

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JOVER NARANJO</b>	:	
for Redetermination of Deficiencies or for Refund of	:	
New York State Personal Income Tax under Article 22	:	ORDER
of the Tax Law for the Year 2009 and the Periods	:	DTA NO. 830759
Ended March 31, 2010, June 30, 2010, September 30,	:	
2010, December 31, 2010, December 31, 2011,	:	
December 31, 2012, March 12, 2013, March 31, 2013,	:	
March 31, 2014, June 30, 2014, and September 30,	:	
2014 and for Revision of a Determination or for	:	
Refund of Sales and Use Taxes Under Articles 28 and	:	
29 of the Tax Law for the Period March 1, 2013	:	
through May 31, 2013.	:	

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Petitioner, Jover Naranjo, 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 year 2009 and the periods ended March 31, 2010, June 30, 2010, September 30, 2010, December 31, 2010, December 31, 2011, December 31, 2012, March 12, 2013, March 31, 2013, March 31, 2014, June 30, 2014, and September 30, 2014, and for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2013 through May 31, 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), brought a motion on October 6, 2023, seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, submitted a response to the

Division of Taxation's motion on October 30, 2023. The 90-day period for issuance of this determination commenced on November 6, 2023. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jennifer L. Baldwin, Administrative Law Judge, renders the following order.

***ISSUES***

I. Whether the Division of Tax Appeals has jurisdiction over notices and demands for payment of tax due.

II. Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of deficiency.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Jover Naranjo, two notices and demands for payment of tax due, notice numbers L-035039237 and L-039164193, dated November 23, 2010 and March 22, 2013, respectively. Notice and demand L-035039237 assessed tax of \$29,171.00, plus interest and penalty, for failure to pay income tax when it was due for tax year 2009. Notice and demand L-039164193 assessed a fee of \$50.00 as tax because the bank returned petitioner's payment of \$11,211.45 as unpayable on March 5, 2013.

2. The Division issued to petitioner, at a Jamaica, New York, address, 10 notices of deficiency asserting penalty for withholding tax as follows:

Notice Number	Tax Period Ended	Penalty
L-040552891	03/31/10	\$6,370.91
L-040552890	06/30/10	\$9,597.22
L-040552889	09/30/10	\$10,994.83
L-040552888	12/31/10	\$10,631.79
L-040552892	12/31/11	\$1,693.60

L-041748653	12/31/12	\$3,590.94
L-041748652	03/31/13	\$831.38
L-042235738	03/31/14	\$335.72
L-042572545	06/30/14	\$575.52
L-042572546	09/30/14	\$335.72

3. Notices of deficiency L-040552888, L-040552889, L-040552890, L-040552891, and L-040552892 were issued to petitioner on December 26, 2013, because he was determined to be an officer or responsible person of Enviro & Demo Masters Inc., who was liable for a penalty equal to the tax that was not paid by the business pursuant to Tax Law § 685 (g).

4. Notices of deficiency L-041748652 and L-041748653 were issued to petitioner on July 30, 2014, because he was determined to be an officer or responsible person of Gladiators Contracting Corp., who was liable for penalty equal to the tax that was not paid by the business pursuant to Tax Law § 685 (g). Notice of deficiency L-041748653 is referenced as an exhibit in the instant motion but is not included as such.

5. Notices of deficiency L-042235738, L-042572546, and L-042572545 were issued to petitioner on November 26, 2014, March 12, 2015, and March 31, 2015, respectively, because he was determined to be an officer or responsible person of Yankee Carting Corp., who was liable for a penalty equal to the tax that was not paid by the business pursuant to Tax Law § 685 (g). Notice of deficiency L-042572545 is not included in the instant motion.

6. The Division also issued to petitioner a notice of estimated determination, notice number L-041109900, on April 29, 2014 asserting sales tax due of \$750.00, plus interest and penalty, for failure to file a sales tax return for the period March 1, 2013 through May 31, 2013. Notice of estimated determination L-041109900 is not included in the instant motion.

7. On August 26, 2021, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the 13 notices identified above.

8. On October 1, 2021, BCMS issued a conciliation order dismissing request, CMS No. 000332570, to petitioner with regard to notices and demands L-035039237 and L-039164193. The conciliation order determined that BCMS did not have jurisdiction over the notices and demands because such notices "do not provide for prepayment hearing rights."

9. On the same date, BCMS issued a second conciliation order dismissing request, CMS No. 000332498, to petitioner with regard to the notices of deficiency included in the table above. 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 3/12/15, 3/31/15, 11/26/14, 7/30/14, 12/26/13, but the request was not mailed until 8/26/21, or in excess of 90 days, the request is late filed."

10. BCMS issued a third conciliation order dismissing request, CMS No. 000332572, to petitioner on October 1, 2021 with regard to notice of estimated determination L-041109900. 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 4/29/14, but the request was not mailed until 8/26/21, or in excess of 90 days, the request is late filed."

11. On November 17, 2021, petitioner filed a timely petition with the Division of Tax Appeals in protest of all three conciliation orders. In the petition, petitioner asserted that he was untimely in filing his request for conciliation conference because he was arrested on March 14, 2013, and, thereafter, was in federal prison until he was released on August 23, 2019.

12. On October 6, 2023, the Division filed a motion with the Division of Tax Appeals seeking summary determination with regard to 11 of the notices identified above<sup>1</sup> pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). To show proof of proper mailing of the notices of deficiency, the Division, by affirmation of Adam Roberts, Esq., dated October 6, 2023, submitted the following with its motion papers: (i) four affidavits of Marianna Denier, a Principal Administrative Analyst and the Director of the Management Analysis and Project Services Bureau (MAPS), each sworn to on September 6, 2023; (ii) four “Certified Record for Presort Mail – Assessments Receivable” (CMR), postmarked December 26, 2013, July 30, 2014, November 26, 2014, and March 12, 2015; (iii) copies of the notices, dated December 26, 2013, July 30, 2014,<sup>2</sup> November 26, 2014, and March 12, 2015, mailed to petitioner with the associated mailing cover sheets; (iv) four affidavits of Susan Ramundo, a manager of the Division’s mail room, each sworn to on September 7, 2023; (v) a copy of the conciliation order with regard to the notices of deficiency included in the table above issued by BCMS on October 1, 2021; and (vi) a copy of petitioner’s 2012 New York State resident income tax return, form IT-201, filed on February 12, 2013 (2012 return), listing the same Jamaica, New York, address for petitioner as is listed on the copies of the notices, except that petitioner’s address on the copies of the notices is written as “11445 143rd St,” as opposed to “114-45 143 Street” on the 2012 return, and include an additional four zip code digits to petitioner’s five-digit zip code.

13. Mr. Roberts asserts in his affirmation that petitioner’s last known address was “11445 143rd Street, Jamaica, NY 11436” when the notices of deficiency were issued.

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<sup>1</sup> As noted, the Division’s motion did not include notice of deficiency L-042572545 and notice of estimated determination L-041109900.

<sup>2</sup> As noted, a copy of notice of deficiency L-041748653 is not included in the Division’s motion papers.

14. Marianna Denier has served as the Director of MAPS since July 2022. Prior to that, she was a supervisor in MAPS since October 2004. She is also a Principal Administrative Analyst and has held that position since August 2022. Prior to this position, Ms. Denier was a Supervisor of Administrative Analysis from July 2019 through August 2022. In performing her duties, Ms. Denier has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of deficiency. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Denier is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Denier's affidavits set forth the Division's general practices and procedures for generating and issuing statutory notices.

15. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with its accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

16. Each batch of statutory notices is accompanied by a CMR. The CMR lists each notice in the order it is generated in the batch. The certified control numbers are listed on the CMR under the heading entitled "Certified No." The statutory notice 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 mail room together.

All pages of the CMR are banded together when the documents are delivered to the Division’s mail room and remain so when returned to the Division after mailing. 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.

17. Susan Ramundo, a manager of the Division’s mail room, describes the mail room’s general operations and procedures in her affidavits as they relate to statutory notices. Ms. Ramundo has been a manager of the mail room since 2017. As a mail room manager, Ms. Ramundo is knowledgeable regarding past and present office procedures as they relate to statutory notices. Ms. Ramundo’s official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the United States Postal Service (USPS).

18. The mail room receives statutory notices that are ready for mailing in an “Outgoing Certified Mail” area. The mail room also receives the corresponding CMR for each batch of notices. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet in a windowed envelope. That staff member then weighs, seals, and places postage on each envelope. A clerk then checks the first and last pieces of certified mail against the information contained on the CMR. A clerk will also perform 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. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area.

19. A USPS employee affixes a postmark and writes his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. The mail room also 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

*The December 26, 2013 CMR*

20. The CMR for the statutory notices issued by the Division on December 26, 2013 consists of 56 pages with 614 certified control numbers and corresponding assessment numbers, names, and addresses. Each page consists of 11 entries with the exception of page 56, which contains 9 entries. Ms. Denier 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.

21. Each page of the CMR listed 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 page of the CMR to the actual date of mailing. The actual mailing date as handwritten on the first and last page of the CMR was "12/26/13." This was done to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. On page 56, corresponding to "Total Pieces and Amounts" is the preprinted number 614. A USPS representative affixed a postmark, dated December 26, 2013, and initialed or signed each page of the CMR. A USPS



representative wrote "614" on page 56 next to the heading "Total Pieces Received at Post Office," and, as noted, initialed or signed page 56.

22. Page 38 of the CMR indicates that five notices with certified control numbers 7104 1002 9730 0109 0242, 7104 1002 9730 0109 0259, 7104 1002 9730 0109 0266, 7104 1002 9730 0109 0273, and 7104 1002 9730 0109 0280 and reference numbers L 040552888, L 040552889, L 040552890, L 040552891, and L 040552892, respectively, were mailed to petitioner at the Jamaica, New York, address listed on the notices. The corresponding mailing cover sheets, attached to the Denier affidavit with the copies of the notices as exhibit "B," bear these certified control numbers and petitioner's name and address as stated above.

23. Ms. Denier states that notices of deficiency L-040552888, L-040552889, L-040552890, L-040552891, and L-040552892 were mailed on December 26, 2013, as indicated by the CMR, as well as the USPS postmark on each page of the CMR.

24. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on December 26, 2013.

25. Ms. Ramundo avers that each page of the CMR in exhibit "A" of the Denier affidavit contains a postmark, and that a USPS employee initialed or signed page 56 of the CMR and wrote the total number of pieces of certified mail. A review of the CMR confirms this assertion.

26. Based on her review of the affidavit of Ms. Denier and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Ramundo stated that on December 26, 2013, an employee of the mail room delivered five pieces of certified mail addressed to petitioner at his Jamaica, New York, address in sealed postpaid envelopes for delivery by certified mail. She also stated the CMR delivered to the USPS on December 26, 2013 was returned to the Division. Ms. Ramundo attested that the procedures

described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on December 26, 2013.

*The July 30, 2014 CMR*

27. The CMR for the statutory notices issued by the Division on July 30, 2014 consists of 24 pages with 262 certified control numbers and corresponding assessment numbers, names, and addresses.<sup>3</sup> Each page consists of 11 entries with the exception of pages 3 and 24, which contain 10 entries (two of the original 11 entries on page 3 are crossed out but the same certified control number is handwritten above one entry). Ms. Denier 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.

28. Each page of the CMR listed 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 page of the CMR to the actual date of mailing. The actual mailing date as handwritten on the first and last page of the CMR was "7/30/14." This was done to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. On page 24, corresponding to "Total Pieces and Amounts" is the preprinted number 263. A USPS representative affixed a postmark, dated July 30, 2014, and initialed or signed each page of the CMR. A USPS representative wrote "262" on page 24 next to the heading "Total Pieces Received at Post Office," and initialed or

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<sup>3</sup> The CMR originally listed 263 certified control numbers. As noted in findings of fact 32 and 33, the preprinted number of pieces received at the post office is crossed out, "261" is handwritten and also crossed out, and "262" is handwritten underneath the crossed out "261" on the last page of the CMR.

signed next to it. The initials or signature next to the postmark on each page of the CMR do not match the initials or signature next to the handwritten "262" on page 24 of the CMR.

29. Page 13 of the CMR indicates that two notices with certified control numbers 7104 1002 9730 0270 2359 and 7104 1002 9730 0270 2366 and reference numbers L 041748652 and L 041748653, respectively, were mailed to petitioner at the Jamaica, New York, address listed on the notices. The corresponding mailing cover sheet for notice of deficiency L-041748652, attached to the Denier affidavit with a copy of the notice as exhibit "B," bears this certified control number and petitioner's name and address as stated above. Neither the mailing cover sheet nor a copy of notice of deficiency L-041748653 was attached to the Denier affidavit or included in the Division's motion papers.

30. Ms. Denier alleges that notices of deficiency L-041748652 and L-041748653 were mailed on July 30, 2014, as indicated by the CMR, as well as the USPS postmark on each page of the CMR.

31. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on July 30, 2014.

32. Ms. Ramundo avers that each page of the July 30, 2014 CMR in exhibit "A" of the Denier affidavit contains a postmark, and that a USPS employee initialed or signed page 24 of the CMR and wrote the total number of pieces of certified mail. On the last page of the July 30, 2014 CMR, a USPS employee crossed out the preprinted number 263 appearing next to the heading "Total Pieces and Amounts" and wrote the number 261 next to the heading "Total Pieces Received at Post Office," along with the employee's initials or signature. The handwritten "261" is also crossed out and a USPS employee wrote the number 262, along with the employee's initials or signature, underneath the crossed out "261." According to Ms.

Ramundo, the number of pieces received was changed from 263 to 262 to reflect that one piece of certified mail had been “pulled” from the CMR. Ms. Ramundo’s affidavit does not explain why the number of pieces received at the post office was initially changed to 261 or why one of the entries on page 3 was crossed out and the same certified control number was handwritten above it. The initials or signature next to the handwritten and crossed out “261” do not match the initials or signature next to the handwritten “262” on page 24 of the CMR. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee’s initials and handwritten number indicate that a total of 262 articles of mail listed on the CMR were delivered to the USPS on July 30, 2014.

33. Ms. Ramundo further explains that a piece of mail may be “pulled” for any number of reasons, including, but not limited to, a discrepancy in a name or address. Any pieces of mail “pulled” will be segregated from the remaining group of statutory notices for correction and issuance at another time. A review of the July 30, 2014 CMR reflects that one piece of mail was “pulled.” The piece that was pulled is listed on page 3 of the CMR. This piece had been assigned certified control number 7104 1002 9730 0270 1345. A line was placed through the entry for this taxpayer after the statutory notice was “pulled.” This deletion is reflected in the change of the total pieces received at the post office on page 24 of the CMR. No such mark is made on or near the listings for petitioner.

34. Based on her review of the affidavit of Ms. Denier and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Ramundo stated that on July 30, 2014, an employee of the mail room delivered two pieces of certified mail addressed to petitioner at his Jamaica, New York, address in sealed postpaid envelopes for delivery by certified mail. She also stated the CMR delivered to the USPS on July

30, 2014 was returned to the Division. Ms. Ramundo attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on July 30, 2014.

*The November 26, 2014 CMR*

35. The CMR for the statutory notices issued by the Division on November 26, 2014 consists of 30 pages, starting on page 1 and ending on page 31 but omitting page 24, with 325 certified control numbers and corresponding assessment numbers, names, and addresses.<sup>4</sup> Each page consists of 11 entries with the exception of page 3, which contains 10 entries (one of the original 11 entries is crossed out), and page 31, which contains 7 entries. Ms. Denier 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.

36. Each page of the CMR listed 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 page of the CMR to the actual date of mailing. The actual mailing date as handwritten on the first and last page of the CMR was "11/26/14." This was done to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. On page 31, corresponding to "Total Pieces and Amounts" is the preprinted number 337. A USPS representative affixed a postmark, dated November 26, 2014, and initialed or signed each page of the CMR. The postmark on page 16 of the CMR is almost entirely illegible. A USPS representative wrote

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<sup>4</sup> The CMR originally listed 337 certified control numbers and does not appear to account for the missing page. As noted in findings of fact 40 and 41, the preprinted number of pieces received at the post office is crossed out and "336" is handwritten on the last page of the CMR.

“336” on page 31 next to the heading “Total Pieces Received at Post Office,” and initialed or signed underneath it. The initials or signature next to the postmark on each page of the CMR do not match the initials or signature underneath the handwritten “336” on page 31 of the CMR.

37. Page 21 of the CMR indicates that a notice with certified control number 7104 1002 9730 0329 9766 and reference number L 042235738 was mailed to petitioner at the Jamaica, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit with a copy of the notice as exhibit “B,” bears this certified control number and petitioner’s name and address as stated above.

38. Ms. Denier alleges that notice of deficiency L-042235738 was mailed on November 26, 2014, as indicated by the CMR, as well as the USPS postmark on each page of the CMR.

39. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on November 26, 2014.

40. Ms. Ramundo avers that each page of the November 26, 2014 CMR in exhibit “A” of the Denier affidavit contains a postmark, and that a USPS employee initialed or signed page 31 of the CMR and wrote the total number of pieces of certified mail. On the last page of the November 26, 2014 CMR, a USPS employee crossed out the preprinted number 337 appearing next to the heading “Total Pieces and Amounts” and wrote the number 336 next to the heading “Total Pieces Received at Post Office,” along with the employee’s initials or signature.

According to Ms. Ramundo, the number of pieces received was changed from 337 to 336 to reflect that one piece of certified mail had been “pulled” from the CMR. The affixation of the postmarks and the USPS employee’s initials and handwritten number indicate that a total of 336 articles of mail listed on the CMR were delivered to the USPS on November 26, 2014. As noted

in finding of fact 35, however, the November 26, 2014 CMR attached to the Denier affidavit contains only 30 pages and 325 certified control numbers.

41. Ms. Ramundo further explains that a piece of mail may be “pulled” for any number of reasons, including, but not limited to, a discrepancy in a name or address. Any pieces of mail “pulled” will be segregated from the remaining group of statutory notices for correction and issuance at another time. A review of the November 26, 2014 CMR reflects that one piece of mail was “pulled.” The piece that was pulled is listed on page 3 of the CMR. This piece had been assigned certified control number 7104 1002 9730 0329 7762. A line was placed through the entry for this taxpayer after the statutory notice was “pulled.” This deletion is reflected in the change of the total pieces received at the post office on page 31 of the CMR. No such mark is made on or near the listing for petitioner.

42. Based on her review of the affidavit of Ms. Denier and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Ramundo stated that on November 26, 2014, an employee of the mail room delivered one piece of certified mail addressed to petitioner at his Jamaica, New York, address in a sealed postpaid envelope for delivery by certified mail. She also stated the CMR delivered to the USPS on November 26, 2014 was returned to the Division. Ms. Ramundo attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on November 26, 2014.

*The March 12, 2015 CMR*

43. The CMR for the statutory notices issued by the Division on March 12, 2015 consists of 22 pages with 236 certified control numbers and corresponding assessment numbers, names,

and addresses. Each page consists of 11 entries with the exception of page 22, which contains 5 entries. Ms. Denier 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.

44. Each page of the CMR listed 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 page of the CMR to the actual date of mailing. The actual mailing date as handwritten on the first and last page of the CMR was "3/12/15." This was done to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. On page 22, corresponding to "Total Pieces and Amounts" is the preprinted number 236. A USPS representative affixed a postmark, dated March 12, 2015, and initialed or signed each page of the CMR. A USPS representative wrote "236" on page 22 next to the heading "Total Pieces Received at Post Office," and, as noted, initialed or signed page 22.

45. Page 14 of the CMR indicates that a notice with certified control number 7104 1002 9730 0420 0112 and reference number L 042572546 was mailed to petitioner at the Jamaica, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit with a copy of the notice as exhibit "B," bears this certified control number and petitioner's name and address as stated above.

46. Ms. Denier states that notice of deficiency L-042572546 was mailed on March 12, 2015, as indicated by the CMR, as well as the USPS postmark on each page of the CMR.

47. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on March 12, 2015.



48. Ms. Ramundo avers that each page of the CMR in exhibit “A” of the Denier affidavit contains a postmark, and that a USPS employee initialed or signed page 22 of the CMR and wrote the total number of pieces of certified mail. A review of the CMR confirms this assertion.

49. Based on her review of the affidavit of Ms. Denier and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Ramundo stated that on March 12, 2015, an employee of the mail room delivered one piece of certified mail addressed to petitioner at his Jamaica, New York, address in a sealed postpaid envelope for delivery by certified mail. She also stated the CMR delivered to the USPS on March 12, 2015, was returned to the Division. Ms. Ramundo attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on March 12, 2015.

50. Petitioner filed a response to the Division’s motion on October 30, 2023. In his response, petitioner continues to argue that his incarceration during the time when some of the notices were issued made him unable to receive mail or respond.

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

A. As noted, the Division brings a motion for summary determination under section 3000.9 (b) of the Rules. The petition in this matter was filed within 90 days of the conciliation orders (*see* findings of fact 8, 9, 10, and 11), therefore, the petition is timely. While the Division of Tax Appeals does have jurisdiction over every petition filed timely, that does not confer subject matter jurisdiction over the notices and demands herein, since a notice and demand does not give rise to hearing rights before the Division of Tax Appeals pursuant to Tax Law § 173-a (2).

B. The Division of Tax Appeals is a forum of limited jurisdiction (Tax Law § 2008; *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom New York State Dept. of Taxation and Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [Sup Ct, Albany County 1991, Keniry J.]). Its power to adjudicate disputes is exclusively statutory (*id.*). The Division of Tax Appeals is authorized “[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006 [4]).

Tax Law § 173-a (2) provides:

“Corporate and personal income taxes. With respect to any tax which incorporates or otherwise utilizes the procedures set forth in part VI of article twenty-two or article twenty-seven of this chapter, provisions of law which authorize the issuance of a notice and demand for an amount without the issuance of a notice of deficiency for such amount, including any interest, additions to tax or penalties related thereto, in cases of mathematical or clerical errors or failure to pay tax shown on a return, or authorize the issuance of a notice of additional tax due, including any interest, additions to tax or penalties related thereto, shall be construed as specifically denying and modifying the right to a hearing with respect to any such notice and demand or notice of additional tax due for purposes of subdivision four of section two thousand six of this chapter. Any such notice and demand or notice of additional tax due shall not be construed as a notice which gives a person the right to a hearing under article forty of this chapter.”

C. The Division issued to petitioner two notices and demands for payment for tax due. Notice and demand L-035039237 assessed tax of \$29,171.00, plus interest and penalty, for failure to pay income tax when it was due for tax year 2009. As set forth above, Tax Law § 173-a (2) specifically denies the right to a hearing for a notice and demand based on the failure to timely pay the tax due as shown on a return (*see Matter of Rothberg*, Tax Appeals Tribunal, January 17, 2013). Notice and demand L-039164193 assessed a fee of \$50.00 as tax because the bank returned petitioner’s payment of \$11,211.45 as unpayable on March 5, 2013. Such fee is authorized by Tax Law § 30, which provides that “[t]he fee must be paid upon notice and

demand, and will be assessed, collected and paid in the same manner as the tax, fee, special assessment or other imposition to which the payment relates.” This notice and demand too does not give petitioner the right to a hearing (*see* Tax Law § 173-a [2]). Notwithstanding that a timely petition was filed, it remains that the Division of Tax Appeals is without jurisdiction to hear and determine the substantive issues in notices and demands L-035039237 and L-039164193 (*see Matter of Chait*, Tax Appeals Tribunal, April 22, 2010; *see also Matter of PC Touch Servs. Inc.*, Tax Appeals Tribunal, August 23, 2012).

D. Turning to the remainder of the Division’s motion for summary determination, such motion “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]).

E. 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 v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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 v City of New York*, 49 NY2d at 562).

F. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice of deficiency 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 date 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).

G. Where, as here, the timeliness of a request for a conciliation conference or petition is at issue, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice 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).

H. The Division has offered proof sufficient to establish the mailing of notices of deficiency L-040552888, L-040552889, L-040552890, L-040552891, and L-040552892 to petitioner's last known address on December 26, 2013, and L-042572546 to petitioner's last known address on March 12, 2015. The December 26, 2013 and March 12, 2015 CMRs have been properly completed and therefore constitute 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 CMRs 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 sheets and the CMRs conform with the address listed on petitioner's 2012 return, which satisfies the "last known address" requirement in Tax Law § 681 (a).<sup>5</sup>

I. It is thus concluded that the Division properly mailed notices of deficiency L-040552888, L-040552889, L-040552890, L-040552891, and L-040552892 to petitioner on December 26, 2013 and L-042572546 to petitioner on March 12, 2015, and the statutory 90-day time limit to either file a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on those dates (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Petitioner's request for a conciliation conference was filed on August 26, 2021. This date

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<sup>5</sup> While it is noted that petitioner's street address on the copies of the notices is "11445 143rd St," as opposed to "114-45 143 Street" on petitioner's 2012 return, and the Division added four additional zip code digits to petitioners' five-digit zip code as reflected on their 2012 return, such differences are deemed inconsequential (*see Matter of Altamirano*, Tax Appeals Tribunal, March 23, 2023; *Matter of Perk*, Tax Appeals Tribunal, December 13, 2001; *Matter of Rubinos*, Tax Appeals Tribunal, April 3, 2017). Moreover, petitioner does not contend that the notices were improperly addressed or that he informed the Division of a different address. As such, it is deemed admitted that the address on the notices was petitioner's last known address.

falls well after the 90-day period of limitations for the filing of such a request. Consequently, the request was untimely and the same was properly dismissed by the October 1, 2021 conciliation order issued by BCMS.

J. The Division's proof fails to establish the mailing of notices of deficiency L-041748652 and L-041748653 to petitioner's last known address on July 30, 2014. While the Division's affidavits and exhibits explain why the piece of mail with certified control number 7104 1002 9730 0270 1345 was "pulled" from the July 30, 2014 CMR, there is no explanation as to why another entry on the July 30, 2014 CMR was crossed out and the same certified control number was handwritten above it, why the total number of pieces received at the post office was initially changed to 261 before being changed to 262 or why there are three different sets of initials or signatures on the July 30, 2014 CMR. Without such explanations, it cannot be determined that the Division's standard mailing procedure was followed in this particular case. It is also noted that while Ms. Denier avers that a copy of notice of deficiency L-041748653 with its mailing cover sheet was attached as exhibit "B" to her affidavit, no such notice or mailing cover sheet is included. As such, the address and certified control number listed on the mailing cover sheet cannot be verified against the CMR. Without other documentary evidence in the record that proves mailing of the notice, the absence of the mailing cover sheet raises a material factual issue of whether the Division's standard mailing procedure was followed in a particular case (*see Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015).

K. The Division's proof also fails to establish the mailing of notice of deficiency L-042235738 to petitioner's last known address on November 26, 2014. Again, the Division's affidavits and exhibits explain why the piece of mail with certified control number 7104 1002 9730 0329 7762 was "pulled" from the November 26, 2014 CMR. But, both affidavits state that

the November 26, 2014 CMR consisted of 31 pages and that 336 pieces of mail were delivered to the USPS, relying on the USPS employee's handwritten number 336 and the employee's initials or signature to corroborate that the USPS received 336 pieces of mail from the Division on November 26, 2014. The November 26, 2014 CMR attached to the Denier affidavit, however, only consists of 30 pages (with page 24 omitted from the CMR) and 325 certified control numbers. While Ms. Denier affirms that the pages of the CMR remain banded together unless otherwise ordered, she provided no explanation for the omission of a page from the CMR. Without such explanation, it cannot be determined that the Division's standard mailing procedure was followed in this particular case. Moreover, the almost entirely illegible postmark on one of the pages of the CMR calls into question whether the notice was mailed as alleged on November 26, 2014.

L. Petitioner's argument that he did not receive the notices because he was incarcerated when some of the notices were issued is of no avail. The 90-day period of limitations is not tolled for a period of incarceration (*see Matter of Matt Petroleum Corp.*, Tax Appeals Tribunal, January 20, 2000). Moreover, a properly mailed notice of deficiency is "valid and sufficient whether or not actually received" (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990) and petitioner's failure to receive the subject notices is "immaterial" (*Matter of Townley*, Tax Appeals Tribunal, January 25, 2018, citing *Matter of Kenning v Department of Taxation & Fin.*, 72 Misc 2d 929, 930 [Sup Ct, Albany County 1972, Casey, J.], *affd* 43 AD2d 815 [3d Dept 1973], *appeal dismissed* 34 NY2d 653 [1974]).

M. The Division of Taxation's motion for summary determination is granted in part and in all other respects denied, the petition of Jover Naranjo is dismissed with regard to notices and demands L-035039237 and L-039164193 and denied with regard to notices of deficiency L-

040552888, L-040552889, L-040552890, L-040552891, L-040552892, and L-042572546, and a hearing will be scheduled in due course with regard to notices of deficiency L-041748652, L-041748653, L-042235738, and L-042572545 and notice of estimated determination L-041109900.

DATED: Albany, New York  
February 1, 2024

/s/ Jennifer L. Baldwin  
ADMINISTRATIVE LAW JUDGE