. Grab avers that it was processed with the Division's refund returns and it was posted to e-MPIRE on April

27, 2016. Mr. Grab also claims that petitioner's return then began back end processing that was completed on April 29, 2016, when his \$23.00 refund was offset to an outstanding liability.

23. Attachment 1 to Mr. Grab's affidavit is copy of petitioner's undated Resident Income Tax Return filed for the year 2015. On this return petitioner's address is reported as 405 Tarrytown Road, Apartment number 1095, White Plains, NY 10607.

24. Attachment 2 to Mr. Grab's affidavit is a one-page printout document, dated "05/05/2017" at "13:22:48," containing an "Address Summary" for petitioner's taxpayer identification number, petitioner's name, and an "Address" of "AIRPONS APT 467, 75 S BROADWAY FL 4, WHITE PLAINS, NY 10601-4413." This document shows petitioner's address change history, including the notification of address change on April 18, 2016 that was posted on April 28, 2016, updating petitioner's address to "405 TARRYTOWN RD APT 1095, WHITE PLAINS, NY 10607-1313," reflected on petitioner's address summary tab as sequence # 010. Review of the "Address Details" section of petitioner's e-MPIRE Address Summary indicates that the source of the change of address to "405 TARRYTOWN RD APT 1095, WHITE PLAINS, NY 10607-1313," sequence number 010, was "ACMS I FACE (II)," and that the "Effective Date/Time Stamp" of such change was "04/28/2016 18:26:23."

25. In her affirmation in support of the Division's motion for summary determination, Ms. Jordan contends that petitioner notified the Division of an address change on March 16, 2016 via telephone. She further contends that petitioner notified the Division of a subsequent address change by paper filing his 2015 return on April 18, 2016. Although petitioner's 2015 return was mailed to the Division prior to the issuance of the subject notice of deficiency on April 27, 2016, Ms. Jordan asserts that the Division cannot be expected to be aware of an address change made on a return that had not yet been processed.

26. Petitioner did not respond to the Division's motion for summary determination. The record is silent as to the date on which petitioner may have received the notice of deficiency.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

“if, upon all 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]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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 determination 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 a material fact is “arguable” (*Glick & Dolleck 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]).

C. 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 (Tax Law § 681[b]). Alternatively, a taxpayer may contest a notice by filing a Request with BCMS “if the

time to petition for such 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 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).

D. Where, as here, the Division claims that a taxpayer’s protest against a notice was not timely filed, the initial inquiry must focus on the issuance of the notice. Where a notice is found to have been properly mailed “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). When a notice is found to have been properly mailed by the Division to a petitioner’s last known address by certified or registered mail, the petitioner, in turn, bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Malpica*; *see also Matter of Ruggerite, Inc. v. State Tax Commission*, 64 NY2d 688 [1984]).

E. The mailing evidence required is two-fold. First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance (*Matter of United Water New York*, Tax Appeals Tribunal, April 4, 2004; *see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Ms. Koslow, 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).

G. The CMR for April 27, 2016 provides sufficient documentary proof to establish that a notice of deficiency, L-044493710, dated April 27, 2016, was mailed as addressed to petitioner. The 39-page document lists 426 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated April 27, 2016 and the initials of a USPS employee. Additionally, on the last page of the CMR, the postal worker wrote and circled the number “426” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE” to indicate receipt by the post office of all pieces of mail listed thereon. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

H. Tax Law § 681(a) authorizes the Division to issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined. This section further requires that the notice “shall be mailed by certified or registered mail to the taxpayer at his last known

address in or out of this state.” A taxpayer’s last known address is “the address given on the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address” (Tax Law § 691[b]).

I. Petitioner filed his income tax return for the year 2015 by mailing the same on April 18, 2016. This was the last return filed by petitioner prior to the issuance of notice of deficiency L-044493710, and it lists petitioner’s address as 405 Tarrytown Road, apartment number 1095, White Plains, NY 10607. The Division, however, issued the subject notice of deficiency to petitioner at the South Broadway, White Plains, New York, address that petitioner provided to the Division during his telephone call to Mr. Addo on March 16, 2016. The Division thus did not mail the April 27, 2016 Notice of Deficiency to petitioner’s last known address. Without proper mailing, the 90-day period for filing either a Request or a petition is tolled until such time as petitioner actually received the subject notice of deficiency (*Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [1992], *lv denied* 79 NY2d 759 [1992]). Since there is no evidence as to when the notice of deficiency may have been received by petitioner, there remains a material issue of fact and the Division’s motion for summary determination must be denied.

J. The Division of Taxation’s motion for summary determination is denied; and a hearing will be scheduled in due course.

DATED: Albany, New York
August 31, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE