

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**FRANK O. ZIMMERMAN** : ORDER  
DTA NO. 828930  
for Redetermination of a Deficiency or for Refund of New :  
York State and City Personal Income Taxes Under Article 22 :  
of the Tax Law and the Administrative Code of the City of :  
New York for the Year 2014. :

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Petitioner, Frank O. Zimmerman, filed a petition for redetermination of a deficiency of New York State and City personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion dated February 21, 2019, seeking an order granting summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, responded by letter brief dated March 26, 2019. The 90-day period for issuance of this order commenced on March 25, 2019. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, James P. Connolly, Administrative Law Judge, renders the following order.<sup>1</sup>

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<sup>1</sup> Petitioner’s brief in response to the Division’s motion was considered in this matter despite being filed one day late. “[A]dministrative law judges . . . have some discretion in accepting late-filed non-jurisdictional documents” (*see Matter of Clifton*, Tax Appeals Tribunal, January 4, 2018).

***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's protest of a notice of deficiency, dated November 30, 2017, and bearing assessment identification number L-046612508 (notice). The notice is addressed to petitioner, Frank O. Zimmerman, at an address in Brooklyn, New York.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request was faxed by petitioner to BCMS on July 11, 2018.

3. On August 3, 2018, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on November 30, 2017, but the request was not faxed until July 11, 2018, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on October 9, 2018. In his petition, petitioner states that he faxed a request for conciliation conference to BCMS on May 8, 2018, and that, after receiving a tax warrant, dated June 21, 2018, for the notice, he re-faxed the request for conciliation conference on July 11, 2018. In response to the Division's motion, petitioner did not present any evidence substantiating his

allegation that he faxed a request for conciliation conference to BCMS on May 8, 2018, or any other date prior to July 11, 2018.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (I) an affidavit, dated November 30, 2018, 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 "Certified Record for DTF-962-F-E - Not of Def Follow Up DTF-963-F-E - Not of Def Follow Up" (CMR) postmarked November 30, 2017; (iii) an affidavit, dated November 30, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the November 30, 2017 notice with the associated mailing cover sheet; (v) a copy of petitioner's request for conciliation conference, faxed to BCMS on July 11, 2018; and (vi) a copy of petitioner's 2016 IT-201 New York State resident income tax return, filed on May 30, 2017, which lists the same Brooklyn, New York, address for petitioner as that listed on the notice, the request for conciliation conference and the petition. The 2016 income tax return was the last return filed with the Division by petitioner before the notice was issued.

6. 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 is the Acting 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 are predated with the anticipated date of mailing (the "run" date) in the upper left margin. Each page of the CMR lists a run 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 "11/30/17." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (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.

7. 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. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. 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."

8. The CMR in the present matter consists of 343 pages and lists 5,034 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 12 to 15 such entries, with the exception of page 343, which includes 7 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.

9. Except as noted, each page of the CMR bears a USPS postmark of "GMF Albany NY 12212," with a date of November 30, 2017. Pages 1, 2 and 4 bear the aforesaid postmark, along

with a second postmark of “Albany GMF 12288,” also with a November 30, 2017 date. Page 3 bears only a postmark of “Albany GMF 12288,” with a November 30, 2017 date. The page numbers shown on the right margin of the first four pages of the CMR are consistent with the rest of the CMR and the first four pages show the same “run” date on the upper left margin as the rest of the CMR. The affidavits submitted by the Division in this matter do not address why pages 1 through 4 of the CMR bear a postmark that differs from the postmark on the other pages of the CMR.

10. A USPS representative wrote the number “5034” on page 343 next to the heading “Total Pieces and Amounts” and initialed or signed page 343.

11. Page 130 of the November 30, 2017 CMR indicates that a notice with certified control number 7104 1002 9735 3985 7805 and reference number L-046612508 was mailed to petitioner at the Brooklyn, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this same certified control number and petitioner’s name and address as noted.

12. 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 mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope.

The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. 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. According to Mr. Ramundo, the affixation of the USPS postmark on each page of the CMR and the USPS employee's writing "5034" on the last page of the CMR, and the employee's initialing of that page indicate that all of the 5,034 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on November 30, 2017.

13. According to both the Picard and Ramundo affidavits, a copy of the notice was mailed to petitioner on November 30, 2017, as claimed.

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

A. As noted, the Division brings a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Because the petition in this matter was filed within 90 days of the conciliation order (*see* finding of fact 4), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9 (b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This determination shall address the instant motion as such.

B. A motion for summary determination “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]).

C. Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). “If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts,” then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

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

E. Where, as here, the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. Here, 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).



G. Whether the Division has offered proof sufficient to establish that the standard procedure was followed in this case requires more discussion. 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 article containing the notice and addressed to petitioner is found on page 130 of the CMR and that all 5,034 certified articles covered by the CMR were delivered into the possession of the USPS on November 30, 2014, as evidenced by the fact that the postal employee who received the CMR and associated certified articles handwrote “5034” on that last page and initialed the 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, whether any particular certified mail article on 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 in the CMR bears on this procedure (*see* finding of fact 9). 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, however, as discussed above, four pages of the CMR bear postmarks that vary from the postmark on the other pages of the CMR by showing a different zip code. More specifically, on pages 1, 2 and 4, in addition to the “GMF Albany NY 12212” postmark generally found on the CMR, there is a second postmark, viz., “Albany GMF 12288.” Page 3 of the CMR contains only the “Albany

GMF 12288” postmark. The presence of “Albany GMF 12288” postmark on pages 1 through 4, while the remaining pages of the CMR have only the “GMF Albany NY 12212” postmark raises a question of fact whether the pages with the “Albany GMF 12288” postmark were delivered to a different post office than those pages with only the “GMF Albany NY 12212” postmark. This explanation of the conflicting postmarks would 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 6). The fact that the date and the consecutive numbering on the first four pages of CMR are consistent with the rest of the CMR is some proof that the Division handled all the pages of the CMR submitted on this motion as a single unit. However, in the absence of the Division offering an alternate explanation for the conflict in the postmarks appearing the in the CMR, let alone 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 article containing the notice issued to petitioner. Thus, because a material question of fact remains as to whether the Division followed its standard procedure for mailing statutory notices, as described by the Picard and Ramundo affidavits, in mailing the notice to petitioner, the Division’s motion must be denied.

H. Petitioner does not question whether the notice was mailed on the date claimed by the Division. Rather, his argument in opposition to the Division’s motion is that he never received the notice and so his request for conciliation should not be considered late-filed. While this argument is moot in regard to the disposition of this motion in light of conclusion of law G, for the sake of completeness it will be addressed. Contrary to petitioner’s argument, “it is well

established that where, as here, a notice of deficiency of income tax has been properly mailed, Tax Law § 681 (a) does not require actual receipt by the taxpayer” (*Matter of Caretenuto*, Tax Appeals Tribunal, March 17, 2016). Accordingly, petitioner’s argument is rejected.

I. The Division’s motion for summary determination is denied without prejudice and the petition of Frank O. Zimmerman shall proceed in due course.

DATED: Albany, New York  
June 20, 2019

/s/ James P. Connolly  
ADMINISTRATIVE LAW JUDGE