

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
VALMIRA KURTISHI : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 824357
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 Years 2005, :
2006 and 2007. :

Petitioner, Valmira Kurtishi, filed a petition 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 years 2005, 2006 and 2007.

On August 22, 2011, the Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). Petitioner, appearing pro se, filed a response to the Division of Taxation's motion on August 26, 2011, which date commenced the 90-day period for the issuance of this determination. After due consideration of the affidavits and documents presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for a conciliation conference following the issuance of twelve 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 twelve notices of deficiency dated July 26, 2010 and addressed to petitioner, Valmira Kurtishi, at a Wayne, New Jersey, address. The notices assessed penalty pursuant to Tax Law § 685(g) in the total amount of \$34,224.00. The notices stated that petitioner was an officer or responsible person of Madrit's Gourmet Restaurant, Inc., and, as such, was liable for a penalty equal to the unpaid withholding tax not remitted by the corporation. By request for conciliation conference, filed on March 18, 2011, petitioner protested the notices, consecutively numbered L-034321533 through L-034321544.

2. On April 8, 2011, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notices was untimely and stated, in part:

The Tax Law requires that a request be filed within thirty days from receipt of the statutory notice. Since the notice(s) was received on July 26, 2010, but the request was not mailed until March 18, 2011, or in excess of thirty days, the request is late filed.

3. In support of its motion, the Division submitted the following: (i) two affidavits, dated August 9, 2011, of Daniel A. Maney, a Tax Processing Specialist 4 and Manager of the Refunds, Deposits, Overpayments and Control Units, which includes the Division's Case and Resource Tracking System (CARTS); (ii) two "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 26, 2010; (iii) two affidavits, dated August 11, 2011, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) two affidavits, dated August 11, 2011, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery

information; (v) twelve Postal Service forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) and twelve United States Postal Service responses to such requests dated June 30, 2011; and (vi) a copy of petitioner's 2009 New York Nonresident and Part-Year Resident Income Tax Return, dated March 2, 2010, the last return petitioner filed with the Division before the issuance of the subject notices of deficiency.

4. The affidavits of Daniel A. Maney set forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMRs and the corresponding notices. The notices are predated with the anticipated date of mailing. Each page of the CMRs lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page of each of the CMRs in the present case to the actual mailing date of "7/26/10." It is also the Division's general practice that all pages of the CMRs are banded together when the documents are delivered into possession of the USPS and remain so when returned to his office. The pages of the CMRs stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMRs run consecutively, starting with page one, and are noted in the upper left corner of each page.

5. 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 CMRs under the heading entitled "Certified No." The CMRs list 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."

6. According to the first Maney affidavit, the first CMR in the present matter consists of one page and lists eight certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to the page of the CMR and initialed or signed the page as well.

The second Maney affidavit states that the second CMR in the present matter consists of 21 pages and lists 11 certified control numbers per page with the exception of page 21, which contains 8 certified control numbers. All certified control numbers are accompanied by corresponding assessment numbers, names and addresses. Mr. Maney again notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each page of the second CMR and, in addition, initialed or signed page 21.

7. Page 1 of the first CMR indicates that four notices of deficiency, assigned certified control numbers 7104 1002 9730 0058 4599, 7104 1002 9730 0058 4605, 7104 1002 9730 0058 4612 and 7104 1002 9730 0058 4629, and assessment ID numbers L-034321533, L-034321534, L-034321535 and L-034321536, were mailed to petitioner at the Wayne, New Jersey, address listed thereon. The corresponding mailing cover sheets bear these certified control numbers and petitioner's name and address as noted.

Pages 1 and 2 of the second CMR indicate that eight notices of deficiency, assigned certified control numbers 7104 1002 9730 0058 4766, 7104 1002 9730 0058 4773, 7104 1002 9730 0058 4780, 7104 1002 9730 0058 4797, 7104 1002 9730 0058 4803, 7104 1002 9730 0058

4810, 7104 1002 9730 0058 4827 and 7104 1002 9730 0058 4834, and assessment ID numbers L-034321537, L-034321538, L-034321539, L-034321540, L-034321541, L-034321542, L-034321543 and L-034321544, were mailed to petitioner at the Wayne, New Jersey, address listed thereon. The corresponding mailing cover sheets bear these certified control numbers and petitioner's name and address as noted.

8. The affidavits of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describe the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. 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 envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMRs 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 signature on the CMRs, indicating receipt by the post office. Here, as noted, each of the pages of both of the CMRs submitted contain such postmarks and initials. The Center 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 last page of the CMRs. Here, the USPS did not comply with this request.

9. According to the Maney affidavits, the affixation of the postmarks and the postal service employee's initials indicate that all 8 articles of mail listed on the first CMR, and all 228 articles listed on the second CMR, including all 12 articles addressed to petitioner, were received by the USPS on July 26, 2010.

10. According to the Maney and Peltier affidavits, copies of the subject notices were mailed to petitioner on July 26, 2010, as claimed.

11. The affidavits of Heidi Corina describe the Division's requests to the USPS for delivery information on the subject notices of deficiency. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the articles of mail bearing certified control numbers 7104 1002 9730 0058 4599, 7104 1002 9730 0058 4605, 7104 1002 9730 0058 4612, 7104 1002 9730 0058 4629, 7104 1002 9730 0058 4766, 7104 1002 9730 0058 4773, 7104 1002 9730 0058 4780, 7104 1002 9730 0058 4797, 7104 1002 9730 0058 4803, 7104 1002 9730 0058 4810, 7104 1002 9730 0058 4827 and 7104 1002 9730 0058 4834 and addressed to petitioner. The USPS responses to these requests indicate that the articles bearing such certified control numbers and addressed to petitioner were delivered as addressed in Wayne, New Jersey, on July 30, 2010.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. There is a 90-day statutory time limit¹ for filing a petition or request for conciliation conference following the issuance of a Notice of Deficiency (Tax Law § 681[b]; § 689[b]). In most cases, where, as here, the timeliness of such a protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to

¹ Although the BCMS Conciliation Order Dismissing Request issued to petitioner (*see* Finding of Fact 2) refers to a 30-day statutory time limit within which to file a request for a BCMS conference, there is nothing in the notices of deficiency issued to petitioner that indicate that the conditions contained in Tax Law § 170(3-a)(h) requiring a 30-day limit are present. Therefore, the 90-day time limit will be addressed herein.

petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 681[a]). In the present matter, however, the Division does not seek to establish the date of issuance of the statutory notice, but rather the date of receipt of the notice by the taxpayer. Under such circumstances, that is, where the date of mailing is not established, the 90-day period for filing a petition or request for conciliation conference commences with the date of actual notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]).

C. Here, the record shows that petitioner received actual notice of the subject notices of deficiency on July 30, 2010. Specifically, the Maney and Peltier affidavits establish the Division's standard mailing procedure, including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheets as well as the CMRs, and the inclusion of such mailing cover sheets along with the notices in the windowed envelopes for mailing. A review of the mailing cover sheets related to the notices mailed to petitioner confirms that the control numbers listed thereon are consistent with the control numbers listed on the CMRs and the USPS responses to the Division's requests for delivery information. The documentation provided to the Division by the USPS shows that articles of mail bearing such certified control numbers were delivered to petitioner's address on July 30, 2010. Petitioner thus received actual notice of the subject notices of deficiency on that date.

D. Petitioner's request for conciliation conference was filed on March 18, 2011, well beyond 90 days from the date of actual notice. The request was therefore untimely filed (*see Matter of Hyatt Equities, LLC*; *see also* Tax Law § 689[b]; § 170[3-a][b]). Consequently, the

Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

E. The petition of Valmira Kurtishi is hereby dismissed.

DATED: Troy, New York
October 27, 2011

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE