

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DAVID GEWIRTZ</b>	:	<b>ORDER</b>
for Redetermination of Deficiencies or for Refund of	:	<b>DTA NO. 828762</b>
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 2010 through 2013	:	
and for Review of a Notice of Proposed Driver License	:	
Suspension Referral under Tax Law § 171-v.	:	

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Petitioner, David Gewirtz, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2010 through 2013 and for review of a notice of proposed driver license suspension referral under Tax Law § 171-v.

The Division of Taxation, appearing by its representative, Amanda Hiller, Esq. (Karry L. Culihan, Esq., of counsel), filed a motion on October 16, 2019, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The 90-day period for issuance of this order commenced on November 18, 2019. Based upon the motion papers, the affidavits and documents submitted, and all pleadings and documents submitted in connection with this matter, James P. Connolly, Administrative Law Judge, renders the following order.

***ISSUES***

I. Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of notices of deficiency.

II. Whether the Division of Taxation's notice of proposed driver license suspension referral pertaining to petitioner should be sustained.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is (i) the timeliness of petitioner's protest of four notices of deficiency for personal income tax, three dated November 7, 2017, and bearing, respectively, assessment identification numbers L-047083452, L-047083453, and L-047083454 (the 2017 notices of deficiency), and a fourth notice of deficiency, bearing assessment identification number L-035952336, and (ii) the validity of the Division's subsequent issuance of a notice of proposed driver license suspension referral (form DTF-454), collection case ID: E-012510819-CL01-4 (60-day notice), advising that petitioner must pay his New York State tax debts or face the possible suspension of his driver's license pursuant to Tax Law § 171-v. The Division's motion does not include a copy of notice of deficiency number L-035952336 and no copy of the notice of deficiency is attached to the petition.

2. The 60-day notice is dated April 18, 2018, and is addressed to petitioner at his Brooklyn, New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated April 18, 2018, listing four unpaid personal income tax assessments subject to collection, including the three 2017 notices of deficiency identified in finding of fact 1, with the information as set forth in the following table:

Assessment No.	Period Ended	Tax Amount Assessed	Interest Assessed	Penalty Assessed	Current Balance Due (After Credits)
L-047083452	12/31/12	\$14,630.00	\$6,748.88	\$7,711.75	\$29,090.63
L-047083453	12/31/13	\$14,762.00	\$5,249.01	\$7,016.55	\$27,027.56
L-047083454	12/31/11	\$12,546.00	\$7,217.52	\$7,334.77	\$27,098.29
L-035952336	12/31/10	\$5,495.00	\$4,053.75	\$1,608.50	\$7,735.56
Total					\$90,952.04

3. The 60-day notice indicated that a response was required within 60 days from its mailing, or the Division would notify the New York State Department of Motor Vehicles (DMV) and petitioner's driver's license would be suspended. The front page of the 60-day notice informed petitioner that unless one of the exemptions on the back page of the 60-day notice applied, he was required to either pay the amount due or set up a payment plan in order to avoid suspension of his license.

4. The back page of the 60-day notice is titled, "How to respond to this notice." The opening sentence directly beneath the title lists a phone number and instructs the recipient that "[i]f any of the following apply," he or she is to call the Division at that number. Furthermore, the recipient is advised that he or she may be asked to supply proof in support of his or her claim.

5. The first two headings under the title, "How to respond to this notice," are "child support exemption" and "commercial driver's license exemption." The third heading, "Other grounds," states that the recipient's driver's license will not be suspended if any of the following apply:

“You are not the taxpayer named in the notice. The tax debts have been paid. The Tax Department [Division] is already garnishing your wages to pay these debts. Your license was previously selected for suspension for unpaid tax debts **and**: you set up a payment plan with the Tax Department [Division], **and** the Tax Department [Division] erroneously found you failed to comply with that payment plan on at least two occasions in a twelve-month period.”

Also listed under “Other grounds” is the statement that the recipient may contact the Division to establish that he or she is eligible for innocent spouse relief under Tax Law § 654, or that enforcement of the underlying tax debts has been stayed by the filing of a bankruptcy petition.

6. Under the heading, “Protests and legal actions,” it is explained that if the recipient protests with the Division, or brings a legal action, he or she may only do so based upon the grounds listed above. Furthermore, under a heading titled, “If you do not respond within 60 days,” the recipient is informed that the Division will provide DMV with the information necessary to suspend the recipient’s driver’s license, unless the recipient does one of the following within 60 days: resolves his or her tax debts or sets up a payment plan; notifies the Division of his or her eligibility for an exemption; or protests the proposed suspension of his or her license by either filing a request for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS), or filing a petition with the Division of Tax Appeals.

7. On June 25, 2018, the Division of Tax Appeals received a petition protesting both the 60-day notice and the four notices of deficiency described in finding of fact 2. The petition was delivered by United States Postal Service (USPS) priority mail. The envelope containing the petition had no postmark. The envelope did not show the postage paid, but did have a sticker showing the USPS tracking number, which indicated an expected delivery date of June 23, 2018,

which leads to the conclusion that sufficient postage was paid. Petitioner signed and dated the petition June 21, 2018.

8. The petition does not challenge the Division's issuance or petitioner's receipt of either the 60-day notice or the four notices of deficiency. Instead, the petition states that the deficiency calculated by the Division was based on incomplete information and that, with complete information, there should be little or no deficiency.

#### The Notices of Deficiency

9. In support of its motion, the Division submitted: (i) an affirmation, dated October 16, 2019, of Karry L. Culihan, Esq., an attorney employed in the Division's Office of Counsel; (ii) an affidavit, dated October 9, 2019, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a copy of pages 1, 615 and 1,554 of a "Certified Record For - DTF-962-F-E - Not of Def Follow Up DTF-963-F-E - Not of Def Follow Up" (CMR); (iv) an affidavit, dated October 10, 2019, of Fred Ramundo, a supervisor in the Division's mail room; (v) a copy of each of the 2017 notices of deficiency, each dated November 7, 2017, but not notice of deficiency number L-035952336; (vi) an affidavit, dated October 9, 2019, of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel; (vii) three Requests for Delivery Information/Return Receipt After Mailing (USPS form 3811-A), one for each of the 2017 notices of deficiency, and the USPS response to each such request dated October 7, 2019; and (viii) a copy of petitioner's electronically filed 2010 New York State resident income tax return (form IT-201). That return lists the same Brooklyn, New York, address for petitioner as the address listed on the 60-day notice and the petition.

10. Ms. Culihan's affirmation avers that the form IT-201 for 2010 filed by petitioner was the last return filed with the Division prior to November 7, 2017, the claimed issuance date of the 2017 notices of deficiency. The filing date of the IT-201 is not specified.

11. The affidavit of Deena Picard, who has been in her current position since May 2017 and a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard, as the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of "11/7/17." It is also the Division's general practice that 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.

12. 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.

13. The CARTS-generated CMR for each batch of notices lists each notice in the order the notices are generated in the batch. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address." Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together.

14. The CMR for the batch of notices to be issued on November 7, 2017, including the three 2017 notices of deficiency addressed to petitioner herein, allegedly consisted of 1,554 cut sheet pages. As noted, the Division included herein only page "1" (the first page), page "615" (the page on which information pertaining to petitioner appears) and page "1,554" (the last page of the CMR). Each of these three pages includes in its upper left corner the preprinted year/day/time "run" listing of "20173050635." Appearing in the upper right corner of the pages 1 and 1,554 is the handwritten date "11/7/17," reflecting the manual change made by the Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. Each of the foregoing three pages includes a USPS postmark, dated November 7, 2017, of the USPS Albany, New York, General Mail Facility. Ms. Picard noted that the portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

15. Page 615 of the CMR indicates the following information for the 2017 notices of deficiency:

<u>Certified Control Number</u>	<u>Reference Number</u>
7104 1002 9735 3907 5704	L-047083452
7104 1002 9735 3907 5711	L-047083453
7104 1002 9735 3907 5728	L-047083454

The respective corresponding mailing cover sheet, for each of the 2017 notices of deficiency, attached to the Picard affidavit as exhibit “B,” bears the certified control number as noted above and petitioner’s name and Brooklyn, New York, address as noted in finding of fact 9.

16. Appearing below the 8 entries on page 1,554 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS,” next to which the preprinted number “22,662” and the handwritten number “22,662” appear. Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” next to which are the initials of the USPS employee.

17. The affidavit of Fred Ramundo, a supervisor in the Division’s mail room and whose current title is Stores and Operations Supervisor, describes the general operations and procedures of the Division’s mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. Under the Division’s standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for “Outgoing Certified Mail.” Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet 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 places postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information listed on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee then affixes his or her initials or signature and a USPS postmark to a page or pages of the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR.

18. 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, the 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.

19. Based upon his review of the affidavit of Ms. Picard, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on November 7, 2017, an employee of the mail room delivered three items of certified mail addressed to petitioner at his Brooklyn, New York, address to the USPS in Albany, New York, in sealed postpaid windowed envelopes for delivery by certified mail.<sup>1</sup> He states that he can also determine that a member of the mail room staff obtained the CMR delivered to and accepted by the USPS on November 7, 2017 to be kept as part of the records of the Division. Mr. Ramundo asserts that the procedures described in his

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<sup>1</sup> Mr. Ramundo asserts that one of the articles of certified mail was also addressed to another person.

affidavit are the regular procedures followed by the mail room in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the three articles of certified mail to petitioner on November 7, 2017.

20. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of three USPS forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed three forms 3811-A seeking information for the three items mailed by the Division under certified numbers 7104 1002 9735 3907 5704, 7104 1002 9735 3907 5711, and 7104 1002 9735 3907 5728 on November 7, 2017, from the Albany, New York, branch of the USPS to "Gewirtz - David" at petitioner's Brooklyn, New York, address. In response, the USPS confirmed delivery of those three articles of certified mail on November 9, 2017 at 1:22 p.m. in Brooklyn, New York 11210. The scanned images of the recipient's signature and address as shown on the USPS responses are illegible.

#### The 60-Day Notice

21. The Division also submitted with its motion an affidavit, dated October 16, 2019, of Todd Lewis, who is employed as a Tax Compliance Manager 4 with the Division's Civil Enforcement Division (CED). Mr. Lewis's responsibilities and duties include overseeing the operations of the CED's Operations Analysis and Support Bureau and working with the Office of Information Technology Services. His affidavit is based upon his personal knowledge of the facts in this matter and a review of the Division's official records, which are kept in the ordinary course of business.

22. Mr. Lewis's affidavit details the sequential actions, i.e., the initial process, the DMV data match, the suspension process and the post-suspension process undertaken by the Division in carrying out the license suspension program authorized by § 171-v of the Tax Law. These steps are summarized as follows:

a) The "Initial Process" involves the Division's identification of taxpayers who may be subject to the issuance of a 60-day notice of proposed driver license suspension referral under Tax Law § 171-v. First, the Division internally sets the following selection criteria: the taxpayer has an outstanding cumulative balance of tax, penalty and interest in excess of \$10,000.00; the age of the assessment used to determine the cumulative total must be less than 20 years from the notice and demand issue date; all cases in formal or informal protest, and all cases in bankruptcy status are eliminated; all cases where taxpayers have active approved payment plans are excluded; and any taxpayer with a "taxpayer deceased" record on his or her collection case is excluded.

Next, the criteria are used to search the Division's databases on a weekly basis, and a file is created of possible taxpayers to whom a 60-day notice of proposed driver license suspension referral could be sent. This process involves first using the criteria to identify taxpayers owing a cumulative and delinquent tax liability (tax, penalty and interest) in excess of \$10,000.00 in the relevant time frame, and then for each such identified candidate, determining whether that candidate would be excluded under any of the following criteria:

- a formal or informal protest has been made with respect to any assessment included in the cumulative balance of tax liability where the elimination of such assessment(s) would leave the balance of such liability below the \$10,000.00 threshold for license suspension;
- the taxpayer is in bankruptcy;

- the taxpayer is deceased; or
- the taxpayer is on an active approved payment plan.

b) the “DMV Data Match” involves the Division providing identifying information to DMV for each taxpayer not already excluded under the foregoing criteria to determine whether the taxpayer has a qualifying driver’s license potentially subject to suspension per Tax Law § 171-v. DMV then conducts a data match of the information provided by the Division with its information and returns the following information to the Division: (1) social security number; (2) last name; (3) first name; (4) middle initial; (5) name suffix; (6) DMV client ID; (7) gender; (8) date of birth; (9) street; (10) city; (11) state; (12) zip code; (13) license class; and (14) license expiration date.

Once the Division determines that a taxpayer included in the DMV Data Match has a qualifying driver’s license, that taxpayer is put into the suspension process.

c) The “Suspension Process” commences with the Division performing a post-DMV data match review to confirm that the taxpayer continues to meet the criteria for suspension detailed above in (a). If the taxpayer remains within the criteria for suspension, then a 60-day notice of proposed driver license suspension referral will be issued to the taxpayer via regular United States mail.

After 75 days with no response from the taxpayer, and no update to the case such that the matter no longer meets the requirements for license suspension (i.e., the case is not on hold or closed), the Division sends the case electronically to DMV for license suspension.<sup>2</sup> Such case

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<sup>2</sup> Prior to license suspension, the Division performs another compliance check of its records. If, for any reason, a taxpayer “fails” the compliance criteria check, the case status will be updated to “on-hold” or “closed” (depending on the circumstances) and the suspension will be stayed. If the status is “on-hold,” the 60-day notice of proposed driver license suspension referral remains on the Division’s system but the suspension will not proceed until the “on-hold” status is resolved. If the suspension is “closed,” the 60-day notice will be canceled. If the

data is sent daily, Monday through Friday, by the Division to DMV. DMV then sends a return data file to the Division each day confirming data records that were processed successfully, and indicating any data records with an issue. The Division investigates those data records with an issue. With regard to the data records that were processed successfully, DMV sends a 15-day letter to the taxpayer, advising of the impending license suspension. In turn, if there is no response from the taxpayer, and DMV does not receive a cancellation record from the Division, the taxpayer's license will be marked as suspended on the DMV database.

d) The "Post-Suspension Process" involves monitoring events subsequent to license suspension to update the status of a suspension that has taken place. Depending upon the event, the status of a suspension may be changed to "on-hold" or "closed." A change to "on-hold" status can result from events such as those set forth above in (a) (e.g., the filing of a protest, a bankruptcy filing, or the creation and approval of an installment payment agreement). Where a subsequent event causes a case status change to "on-hold," the license suspension would be revoked by DMV and the matter would not be referred back to DMV by the Division for resuspension until resolution of the "on-hold" status; however, the 60-day notice of proposed driver license suspension referral would remain in the Division's system. If the status is changed to "closed," the 60-day notice of proposed driver license suspension referral is canceled.

23. Mr. Lewis's affidavit also fully details how that process was followed by the Division in the instant matter concerning the 60-day notice issued to petitioner. A copy of the 60-day notice of proposed driver license suspension referral and the consolidated statement of tax liabilities described in findings of fact 1 and 2, and a payment document (form DTF-968.4), by which petitioner could remit payment against the liability in question, were included with Ms.

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taxpayer "passes" this final compliance check, the suspension by DMV will proceed.

Culihan's affirmation. Mr. Lewis avers that, based upon his review of Division records and his personal knowledge of Departmental policies and procedures regarding driver's license suspension referrals, the issuance of the 60-day notice to petitioner on April 18, 2018 comports with statutory requirements, petitioner has not raised any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v (5) and, therefore, the 60-day notice has not been, and should not be, canceled.

24. In its answer to the petition, and in its representative's affirmation submitted in support of the motion, the Division maintains that petitioner: a) has not argued or provided any basis to establish that the liabilities asserted in the notices of deficiency are not fixed, final and outstanding (*see* finding of fact 2); and b) has not sought relief from the proposed suspension of his driver's license under any of the six specifically enumerated grounds for such relief set forth at Tax Law former § 171-v (5) (i) - (vi). The Division thus argues that the proposed suspension is proper, and that there is no basis for administrative or judicial review of such proposed suspension, including review by the Division of Tax Appeals. Accordingly, the Division seeks dismissal of the petition for lack of jurisdiction or summary determination in its favor.

25. In her affirmation, Ms. Culihan asserts that petitioner did not timely protest the 60-day notice, but the Division did not present any evidence with this motion establishing when it issued the 60-day notice.

26. Petitioner did not respond to the Division's motion.

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

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). A motion to dismiss a petition may be granted, as

pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9 [a] [1] [ii]). A motion for summary determination may 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]).

B. Section 3000.9 (c) of the Tax Appeals Tribunal’s Rules of Practice and Procedure provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211, and a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant “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 the Tribunal noted in *Matter of United Water New York*:

“Inasmuch 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 v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

C. To prevail against a proponent of a motion to dismiss or 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’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], quoting *Zuckerman*).

D. Petitioner challenges both the substantive merits of the assessment set forth on the four notices of deficiency issued to him and the Division's subsequently issued 60-day notice. Each challenge is addressed below.

The Notices of Deficiency

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

F. The Division may meet its burden of proving proper mailing by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). The evidence required of the Division in order to establish proper mailing is two-fold:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991).

G. On this motion, the Division introduced no mailing proof with regard to notice of deficiency number L-035952336. Accordingly, the portion of the Division’s motion seeking to dismiss the petition with regard to that notice must be denied because a material issue of fact exists as to the date of issuance of that notice.

H. With respect to the 2017 notices of deficiency, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Mr. Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). However, the Division’s submission of a truncated CMR with regard to the 2017 notices of deficiency is not sufficient to establish that the Division’s standard mailing procedure was followed with regard to those notices (*see Matter of Ankh-Ka-Ra Sma-Ntr f/k/a Andre Williams*, Tax Appeals Tribunal, April 14, 2016; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Hence, the 90-day period for petitioner to file a protest was not triggered as of the asserted date.

I. An inadequacy in the evidence of mailing, as in conclusion of law H, may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals

Tribunal, December 3, 2015). In such instances of failure to prove proper mailing, the 90-day period for filing either a request or a petition is tolled until such time as the taxpayer actually receives the notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib. of State of N.Y.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest will commence (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v Tax Commn. of the State of N.Y.*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

J. To show petitioner's actual receipt of the 2017 notices of deficiency, the Division has submitted the Corina affidavit and the accompanying USPS forms 3811-A and USPS responses thereto. The USPS responses show that on November 9, 2017, three articles of certified mail addressed to petitioner at his Brooklyn, New York, address with certified numbers corresponding to the 2017 notices of deficiency were, in fact, delivered in Brooklyn, New York 11210. While the signature and address boxes were not legible on the USPS responses, petitioner has not disputed he received the 2017 notices of deficiency. Under these circumstances, the Division has established that petitioner received the 2017 notices of deficiency on November 9, 2017. As a result, the period within which to challenge those notices commenced to run on the date of such actual receipt, i.e., November 9, 2017, and in order to be timely, a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS, had to have been filed within 90 days thereafter (*see Matter of Agosto; Matter of Rosen*). In turn, 90 days after the date of actual receipt of the 2017 notices of deficiency was February 7, 2018. The petition was received by the Division of Tax Appeals on June 25, 2018. While petitioner used sufficient postage in mailing the envelope containing the petition, the envelope does not bear a USPS

postmark. In such a case, the Tribunal's Rules of Practice and Procedure provide that, to be timely, the petition:

“must be received . . . not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing . . .” (20 NYCRR 3000.22 [b]; *see also* 20 NYCRR 3000.22 [a] [3] [making 20 NYCRR 3000.22 (b) applicable]).

The quoted regulation further provides that, in a case where the document is received after the time a document so mailed and postmarked would ordinarily be received, the document will be treated as having been received at a time when a document so mailed and postmarked would ordinarily have been received, if the person who is required to file the document establishes:

“(i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the prescribed period or on or before the prescribed date for filing or paying;

(ii) that the delay in receiving the document or payment was due to a delay in the transmission of the mail; and

(iii) the cause of the delay (20 NYCRR 3000.22 [b] [2]).”

In *Matter of Harron's Electric Service, Inc.* (Tax Appeals Tribunal, February 19, 1988), the Tribunal, citing CPLR 2103 (2), held that “[f]ive days is, in our opinion, not later than the date a document would ordinarily be received when mailed through the United States Postal Service.” In the present instance, if petitioner mailed his petition on the last day, i.e., February 7, 2018, it should have been received by the Division of Tax Appeals within 5 days, or on or before February 12, 2018. However, it was not received until June 25, 2018. Petitioner made no response to this motion, so petitioner has offered no evidence as to the actual date on which the petition was deposited in the mail or as to any delay in transmission of the mail or reasons therefore as required by the provisions of 20 NYCRR 3000.22 (b) (2). Accordingly, it must be

found that the petition is untimely as to the 2017 notices of deficiency and the Division of Tax Appeals is without jurisdiction to provide administrative review of those notices.

#### The 60-Day Notice

K. Also at issue is petitioner's protest of the 60-day notice proposing the suspension of his driver's license. Petitioner challenged the 60-day notice by filing a petition with the Division of Tax Appeals. While the Division's motion challenges the timeliness of petitioner's protest of the 60-day notice, it presented no evidence as to when it issued that notice to petitioner. Thus, for purposes of this motion, it is assumed that petitioner has timely protested the 60-day notice and that, therefore, the Division of Tax Appeals has jurisdiction to address this protest.

L. A taxpayer's right to challenge a notice issued pursuant to Tax Law § 171-v is specifically limited, and must be based on one of the following grounds:

“(i) the individual to whom the notice was provided is not the taxpayer at issue;

(ii) the past-due tax liabilities were satisfied;

(iii) the taxpayer's wages are being garnished by the department for the payment of the past-due tax liabilities at issue or for past-due child support or combined child and spousal support arrears;

(iv) the taxpayer's wages are being garnished for the payment of past-due child support or combined child and spousal support arrears pursuant to an income execution issued pursuant to section five thousand two hundred forty-one of the civil practice law and rules;

(v) the taxpayer's driver's license is a commercial driver's license as defined in section five hundred one-a of the vehicle and traffic law; or

(vi) the department incorrectly found that the taxpayer has failed to comply with the terms of a payment arrangement made with the commissioner more than once within a twelve month period for the purposes of subdivision three of this section” (Tax Law former § 171-v [5]).<sup>3</sup>

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<sup>3</sup> By part EEE of Chapter 59 of the Laws of 2019, the Legislature amended Tax Law § 171-v to add two new grounds for protesting the issuance of a drivers license suspension notice, namely “(vii) the taxpayer receives

M. The Division, through the factual assertions set forth in its motion papers, has established a prima facie showing that petitioner met the requirements for license suspension, to wit: (i) the giving of notice of the proposed suspension referral and the existence of fixed and final outstanding tax liabilities in excess of \$10,000.00 and (ii) petitioner does not meet any of the six specifically enumerated grounds set forth at Tax Law § 171-v (5) (i) - (vi) allowing for relief from license suspension. The \$10,000.00 threshold is met notwithstanding that the Division failed to establish that one of the notices of deficiency listed on the 60-day notice, L-035952336, with a balance due of \$7,735.56, was fixed and final (*see* conclusion of law G). The three remaining notices of deficiency listed on the 60-day notice, which were fixed and final as of the date of the 60-day notice, April 18, 2018, had a balance due of \$83,216.48 as of that date (*see* finding of fact 2; conclusion of law J).

To rebut this prima facie showing, it was incumbent upon petitioner to produce evidence in admissible form sufficient to raise an issue of fact requiring a hearing (*Zuckerman v City of New York*, 49 NY2d at 562 [1980]). Petitioner, however, made no response to the Division's motion and thus has presented no evidence to contest the facts alleged in the Lewis affidavit and the exhibits attached thereto. In his petition, petitioner argues only that the notices of deficiency issued to him may be incorrect. Thus, with no dispute as to the facts and no basis in law upon which to grant the petition

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public assistance or supplemental security income; or (viii) the taxpayer demonstrates that suspension of the taxpayer's driver's license will cause the taxpayer undue economic hardship." Part EEE made this new legislation effective as of the ninetieth day after the date of chapter 59's enactment, April 12, 2019. In light of the amendment's delayed effective date, it must be given prospective application only and is thus inapplicable to this proceeding, having become effective after the date of the 60-day notice issued to petitioner (*see Davidson v Evans*, 104 AD3d 1046 [3d Dept 2013]).

with regard to the 60-day notice, summary determination in the Division's favor will be granted with regard to that notice (*see Matter of Faupel*, Tax Appeals Tribunal, December 23, 2015).

N. The Division of Taxation's motion is granted to the extent that the petition of David Gewirtz is dismissed with regard to the 2017 notices of deficiency, as indicated by conclusion of law J; the petition is denied with regard to the Division's notice of proposed driver license suspension, dated April 18, 2018, and such notice is sustained, as indicated in conclusion of law M; but the motion is otherwise denied, and the hearing in this matter with regard to notice of deficiency number L-035952336 will be scheduled in due course.

DATED: Albany, New York  
February 13, 2020

/s/ James P. Connolly  
ADMINISTRATIVE LAW JUDGE