

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
NELLO BALAN : DECISION
 : DTA NO. 826224
for Revision of Determinations or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Periods June 1, 2001 through August 31, 2002; :
December 1, 2006 through February 28, 2007; June 1, :
2007 through February 29, 2008; and December 1, 2008 :
through August 31, 2009. :

Petitioner, Nello Balan, filed an exception to the determination of the Administrative Law Judge issued on October 29, 2015. Petitioner appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian McCann, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply letter brief. Oral argument was not requested. The six-month period for the issuance of this decision began on April 28, 2016, the date that petitioner's reply letter brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of notices of determination.

FINDINGS OF FACT

We find that facts as determined by the Administrative Law Judge in his order in this matter issued on December 18, 2014. Such facts are set forth below.

1. On April 4, 2014, the Division of Tax Appeals received a petition from petitioner, Nello Balan, which protested the following notices of determination and notices of estimated determination:

Notice #	Period Ending	Notice date
L-032425365	2/28/07	8/24/09
L-032425364	8/31/07	8/24/09
L-032425363	11/30/07	8/24/09
L-034985393	2/28/09	11/08/10
L-034985392	5/31/09	11/08/10
L-034985391	8/31/09	11/08/10
L-031117485	2/28/07	12/01/08
L-030698080	11/30/07	9/29/08
L-030698078	2/29/08	9/29/08
L-033143491	8/31/09	1/04/10
L-022525966	8/31/01	6/23/03
L-022525965	11/30/01	6/23/03
L-022525962	2/28/02	6/23/03
L-022525964	5/31/02	6/23/03
L-022525963	8/31/02	6/23/03

2. The petition is dated April 3, 2014 and signed by petitioner's representative, Stewart Buxbaum. The petition was delivered via United Parcel Service and is date stamped as received by the Division of Tax Appeals on April 4, 2014.

3. The petition alleges that the notices were never sent to petitioner's last known address and that petitioner only became aware of the notices as a result of collection efforts undertaken by the Division of Taxation (Division).

4. On May 30, 2014, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition indicates that the subject petition was filed in protest of notices of determination and notices of estimated determination issued to petitioner more than 90 days prior to the petition being filed in this matter.

5. In response to the issuance of the notice of intent to dismiss petition, the Division indicated that it was seeking to establish proper mailing of notices L-031117485, L-030698080, L-030698078 and L-033143491 and offered no proof of mailing with respect to the other eleven notices. The Division submitted, among other documents, an affidavit of Leo Gabovich, a law clerk employed in the Office of Counsel of the Division, dated September 11, 2014, with attachments including a copy of petitioner's 2005 New York State resident income tax return, dated April 6, 2006. Said return bears the same Garden City, New York, address as listed on the four notices of determination described above.

6. To show proof of proper mailing of notices of determination L-030698080 and L-030698078, both dated September 29, 2008, the Division provided the following: (i) an affidavit, dated September 5, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Non-Presort Manual Mail - Assessments Receivable" (CMR) postmarked September 29, 2008; and (iii) an affidavit, dated September 8, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's mail room.

7. To show proof of proper mailing of notice of determination L-031117485, dated December 1, 2008, the Division provided the following: (i) a second affidavit, dated September 5, 2014, of Mary Ellen Nagengast; (ii) a CMR postmarked December 1, 2008; and (iii) a second affidavit, dated September 8, 2014, of Bruce Peltier.

8. To show proof of proper mailing of notice of determination L-033143491, dated January 4, 2010, the Division provided the following: (i) a third affidavit, dated September 5, 2014, of Mary Ellen Nagengast; (ii) a CMR postmarked January 4, 2010; and (iii) a third affidavit, dated September 8, 2014, of Bruce Peltier.

9. The affidavits of Mary Ellen Nagengast, who has been in her current position since October 2005, set forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. 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. In addition, as described by Ms. Nagengast, 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. Notices that are targeted for manual review are printed in one printing run, and each unit that has notices selected

for manual review receives a separate and complete CMR for their notices. With the exception of the January 4, 2010 notice (L-033143491), the remaining notices at issue (L-030698080, L-030698078 and L-031117485) were targeted for manual review by the Civil Enforcement DO High Value unit of the Division; the respective CMR's for these notices consist of one page.

10. 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 that the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

11. The one-page September 29, 2008 CMR indicates that notices of determination with certified control numbers 7104 1002 9730 0859 6983 and 7104 1002 9730 0859 7003 and assessment identification numbers L-030698078 and L-030698080, respectively, were mailed to "Balan-Nello" at the Garden City, New York, address listed on the September 29, 2008 notices of determination. A USPS employee affixed a USPS postmark dated September 29, 2008 to the CMR and also wrote his or her initials thereon. The corresponding mailing cover sheets bear these certified control numbers and the name, "Balan-Nello," and the Garden City, New York, address.

12. The one-page December 1, 2008 CMR indicates that a notice of determination with certified control number 7104 1002 9730 1085 5580 and assessment identification number L-

031117485 was mailed to “Balan-Nello” at the Garden City, New York, address listed on the December 1, 2008 notice of determination. A USPS employee affixed a USPS postmark dated December 1, 2008 to the CMR and also wrote his or her initials thereon. The corresponding mailing cover sheets bear these certified control numbers and the name, “Balan-Nello,” and the Garden City, New York, address.

13. The January 4, 2010 CMR consists of 46 pages and lists 505 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated January 4, 2010 to each page of the CMR and also wrote his or her initials on each page thereof. Page 21 of the CMR indicates that a notice of determination, assigned certified control number 7104 1002 9730 1707 2690 and assessment number L-033143491, was mailed to petitioner at the Garden City, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner’s name and address as noted.

14. Page 10 of the January 4, 2010 CMR also indicates that a copy of notice of determination with certified control number 7104 1002 9730 1707 1419 and assessment ID number L-033143491 was sent to “P Tong, L Rosen and MM Clemente CPAS.” An enclosure with the notice states that a copy of the notice was forwarded to the above-referenced individuals because the Division’s records indicate that a power of attorney was on file for the tax matters at issue in the notice.

15. Each of the three affidavits of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the mail room’s general operations and

procedures. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier 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 listed on the CMR 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. Each of the CMRs has been stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas.” 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 September 29, 2008 and December 1, 2008 CMR’s indicate that the USPS employee complied with this request by circling the number of pieces received.¹ The January 4, 2010 CMR reveals that the USPS employee complied with this request by both writing in the number received and by circling same.

16. According to the Peltier affidavits, a copies of the respective notices were mailed on the date indicated as claimed.

¹ The respective affidavits of Bruce Peltier state that the Postal Service employee wrote the total number of pieces received rather than circled the number of pieces listed. It is determined that this error was merely an oversight in providing a description of the relevant CMRs.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge issued an order dated December 18, 2014 dismissing the petition as it pertains to the four notices of determination for which the Division offered proof of mailing (L-031117485, L-030698080, L-030698078 and L-033143491).

The Administrative Law Judge noted that the Division has the burden to demonstrate proper mailing of a statutory notice where the timeliness of a petition is at issue. He concluded that the Division had established the fact and date of mailing of the four notices of determination for which it provided mailing evidence. Specifically, the Administrative Law Judge found that the CMRs submitted were properly completed and thus constituted probative evidence of the fact and date of mailing. Accordingly, the Administrative Law Judge concluded that the CMRs, along with the Nagengast and Peltier affidavits, established that the Division had a general mailing procedure and that such procedure was followed in this instance. The Administrative Law Judge also found that the Division met its obligation to mail the notices to petitioner's last known address. The Administrative Law Judge thus concluded that the Division proved proper mailing of the four notices on September 29, 2008 (L-030698080 and L-030698078), December 1, 2008 (L-031117485), and January 4, 2010 (L-033143491), as claimed. Accordingly, the Administrative Law Judge concluded that the petition in this matter, dated April 3, 2014 and received on April 4, 2014, was untimely filed with respect to those four notices. The Administrative Law Judge thus determined that the Division of Tax Appeals was without jurisdiction and dismissed the petition with respect to those four notices.

The Administrative Law Judge rejected petitioner's claim that the September 29, 2008 and December 1, 2008 CMRs were not properly completed because the USPS employee did not

write in the number of pieces of mail delivered. The Administrative Law Judge found that the Division's general mailing procedure permits USPS employees to either write in the number of pieces received or to circle the number of pieces listed on the CMR to indicate receipt. Here, the USPS employee circled the number of pieces listed. The Administrative Law Judge found that this complied with the Division's mailing policy.

The Administrative Law Judge rescinded the notice of intent to dismiss with respect to the remaining 11 statutory notices because the Division provided no proof of mailing of those documents.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that petitioner's protest of the remaining 11 statutory notices was resolved pursuant to a stipulation for discontinuance of proceeding filed on August 11, 2015. The Administrative Law Judge further noted that, accordingly, the December 18, 2014 order had become final and conclusive for purposes of review by this Tribunal.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends that the Division's proof of mailing is deficient because it lacks an affidavit from the Division employee who delivered the CMR to the post office. Petitioner also contends that the CMRs are deficient because they lack the signature of the Division employee who delivered the mail to the post office.

Petitioner asserts that the Division's evidence is flawed because it does not establish that a USPS employee actually initialed the CMR at the time the CMRs and the pieces of mail were transferred to the USPS. Furthermore, according to petitioner, a properly completed CMR requires the signature, and not the initials, of the USPS employee who received the mail.

Petitioner asserts that federal case law requires a signature on the PS form 3877, a form comparable to the CMR, and that the USPS mailing procedures also require a signature on that form. Petitioner thus contends that the CMRs in the present matter have not been properly completed.

Petitioner also argues that the Nagengast affidavit pertaining to the September 29, 2008 notices is incomplete because it does not describe the preprinted stamp on the CMR (“Post Office Hand write total # of pieces and initial. Do Not stamp over written areas.”).

Petitioner objects to the Peltier affidavits as affidavits of habit based on the Nagengast affidavits and not based on first-hand knowledge.

Petitioner asserts that the Nagengast affidavits pertaining to the December 1, 2008 and January 4, 2010 notices appear “not to exist.” Petitioner offers no further explanation of this assertion.

The Division contends that the documentation submitted establishes proper mailing of the statutory notices on the dates claimed. The Division thus argues that the Administrative Law Judge properly determined that petitioner’s petition was late-filed with respect to such notices.

In response to petitioner’s objections, the Division contends that the mailing evidence in this matter is similar to mailing evidence in other cases wherein this Tribunal determined that the Division met its burden to prove proper mailing. More specifically, regarding petitioner’s objection to the lack of an affidavit from the Division employee who delivered the notices to the USPS, the Division asserts that such an affidavit is unnecessary under the precedent of this Tribunal. Additionally, the Division contends that this Tribunal has deemed a CMR bearing the initials of a USPS employee as having been properly completed.

OPINION

The dismissal of petitioner's protest of the four notices of determination remaining at issue was made following the Division of Tax Appeals' issuance to petitioner of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of our Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for such a notice is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

Our rules provide that a summary determination 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]).

As we previously noted in *Matter of United Water New York*:

"Inasmuch 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 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v. Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court 'to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist' (*Daliendo v. Johnson*, 147 AD2d 312 [1989])" (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

With certain exceptions not relevant here, there is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (Tax Law § 1138 [a] [1]).

Alternatively, a taxpayer may file a request for conciliation conference with BCMS to protest a notice of determination if such request is filed within the same 90-day statutory time limit (Tax Law § 170 [3-a] [a]). Pursuant to these provisions, a notice of determination is binding upon a taxpayer unless a timely petition or a timely request for conciliation conference is filed. The

Division of Tax Appeals and this Tribunal lack jurisdiction to consider the merits of a late-filed protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; Tax Law § 2006 [4]).

As the Administrative Law Judge correctly noted, it is well established that, where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Construction, LLC* Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

We find that the Division has established the existence of a standard mailing procedure during the relevant periods through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the period at issue.

We also find that the three relevant CMRs have been properly completed. Each lists certified control numbers and assessment numbers with corresponding names and addresses. As noted, petitioner's name and address, and corresponding certified control and assessment

numbers are included in such lists on each CMR.² Additionally, each CMR bears a USPS postmark dated September 29, 2008, December 1, 2008 and January 4, 2010, respectively, on each page thereof. A USPS employee circled the preprinted total pieces listed number and initialed the September 29, 2008 and December 1, 2008 CMRs to indicate receipt by the post office of all pieces of mail listed thereon in accordance with the Division's standard mailing procedure. Similarly, a USPS employee initialed and hand wrote the total number of pieces received on the January 4, 2010 CMR to indicate receipt by the post office of all pieces of mail listed thereon. As so completed, the CMRs are highly probative evidence of the fact and date of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015 [CMR bearing USPS postmarks on each page, a circled preprinted total pieces listed number and the initials of a USPS employee on the last page determined to be properly completed]).

In reaching the foregoing conclusions, we necessarily reject petitioner's contention that the Division's proof is insufficient because it failed to produce an affidavit from the Division employee who delivered the CMR to the post office. As noted, the Division may meet its burden of proving proper mailing in timeliness cases by producing affidavits from individuals with knowledge of its mailing procedures and a properly completed CMR. Such proof establishes that an employee of the Division delivered the mail to the post office. The Division is not required to produce employees who personally recall the mailing of the notice in question to meet its burden (*see Matter of McNamara*, Tax Appeals Tribunal, January 30, 1997).

² The January 4, 2010 CMR also includes petitioner's former representative as a recipient of a copy of the statutory notice bearing that date. We note that the 90-day period for filing a petition is tolled if a taxpayer's representative is not served with a copy of the statutory notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). We note further that there is no assertion here that petitioner was represented at the time the September 29, 2008 and December 1, 2008 notices were issued.

We also reject petitioner's contention that the CMRs are flawed because they do not contain the signature of the Division employee who delivered the mail to the post office. A properly completed CMR does not require such a signature.

We disagree with petitioner's contention that the mailing evidence is insufficient because it does not establish that a USPS employee actually initialed the CMRs when the CMRs and articles of mail were delivered to the post office. This fact is established by the Nagengast and Peltier affidavits and the properly completed CMRs.

We dismiss petitioner's contention that the CMRs have not been properly completed because the USPS employee initialed the CMR instead of signing his or her full name. The Peltier affidavits establish that, as part of the Division's standard mailing procedure, the USPS employee may affix either his or her initials or signature to the CMR to indicate receipt of the pieces of mail listed thereon (*see* finding of fact 15). Initialing is thus permissible under the standard mailing procedure. Indeed, there are numerous decisions of this Tribunal that deem a CMR bearing the initials of the receiving USPS employee to be properly completed (*see e.g. Matter of McAleese*, Tax Appeals Tribunal, June 30, 2016; *Matter of Carotenuto*, Tax Appeals Tribunal, March 17, 2016; *Matter of Modica*).

We also reject petitioner's assertion that the Nagengast affidavit pertaining to the September 29, 2008 notices is incomplete because it does not describe the preprinted stamp on the CMR. As noted previously, the Nagengast and Peltier affidavits establish the Division's standard mailing procedure and the CMRs in the present matter were properly completed in accordance with such procedure, the preprinted stamp notwithstanding. We note that this Tribunal has previously held that the Division met its burden to prove mailing where, as in the

present matter, the CMR contained a similar stamped instruction that was not referenced in the affidavits submitted to establish a standard mailing procedure (*see Matter of Modica; Matter of Cato*, Tax Appeals Tribunal, October 27, 2005).

Petitioner's contention that the Peltier affidavits are merely based on the Nagengast affidavits is unsupported by the record. A reading of these documents clearly shows that this is not the case (*compare* finding of fact 9 *with* finding of fact 15).

As to petitioner's claim that the Nagengast affidavits pertaining to the December 1, 2008 and January 4, 2010 notices appear "not to exist," we note that such affidavits are included in the record and that we have reviewed such affidavits in our consideration of this matter. We note also that petitioner offered no further explanation of this claim. If petitioner did not receive copies of such affidavits from the Division, his representative should have brought this situation to the attention of the Administrative Law Judge during the pendency of the order. There is no indication in the record that petitioner did so.

Pursuant to the foregoing discussion, we find that the Division properly issued the subject notices of determination to petitioner at his last known address on September 29, 2008 (L-030698080 and L-030698078), December 1, 2008 (L-031117485), and January 4, 2010 (L-033143491), respectively. Petitioner's petition in protest of such notices, dated April 3, 2014 and received on April 4, 2014, was thus untimely filed well-beyond the 90-day period of limitations (*see* Tax Law § 1138 [a] [1]). As noted previously, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Nello Balan is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Nello Balan, having been otherwise resolved pursuant to the stipulation for discontinuance filed on August 11, 2015, is dismissed with respect to notices of determination numbered L-031117485, L-030698080, L-030698078 and L-033143491.

DATED: Albany, New York
October 27, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner