

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT AND ANGELA PERSICO	:	DETERMINATION
	:	DTA NO. 824526
for Redetermination of Deficiencies or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 2006 and 2007.	:	

Petitioners, Robert and Angela Persico, 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 2006 and 2007.

On December 30, 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). Accompanying the motion was the affidavit of John E. Matthews, dated December 30, 2011, and annexed exhibits supporting the motion. Petitioners, represented by Castellano, Korenberg & Co. (Robert J. Schaffer, CPA), filed a response to the Division of Taxation's motion on January 26, 2012. Accordingly, the 90-day period for the issuance of this determination began on that date. After due consideration of the affidavits and documents presented, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of certain notices of deficiency.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioners' protest of notices of deficiency numbered L-033533258 and L-033533263, both dated April 19, 2010, and addressed to petitioners, Robert and Angela Persico, at "93 Deerhurst Rd, Scarsdale, NY 10583-4716." Notice number L-033533258 asserted New York State income tax due for the year 2006 in the amount of \$73,878.46, plus interest, for a balance due of \$86,682.25. Notice number L-033533263 asserted New York State income tax due for the year 2007 in the amount of \$72,358.94, plus interest, for a balance due of \$79,858.74. A copy of each notice was mailed on April 19, 2010 to Norman Greene, petitioners' then-representative, at "445 Broadhollow Rd., Melville, NY 11747-3669." Petitioners protested the notices by their request for conciliation conference, filed on June 1, 2011.

2. On June 17, 2011, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioners. The order determined that petitioners' protest of the subject notices was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on April 19, 2010, but the request was not mailed until June 1, 2011, or in excess of 90 days, the request is late filed.

3. To show proof of proper mailing of the notices of deficiency dated April 19, 2010, the Division provided the following: (i) an affidavit, dated December 13, 2011, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit,

dated December 8, 2011, of Daniel A. Maney, a supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 19, 2010; (iv) a copy of the June 17, 2011 Conciliation Order Dismissing Request; and (v) a copy of petitioners' personal income tax return for the year 2008, dated July 28, 2009, listing petitioners' address as "93 Deerhurst Rd, Scarsdale NY 10583" and also listing petitioners' third-party designee as Norman Greene, with an address at "445 Broadhollow Rd Ste 230, Melville NY 11747."

4. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, each page of the 15-page CMR lists an initial date, which 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 to "4/19/10," to reflect the actual mailing date. 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," 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 assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and P.O. Address." Pages four and five of the CMR contain information on the subject notices and establish that on April 19, 2010, notices with the control numbers 7104 1002 9730 1809 7159 and 7104 1002 9730 1809 7173 were sent by certified mail to petitioners at "93 Deerhurst Rd., Scarsdale, NY 10583-4716." The control numbers, assessment

identification numbers and petitioners' address as listed on the CMR all correspond to the information on the mailing cover sheet and the subject notices. Page eight of the CMR contains information indicating that copies of the same two notices were sent by certified mail on April 19, 2010 to petitioners' then-representative, Norman Greene, at "445 Broadhollow Rd., Melville, NY 11747-3669," using control numbers 7104 1002 9730 1809 7555 and 7104 1002 9730 1809 7579.

5. The affidavit of Bruce Peltier describes the mail processing center's (Center) general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various United States Postal Service (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 Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR.

6. A review of the CMR submitted by the Division confirms that a USPS employee at the Colonie Center branch affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 160 and the

handwritten entry “160.” In addition, the page is postmarked and initialed, confirming that all notices were received. As a result, the total pieces of mail received at the Colonie Center branch of the USPS was 160. The USPS postmark is from the Colonie Center branch and bears the date April 19, 2010, confirming that the notices were mailed on that date.

7. The last return filed by petitioners prior to issuance of the notices at issue was their personal income tax return for the year 2008, which was dated July 28, 2009. The address appearing on that return is “93 Deerhurst Rd., Scarsdale, NY 10583.” Petitioners’ address on the CMR, the Mailing Cover Sheet and the April 19, 2010 notices of deficiency reads “93 Deerhurst Rd., Scarsdale, NY 10583-4716.”

8. Petitioners, through their representative, submitted a response to the Division’s motion on January 26, 2012. This response does not address the timeliness of petitioners’ request for conciliation conference, but rather solely discusses the substance of the subject notices.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

if, upon all 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. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner’s last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notices, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices on the same date that they were dated, i.e., April 19, 2010, to petitioners' last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of Deweese*, Tax Appeals Tribunal, June 20, 2002). The address on the CMR, the Mailing Cover Sheet and the April 19, 2010 notices of deficiency conform with the address listed on petitioners' 2008 personal income tax return, which is the last return they filed with the Division before the issuance of the subject notices and thereby satisfies the "last known address" requirement in Tax Law § 681(a). Moreover, petitioners do not contest receipt of the notices in their petition or response to the Division's motion. In addition, the Division's affidavits demonstrate that a copy of the subject notices was contemporaneously sent to petitioners' then-representative at the address indicated on their last return. Accordingly, the subject notices were properly mailed, and thus, 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 April 19, 2010 (Tax Law § 170[3-a][a]; § 681[b]).

D. In their response to the Division's motion, petitioners submitted no evidence or argument that their request for conciliation conference was filed within the time required. In addition, petitioners have failed to challenge the Division's proof of mailing of the subject notices with any evidence or arguments. Therefore, it must be concluded that petitioners have failed to meet their burden of proof required to defeat the Division's motion.

E. While the notices were mailed on April 19, 2010, the request was not filed until June 1, 2011, which is well beyond the 90-day period of limitations. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation (*see Matter of Rattien*, Tax Appeals Tribunal, March 10, 2011).

F. The Division of Taxation's motion for summary determination is granted, and the petition of Robert and Angela Persico is dismissed.

DATED: Albany, New York
March 8, 2012

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE