

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD MCELROY	:	ORDER
for Redetermination of Deficiencies or for Refund of	:	DTA NO. 829526
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1998, 2000 through 2002	:	
and 2004 through 2008.	:	

Petitioner, Richard McElroy, 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 1998, 2000 through 2002 and 2004 through 2008.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michael Trajbar, Esq., of counsel), brought a motion dated November 18, 2019, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the Division of Taxation’s motion. The 90-day period for issuance of this order commenced on December 18, 2019. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices 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 the following 23 notices of deficiency. Except for the first two notices listed, L-016976529 and L-016976530,¹ all of the notices were addressed to petitioner at a North Brunswick, New Jersey, address:

Notice #	Period Ending	Notice date
L-016976529	--	10/4/99
L-016976530	--	10/4/99
L-022321433	9/30/02	5/5/03
L-022321434	6/30/02	5/5/03
L-022321435	3/31/02	5/5/03
L-022321436	6/31/01	5/5/03
L-022321437	12/31/01	5/5/03
L-022321438	9/30/01	5/5/03
L-022321439	3/31/01	5/5/03
L-022321440	12/31/00	5/5/03
L-022321441	9/30/00	5/5/03
L-029607321	6/30/07	1/18/08
L-029607322	3/31/07	1/18/08
L-029607323	3/31/06	1/18/08
L-029607324	12/31/05	1/18/08
L-029607325	6/30/05	1/18/08
L-029607326	3/31/05	1/18/08
L-029607327	12/31/04	1/18/08
L-029607328	9/30/04	1/18/08

¹ As noted herein, notices L-016976529 and L-016976530 were not addressed in the motion and there is no evidence indicating what address(es) those two notices were sent to.

L-029607329	6/30/04	1/18/08
L-029607330	1/21/04-3/31/04	1/18/08
L-029607320	9/30/07	1/31/08
L-031941123	9/30/08	5/14/09

2. Petitioner filed a request for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices.² The request was postmarked July 15, 2019 and marked as received by BCMS on July 19, 2019.

3. On August 16, 2019, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner addressing all of the notices. The conciliation order determined that petitioner’s protest of the notices 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 May 14, 2009; January 18, 2008; January 31, 2008; May 5, 2003 and October 4, 1999, but the request was not mailed until July 15, 2019, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on August 20, 2019. The petition lists Jay Gelbein, CPA, as petitioner’s representative, but does not include an executed power of attorney form with the petition. In the petition, petitioner states that he is not a responsible party and has no financial ties to the company for which the tax assessments are based.

5. In the motion, the Division neglects to address, or provide any mailing documentation for, notices L-016976529 and L-016976530, both dated October 4, 1999 (1999 notices).

² The copy of petitioner’s request for a conciliation conference with BCMS that was submitted with the motion indicates that petitioner challenged the latter 13 notices of the 23 notices listed above. However, the relevant BCMS conciliation order addresses all 23 notices as though they were challenged altogether by petitioner. The parties did not offer any explanation for the difference. Based upon the relevant BCMS order it is deemed that petitioner sought a BCMS conciliation conference for all 23 of the subject notices together.

6. To show proof of proper mailing of the nine notices of deficiency, L-022321433 through L-022321441 (*see* finding of fact 1), each dated May 5, 2003 (2003 notices), the Division provided the following: (i) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS), dated October 23, 2019; (ii) a "Certified Record for Presort Non-Qualified Mail" (CMR) postmarked May 5, 2003; (iii) an affidavit of Fred Ramundo, a supervisor in the Division's mail room, dated October 31, 2019; (iv) a copy of each of the nine 2003 notices with the associated mailing cover sheets addressed to petitioner; (v) an affidavit of Diane Conti, a Taxpayer Services Administrator 3 in the Division's Office of Processing and Taxpayer Services, dated November 12, 2019, together with a transcript of petitioner's personal income tax return (form IT-203), filed for the year 2002 on April 15, 2003. According to the affirmation filed by the Division's representative, Michael Trajbar, the 2002 income tax return was the last return filed with the Division by petitioner before the 2003 notices were issued. The North Brunswick, New Jersey, address on the 2002 tax return is the same address as that listed on each of the 2003 notices.

7. To show proof of proper mailing of the ten notices of deficiency, L-029607321 through L-029607330 (*see* finding of fact 1), each dated January 18, 2008 (2008 notices), the Division provided the following: (i) a second affidavit of Deena Picard, dated October 23, 2019; (ii) a CMR entitled "Certified Record for Presort Mail – Assessments Receivable" postmarked January 18, 2008; (iii) a second affidavit of Fred Ramundo, dated October 31, 2019; (iv) a copy of each of the ten 2008 notices with the associated mailing cover sheets addressed to petitioner; (v) a second affidavit of Diane Conti, dated November 12, 2019, together with a transcript of petitioner's personal income tax return (form IT-203), filed for the year 2006 on April 15, 2007.

According to the affirmation filed by Mr. Trajbar, the 2006 income tax return was the last return filed with the Division by petitioner before the 2008 notices were issued. The North Brunswick, New Jersey, address on the 2006 tax return is the same address as that listed on each of the 2008 notices.

8. To show proof of proper mailing of notice of deficiency L-029607320, dated January 31, 2008, the Division provided the following: (i) a third affidavit of Deena Picard, dated October 23, 2019; (ii) a CMR postmarked January 31, 2008; (iii) a third affidavit of Fred Ramundo, dated October 31, 2019; and (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioner. According to the affirmation filed by Mr. Trajbar, the 2006 income tax return described in finding of fact 7 is also the last tax return filed before this notice was issued. The North Brunswick, New Jersey, address on the 2006 tax return is the same address as that listed on notice L-029607320.

9. To show proof of proper mailing of notice of deficiency L-031941123, dated May 14, 2009, the Division provided the following: (i) a fourth affidavit of Deena Picard, dated October 23, 2019; (ii) a CMR postmarked May 14, 2009; (iii) a fourth affidavit of Fred Ramundo, dated October 31, 2019; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioner; and (v) a copy of petitioner's personal income tax return (form IT-203), filed for the year 2008, with the envelope addressed to the State Processing Center, postmarked on May 4, 2009. According to the affirmation filed by Mr. Trajbar, the 2008 tax return was the last tax return filed before notice L-031941123 was issued. The North Brunswick, New Jersey, address on the 2008 tax return is the same address as that listed on notice L-031941123.

10. The affidavits 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 is familiar with the Division's Case and Resource Tracking System (CARTS), which generates statutory notices prior to mailing. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with 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 is manually changed on the first and last page of the CMR to the actual date of mailing. 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.

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. 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 P.O. ADDRESS."

12. The May 5, 2003 CMR consists of 45 pages and lists 493 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR

includes 11 such entries with the exception of page 45, which contains 9 entries. Ms. Picard notes that the copy of the CMR 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 5, 2003, to each page of the CMR, initialed each page, circled the number “493” on page 45 next to the heading “TOTAL PIECES AND AMOUNTS LISTED,” and initialed page 45.

13. Page 5 of the May 5, 2003 CMR indicates that the following nine 2003 notices of deficiency, with their respective certified control numbers, were mailed to “MCELROY-RICHARD” at the North Brunswick, New Jersey, address listed on the 2003 notices:

Notice #	Certified Control #
L-022321433	7104 1002 9730 2014 6760
L-022321434	7104 1002 9730 2014 6777
L-022321435	7104 1002 9730 2014 6784
L-022321436	7104 1002 9730 2014 6791
L-022321437	7104 1002 9730 2014 6807
L-022321438	7104 1002 9730 2014 6814
L-022321439	7104 1002 9730 2014 6821
L-022321440	7104 1002 9730 2014 6838
L-022321441	7104 1002 9730 2014 6845

The corresponding mailing cover sheets bear these certified control numbers and petitioner’s name and address as noted.

14. The January 18, 2008 CMR consists of 12 pages and lists 122 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 12, which contains 1 entry. Ms. Picard notes that the copy of the CMR 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 January 18, 2008, to each page of the CMR, initialed each page, circled the number “122” on page 12 next to the heading “Total Pieces and Amounts Listed,” and initialed page 12.

15. Pages 1 and 2 of the January 18, 2008 CMR indicate that the following 10 notices of deficiency, with their respective certified control numbers, were mailed to “MCELROY-RICHARD” at the North Brunswick, New Jersey, address listed on the 2008 notices:

Notice #	Certified Control #
L-029607321	7104 1002 9730 0537 3242
L-029607322	7104 1002 9730 0537 3259
L-029607323	7104 1002 9730 0537 3266
L-029607324	7104 1002 9730 0537 3273
L-029607325	7104 1002 9730 0537 3280
L-029607326	7104 1002 9730 0537 3297
L-029607327	7104 1002 9730 0537 3303
L-029607328	7104 1002 9730 0537 3310
L-029607329	7104 1002 9730 0537 3327

L-029607330	7104 1002 9730 0537 3334
-------------	--------------------------

The corresponding mailing cover sheets bear these certified control numbers and petitioner's name and address as noted.

16. An enclosure included with each of the 2008 notices, except notices L-029607321 and L-029607322 stated, in part:

“Our records indicate that a power of attorney is on file for tax matters at issue in the enclosed document. Therefore, we have forwarded a copy of the document to your legal representative: JAY GELBEIN, ADAM GELBEIN, RIVKA DANAN [address provided]”

The Division's motion papers did not otherwise mention the power of attorney or include documentation to prove mailing of the 2008 notices to petitioner's representative. The Division's motion papers did not include a copy of petitioner's power of attorney that it had on file.

17. The January 31, 2008 CMR consists of 2 pages and lists 13 certified control numbers along with corresponding assessment numbers, names and addresses. The first page of the CMR includes 11 such entries and the second page contains 2 entries. Ms. Picard notes that the copy of the CMR 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 January 31, 2008, to both pages of the CMR, initialed each page, circled the number “13” on page 2 next to the heading “TOTAL PIECES AND AMOUNTS,” and initialed page 2.

18. Page 1 of the January 31, 2008 CMR indicates that a notice with certified control number 7104 1002 9730 0557 1969 and reference number L-029607320 was mailed to “MCELROY-RICHARD” at the North Brunswick, New Jersey, address listed on the January 31,

2008 notice L-029607320. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

19. The May 14, 2009 CMR consists of 19 pages and lists 208 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 19 which contains 10 entries. Ms. Picard notes that the copy of the CMR 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 14, 2009, to each page of the CMR, initialed each page, wrote and circled the number "208" on page 19, and initialed page 19.

20. Page 3 of the May 14, 2009 CMR indicates that a notice with certified control number 7104 1002 9730 1335 5438 and reference number L-031941123 was mailed to "MCELROY-RICHARD" at the North Brunswick, New Jersey, address listed on the May 14, 2009 notice. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

21. Each of the four affidavits of Fred Ramundo, describe the general operations and procedures of the Division's mail room. Mr. Ramundo has been a supervisor in the mail room 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 retrieves 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 contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on

the CMR by checking those envelopes against the information contained 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 USPS employee initialed each page of the respective CMRs and affixed a postmark to each page of the respective CMRs. 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. A review of the May 5, 2003, January 18, 2008, January 31, 2008 and May 14, 2009 CMRs indicate that the USPS employee complied with this request by circling the number of pieces received.

22. The affidavits of Diane Conti state that as part of her regular duties she oversees the analysis and testing of computer systems that process tax information, store information derived from various sources and generate printed documents that are sent to taxpayers, including printouts of purged information. Ms. Conti states that, in processing a return, the Division captures certain information from the return onto the Returns Processing Database in a record format. She further asserts that she has examined the printouts attached to her affidavits and has determined that they are a true and accurate records of the personal income tax returns filed for petitioner for the tax years 2002 and 2006 and petitioner's North Brunswick, New Jersey, address was the address listed on such returns. That address is the same address used on 21 of the 23 notices (*see* finding of fact 1). The attached printouts show filing dates of April 15, 2003 and April 15, 2007 for petitioner's 2002 and 2006 returns, respectively.

23. According to all of the affidavits submitted, copies of the respective notices were properly mailed to petitioner at his North Brunswick, New Jersey, address on the dates indicated as claimed.

CONCLUSIONS OF LAW

A. 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, 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 (*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).

E. Where, as here, the timeliness of a request for conciliation conference 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. The petition protests 23 notices issued to petitioner and addressed in the conciliation order. However, the Division did not submit any documentation to prove mailing of notice numbers L-016976529 and L-016976530 to petitioner on October 4, 1999. Therefore, with no proof in admissible form, it cannot be concluded that the petition is untimely with respect to those notices.

G. The Division has offered proof sufficient to establish the mailing of the 2003 notices to petitioner's last known address on May 5, 2003. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheet and CMR conforms with the address listed on the transcript of petitioner's 2002 personal income tax return, which, along with the affidavit of Ms. Conti, and affirmation of Mr. Trajbar, satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notices on May 5, 2003 and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (*see Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]*). Since the BCMS conciliation conference request form was not filed until July 15, 2019, or well in excess of 90 days from the issuance of the 2003 notices, the petition is untimely, and the Division of Tax

Appeals is without jurisdiction to provide a hearing to address the merits of notices number L-022321433, L-022321434, L-022321435, L-022321436, L-022321437, L-022321438, L-022321439, L-022321440 and L-022321441.

H. The Division has also offered proof sufficient to establish the mailing of the January 18, 2008 notices to petitioner at his last known address on that date. However, the January 18, 2008 notices indicate that a copy of eight of the notices were mailed to petitioner's representative. The Division's motion neglected to address when, and even if, a copy of the relevant notices were sent to petitioner's representative. While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with the notice (*see Matter of Uddin*, Tax Appeals Tribunal, January 18, 2018, citing *Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988). Since the Division did not submit proof with respect to service of the January 18, 2008 notices on the representative, a question of fact exists as to whether the representative was properly served and the 90-day period for filing a request for conciliation conference or petition was tolled with regard to notices number L-029607321, L-029607322, L-029607323, L-029607324, L-029607325, L-029607326, L-029607327, L-029607328, L-029607329 and L-029607330.

I. Additionally, neither the Division nor petitioner submitted a copy of the relevant power of attorney that would have been on file with the Division. The lack of documentation raises questions as to when, and for which notices, the power of attorney was in effect. This ambiguity raises questions of fact regarding the mailing of the 2008 notices, as well as the

subsequent notices, dated January 31, 2008 and May 14, 2009, at issue here. With a material question of fact remaining, as discussed in Conclusion of Law C, summary determination is also improper as to notices number L-029607320 and L-031941123.

J. The Division's motion for summary determination is hereby granted to the extent indicated in conclusion of law G, and denied in accordance with conclusions of law F, H and I. The matter will proceed, and a hearing will be scheduled in due course for the notices still at issue.

DATED: Albany, New York
March 12, 2020

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE