

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JUDITH LEE ALSTON** : ORDER  
 : DTA NO. 828836  
for Redetermination of a Deficiency or for Refund of :  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Years 2011 through 2013 and for :  
Review of a Notice of Proposed Driver License Suspension :  
Referral under Tax Law § 171-v. :

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Petitioner, Judith Lee Alston, 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 years 2011 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. (Kathleen A. Korycinski, Esq., of counsel), filed a motion on March 21, 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. Petitioner, appearing pro se, failed to respond to the motion. Petitioner's response was due on April 22, 2019, which date began the 90-day period for issuance of this order. Based upon the motion papers, the affidavits and documents submitted, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, 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 three notices of deficiency.

II. Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of proposed driver license suspension referral.

III. 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 the timeliness of petitioner's protest of three notices of deficiency, each dated November 20, 2017 and bearing assessment identification numbers L-047182767, L-047182766, and L-047179974 (notices), and the validity of the Division's subsequent issuance of a notice of proposed driver license suspension referral (form DTF-454), collection case ID: E-047182767-CL01-3 (60-day notice), advising that petitioner must pay her New York State tax debts or face the possible suspension of her driver's license pursuant to Tax Law § 171-v.

2. The 60-day notice is dated May 9, 2018, and is addressed to petitioner at her Airmont, New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated May 9, 2018, setting forth three unpaid personal income tax assessments subject to collection:

Assessment ID	Tax Year Ended	Tax Amount Assessed	Interest Amount Assessed	Current Balance Due (as of May 9, 2018)
L-047182767	12/31/12	\$2,241.00	\$1,049.72	\$4,514.30
L-047182766	12/31/11	\$3,359.00	\$1,957.07	\$7,257.10
L-047179974	12/31/13	\$188.00	\$289.96	\$548.53
Total balance due:				\$12,319.93

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, she was required to either pay the amount due or set up a payment plan in order to avoid suspension of her 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 Tax Department, 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 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 August 7, 2018, petitioner filed a petition with the Division of Tax Appeals protesting both the 60-day notice and the notices.

8. The petition does not challenge the Division’s issuance, or petitioner’s receipt of, either the 60-day notice or the notices. Instead, the petition states that petitioner cannot find anyone to do her taxes for the years at issue without it costing her as much as she owes. Additionally, she states that she wants to know how her balance due was determined.

#### The Notices

9. In support of its motion, the Division submitted: (I) an affidavit, dated March 20, 2019, of Kathleen A. Korycinski, Esq., an attorney employed in the Division’s Office of Counsel; (ii)

an affidavit, dated March 11, 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 a "Certified Record For - DTF-962-F-E - Not of Def Follow Up DTF-962-F-E - Not of Def Follow Up" (CMR); (iv) an affidavit, dated March 13, 2019, of Fred Ramundo, a supervisor in the Division's mail room; (v) a copy of the three November 20, 2017 notices with the associated cover sheets addressed to petitioner; and (vi) a transcript of petitioner's personal income tax return (form IT-201), filed for the year 1999 on April 15, 2000. The 1999 income tax return was the last return filed with the Division by petitioner before these notices were issued. Petitioner's address, as listed on the transcript, was "38-A Rose Ave 1, Spring Valley NY 10977-7343." According to Ms. Korycinski's affidavit, on November 16, 2016, the Division updated petitioner's address to "38 Rose Ave, Apt 14, Spring Valley, NY 10977-7343," based on information received from the IRS. This updated address matches that listed on the three November 20, 2017 notices.

10. The affidavit of Deena Picard, who has been in her current position since May 2017 and was previously 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 “11/20.” 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.

11. 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.

12. 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.

13. The CMR for the batch of notices to be issued on November 20, 2017, including the notices addressed to petitioner herein, consists of 1,336 pages and lists 19,699 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the

CMR includes 11 to 15 entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

14. Each page of the CMR bears a USPS postmark dated November 20, 2017. Pages 1 through 65 and pages 459 through 1,336 bear the postmark “GMF Albany NY 12212.” Pages 66 through 413 and 415 through 458 bear the postmark “Albany NY G.M.F.” Page 414 bears the postmark “Albany NY 12288.”

15. Page 421 of the CMR indicates that three notices of deficiency with certified control numbers 7104 1002 9735 3941 5227, 7104 1002 9735 3941 5234 and 7104 1002 9735 3941 5241, and reference numbers L-047179974, L-047182766 and L-047182767, respectively, were mailed to petitioner at her Spring Valley, New York, address listed on the subject notices of deficiency. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bear these same certified control numbers and petitioner’s name and address as noted.

16. Appearing below the 12 entries on page 1,336 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS,” next to which the preprinted number “19,699” and the handwritten number “19699” appear. Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” next to which the handwritten number “19699” and 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 20, 2017, an employee of the mail room delivered three items of certified mail addressed to petitioner at her Spring Valley, New York, address to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail. 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 20, 2017 to be kept as part of the records of the Division. Mr. Ramundo asserts that the procedures described in his 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 pieces of certified mail to petitioner on November 20, 2017.

#### The 60-Day Notice

20. The Division also submitted with its motion an affidavit, dated March 20, 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.

21. 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 utilized 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 utilizing 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 case will be electronically sent by the Division to DMV for license suspension.<sup>1</sup>

Such case data is sent daily, Monday through Friday, by the Division to DMV. DMV then sends

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<sup>1</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 taxpayer “passes” this final compliance check, the suspension by DMV will proceed.

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 so as 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.

22. 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 3 and 4, and a payment document (form DTF-968.4), by which petitioner could remit payment against the liability in question, were included with Mr. Lewis's affidavit. 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 May 9, 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.

23. To show proof of proper mailing of the 60-day notice, the Division also submitted with its motion papers: (i) an affidavit, dated March 20, 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); (ii) a copy of a "USPS Receipt of Mailing for - DTF-454-DMV Drivers License Susp'd" postmarked May 9, 2018 (mail log); (iii) an affidavit, dated March 20, 2019, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the May 9, 2018 60-day notice addressed to petitioner along with the consolidated statement of tax liabilities (form DTF-967-E), also dated May 9, 2018; and (v) a copy of the petition, and its attached exhibits, filed with the Division of Tax Appeals on August 7, 2018

24. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. As noted previously, Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of records regarding first class mail that was sent with a certificate of mailing, and is familiar with CARTS and the Division's past and present procedures as they relate to statutory notices. The 60-day notices and other statutory notices are generated from CARTS and are predated with the anticipated date of mailing. The first page of the 60-day notice bears the taxpayer's mailing address and a departmental return address on the front, and taxpayer instructions for responding on the back. CARTS also generates a consolidated statement of tax liabilities and a payment document for each 60-day

notice. Each 60-day notice, with appropriate enclosures, is a discrete unit within the batch of notices. The first page of the 60-day notice is the first sheet in the unit.

25. Each batch of statutory notices is accompanied by a computer generated mail log. Each page of a mail log 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 mail log, in the present case, to the actual mailing date of "5/9." In addition, as described by Ms. Picard, generally all pages of a mail log are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. According to Ms. Picard, the pages of a mail log stay banded together unless otherwise ordered. The page numbers of the mail log run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

26. The mail log lists each notice in the order the notices are generated in the batch. Each notice is assigned a standard mail sequence number. The standard mail sequence numbers are listed under the first heading "Sequence No." The assessment numbers are listed under the second heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

27. The 60-day notices that are ready for mailing are received by the Division's Outgoing Mail Processing Center, where they are assigned to a mail room staff member, who operates the mail inserter machine. The assigned staff member places the materials onto a mail inserter machine, which puts each 60-day notice and associated documents into a windowed envelope so that the addresses from the 60-day notice show through the windows. The inserter machine weighs, seals and affixes postage to each envelope in the order the notices are listed on the mail log. The envelopes are then placed in order into mail trays and delivered to a designated area for

outgoing first class mail with a certificate of mailing. A staff member then reviews the mailings, comparing the first and last pieces of mail to the mail log. The total postage fee is computed and a postage meter tape is affixed to the last page of the mail log. A staff member then delivers the envelopes and the mail log to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the mail log, indicating receipt by the post office.

28. The May 9, 2018 mail log consists of 8 pages and lists 115 sequence numbers along with corresponding assessment numbers, names and addresses. Each page of the mail log includes 15 such entries, with the exception of page 8, which contains 10 entries. Ms. Picard notes that the copy of the mail log that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated May 9, 2018 to each page of the mail log, and initialed page 8. On page 8, the last page of the May 9, 2018 mail log, the following preprinted text appears: on the first line, the heading "TOTAL NUMBER OF DOCUMENTS FOR MAILING;" next to which the preprinted number "115" appears, followed by the heading "TOTAL POSTAGE:" that contains no entry; next, a two line statement "I AFFIRM THAT THE ABOVE DOCUMENTS HAVE BEEN RECEIVED FROM THE OPERATIONS SECTION AND FORWARDED TO THE MAILROOM: SIGNED FOR BY CARTS CONTROL UNIT EMPLOYEE:" appears, along with signature of a CARTS Control employee and the handwritten date "4/27/18;" next, appears the statement "I AFFIRM THAT THE ABOVE LISTED DOCUMENTS HAVE BEEN INSERTED INTO MAILING ENVELOPES AND HAD POSTAGE APPLIED," with no signature or date. Below the line "SIGNED FOR BY (POSTAL

EMPLOYEE)” is a handwritten “115” and the initials of a postal employee. The handwritten dollar amount of \$46.00 appears in the upper right corner of page 8.

29. Page 1 of the mail log, indicates that a 60-day notice with sequence number P0000004000001000003, and reference number E-047182767, was mailed to petitioner at the Airmont, New York, address listed on the 60-day notice.

30. The affidavit of Fred Ramundo describes the Division’s mail room’s general operations and procedures. 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. The 60-day notices are mailed by first class mail with a certificate of mailing, and the mail log is the document that records each piece of first class mail with a certificate of mailing. Mr. Ramundo attests that the mail log is signed by the Division’s CARTS Control staff and mail room staff as confirmation of processing and mailing on the date of mailing. He further attests that the May 9, 2018 mail log conforms to the USPS form 3665, Certificate of Mailing.

31. As noted, a USPS postmark dated May 9, 2018 appears on page 8, the last page of the mail log attached to the Picard affidavit as exhibit “A.” According to Mr. Ramundo, the affixation of the postmark and the USPS employee’s initials indicate that all of the 115 articles of mail listed on the mail log, including the article addressed to petitioner, were received by the USPS for mailing on May 9, 2018.

32. 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 liability asserted in the notices are not fixed, final and outstanding (*see* finding of fact 2), and b) has not sought relief from the proposed suspension of her driver’s license under any of the six specifically enumerated grounds for such relief set forth at Tax Law § 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.

### ***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 © 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 assessments set forth on notice numbers L-047182767, L-047182766 and L-047179974, and the Division’s subsequently issued 60-day notice. Since the petition presents distinct challenges, and since each distinct challenge is within the ambit of the subject motion, the challenges will be addressed independently.

#### The Notices

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 (*see* Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of

deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). 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 (*see 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 (*see* 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. In this case, 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).

H. However, the evidence submitted does not prove that the Division followed this standard procedure. The affidavits of Ms. Picard and Mr. Ramundo allege that the CMR in this case is documentary evidence demonstrating that the Division followed its standard procedure here. They point to the fact that the certified control numbers assigned to the certified mail articles containing the notices addressed to petitioner are found on page 421 of the CMR and that all 19,699 certified articles covered by the CMR were delivered into the possession of the USPS on November 20, 2017, as evidenced by the fact that the postal employee who received the CMR and associated certified articles handwrote “19699” on the last page and initialed that page.

While the postal employee’s initialing or signing the last page of the CMR and noting the number of articles received indicates the total number of certified mail articles that were delivered to the USPS, proof of whether any particular certified mail article in the CMR was actually delivered to the USPS depends crucially on the Division’s business practice of generating the CMR and the certified mail articles covered by that CMR at the same time and keeping the CMR and the covered certified mail articles together at all times up to their delivery to the USPS. The conflict in the postmarks appearing on the CMR creates a question regarding this procedure (*see* finding of fact 14). Upon receiving the CMR and the accompanying certified mail articles, the postal employee is to postmark each page of the CMR (*see* USPS Domestic Mail Manual § 503 [5.1.1]). Here, the conflicting postmarks could mean that the Division did not follow its standard procedure of keeping the CMR and the certified mailing articles together until delivered into the possession of the USPS (*see* finding of fact 14). The fact that the date and consecutive page numbering on the CMR are consistent is some proof that the Division

handled all the pages of the CMR as a single unit. However, in the absence of the Division offering an explanation for the conflict in the postmarks appearing on the CMR, as well as proving that explanation to be valid, a material question of fact exists as to whether the certified mail articles covered by the CMR were all listed on and accompanied the CMR as delivered to the USPS, including the certified mail articles containing the notices issued to petitioner. Thus, because a material question of fact remains as to whether the Division followed its standard mailing procedure for mailing statutory notices, as described by the Picard and Ramundo affidavits, in mailing the notices to petitioner, the Division's motion, with respect to the three November 20, 2017 notices, must be denied.

#### The 60-Day Notice

I. Also at issue is petitioner's protest concerning the proper issuance to petitioner of the 60-day notice. Tax Law § 171-v is titled "Enforcement of *delinquent tax liabilities* through the suspension of drivers' licenses" (emphasis added). The stated aim of section 171-v is "to improve tax collection through the suspension of drivers' licenses of taxpayers with past-due tax liabilities equal to or in excess of ten thousand dollars" (Tax Law § 171-v [1]). A specific statutory predicate underlying this sanction is the establishment of the existence of "delinquent tax liabilities," specifically the existence of "*past-due tax liabilities*," owed by the taxpayer in an aggregate amount equal to or greater than \$10,000.00 (emphasis added).

J. Tax Law § 171-v (1) defines the term "past-due tax liabilities" as "any tax liability or liabilities which have become fixed and final *such that the taxpayer no longer has any right to administrative or judicial review*" (emphasis added). The record in this matter, as developed at this point in time, does not allow for an inarguable conclusion that there exists fixed and final tax liabilities owed by petitioner with respect to which she no longer has any right to administrative

or judicial review. The Division specifies notice numbers L-047182767, L-047182766 and L-047179974 as comprising the past-due tax liabilities giving rise to the license suspension and petitioner has challenged the facts underlying those assessments in her petition to the instant motion. It was incumbent upon the Division to establish in its motion that petitioner's tax liabilities under the cited notices are unequivocally fixed and final. However, the Division has offered insufficient evidence, as determined in conclusion of law H, to establish the proper issuance of assessment numbers L-047182767, L-047182766 and L-047179974, and the exhaustion or prohibition of petitioner's administrative or judicial review. In sum, there remains an issue of fact regarding the existence of "past-due tax liabilities," as defined in Tax Law § 171-v (1), and, therefore, summary determination is inappropriate.

K. As to the timeliness of petitioner's protest of the 60-day notice, as determined in conclusion of law H, the proof submitted fails to establish that the three underlying notices were properly mailed on November 20, 2017. Therefore, a question of fact exists as to the proper issuance of the 60-day notice on May 9, 2018.

L. The Division of Taxation's motion is denied, and the petition of Judith Lee Alston shall proceed in due course.

DATED: Albany, New York  
July 18, 2019

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE