

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

In the Matter of the Petition :  
of :  
**ALEXEI P. MOSTOVOI** : DECISION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 827171  
New York State Personal Income Taxes under Article 22 :  
of the Tax Law for the Year 2011. :

---

Petitioner, Alexei P. Mostovoi, filed an exception to the determination of the Administrative Law Judge issued on November 17, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on February 23, 2017, the date that petitioner's reply brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the Administrative Law Judge properly granted the Division's motion for summary determination on the question of whether petitioner timely filed a petition with the Division of Tax Appeals.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except for finding of fact 5, which we have modified to more accurately reflect the record. We have omitted the Administrative Law Judge's finding of fact 17, as it merely sets forth the issues below. The modified finding of fact and the findings of fact as determined by the Administrative Law Judge are set forth below.

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner Alexei P. Mostovoi's protest of a notice of deficiency dated April 6, 2015 and addressed to Alexei P. Mostovoi and Kayoko Mostovoi, "104 Edgemont Rd, Scarsdale, NY 10583-2714." This notice of deficiency, notice number L-042384146-7, asserted additional New York State personal income tax due for the year 2011 in the amount of \$679.00, plus interest, for a balance due of \$848.38. The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0443 8645.

2. On August 26, 2015, petitioner mailed a petition by FedEx standard overnight shipping to the Division of Tax Appeals. It was received on August 27, 2015. The petition lists petitioner's address as 104 Edgemont Road, Scarsdale, New York 10583.

3. On November 12, 2015, the Division filed its answer to the petition affirmatively alleging, among other things, that a notice of deficiency was issued to petitioner on April 6, 2015; petitioner filed a petition with the Division of Tax Appeals on August 27, 2015, more than 90 days after the notice was issued; and that the Division of Tax Appeals lacks jurisdiction to review the merits of the late-filed petition, i.e., the Division's calculation of petitioner's allowable refund for tax year 2011.

4. Initially, petitioner elected to have the proceedings in this matter conducted in the Small Claims Unit. On February 10, 2016, petitioner was notified that the small claims hearing scheduled for March 31, 2016 would confine itself to the issue of the timeliness of the request for conference or the petition filed in this matter. By faxed letter dated February 24, 2016, petitioner requested to have this matter proceed before an administrative law judge.

5. On March 11, 2016, the Division filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9 (a) (1) (i) and 3000.9 (b). Petitioner, appearing pro se, submitted a written statement dated April 8, 2016 and documents in opposition to the Division's motion on April 11, 2016. By order of July 7, 2016, the Administrative Law Judge denied the Division's motion to dismiss the petition or for summary determination.

6. On July 28, 2016, the Division filed a motion for summary determination. In support of this motion and to prove proper and timely mailing of the notice of deficiency under protest, the Division submitted the following: (i) the affirmation of Michele W. Milavec, Esq., the Division's representative, dated July 27, 2016; (ii) the affidavit, dated July 19, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated April 6, 2015; (iv) the affidavit, dated July 20, 2016, of Bruce Peltier, store and mail operations supervisor in the Division's mail room; (v) the affidavit, dated July 26, 2016, of Heidi Corina, Legal Assistant 2 in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (vi) Postal Service form 3811-A (request for delivery information/return receipt after mailing) and the USPS response to such request dated July 21, 2016; (vii) a copy of the petition filed with the Division

of Tax Appeals on August 27, 2015, and the FedEx standard overnight shipping envelope in which the petition was sent; and (viii) a copy of petitioner's and his spouse, Kayoko Mostovoi's, joint New York State Resident Income Tax Return (form IT-201) for the year 2013, filed on April 15, 2014, which was the last filing from petitioner and his spouse prior to the issuance of the notice of deficiency.

7. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets 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 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 was manually changed on the first and last pages of the CMR, in the present case to the actual mailing date of "4/6/15." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. 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.

8. 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 taxpayer 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 “Certified No.” The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading “Reference No.” The names and addresses of the recipients are listed under “Name of Addressee, Street, and P.O. Address.”

9. Ms. Nagengast attested to the truth and accuracy of the copy of the 106-page CMR, which contains a list of 1,158 statutory notices issued by the Division on April 6, 2015. The CMR lists 1,158 computer-printed certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 106, which contains three such entries. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding.

10. Page 30 of the CMR indicates that a notice of deficiency, assigned certified control number 7104 1002 9730 0443 8645 and reference number L-042384146, was issued to “Mostovoi-Alexei P,” at the 104 Edgemont Road, Scarsdale, New York, address listed thereon.<sup>1</sup> The corresponding mailing cover sheet, attached to the Nagengast affidavit as “Exhibit B,” bears this certified control number and petitioner’s name, “Mostovoi-Alexei P,” and his spouse’s name, “Mostovoi-Kayoko,” and the address as noted above.

11. The affidavit of Bruce Peltier, a supervisor in the Division’s mail room since 1999, describes the mail room’s general operations and procedures. The mail room receives the notices in an area designated for “Outgoing Certified Mail.” Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. A staff member

---

<sup>1</sup> The certified mail record lists only the name Alexei P. Mostovoi because it is standard procedure for the certified mail record to set forth the name of the primary taxpayer associated with the statutory notice. Thus, when as here, a husband and wife file a joint personal income tax return wherein the husband’s social security number is listed in the place designated for the primary taxpayer, only the husband’s name will appear on the certified mail record.

retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. That staff member then weighs, seals and places postage and fee amounts on each envelope. The first and last pieces of mail 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 information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area.

12. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. Here, the postal employee did affix a USPS postmark to every page of the CMR, but it is barely legible on eight pages of the CMR. However, the postmark dated April 6, 2015 of the Colonie Center branch of the USPS is legible on page 30, the page on which information concerning the subject notice of deficiency and Alexei P. Mostovoi's name and address appear, and the last page of the CMR. The USPS employee also initialed or signed all 106 pages of the CMR. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, the USPS employee complied with this request by circling and writing the number "1158" on the last page of the CMR next to "TOTAL PIECES RECEIVED AT POST OFFICE."

13. Mr. Peltier's affidavit states that the CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

14. Based upon his review of the affidavit of Mary Ellen Nagengast, the exhibits attached thereto and the CMR, Mr. Peltier avers that on April 6, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to “MOSTOVOI-ALEXEI P, MOSTOVOI-KAYOKO, 104 EDGEMONT RD, SCARSDALE, NY 10583-2714” to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on April 6, 2015 to be kept as part of the records of the Department. Mr. Peltier asserts that the procedures described in his affidavit were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to Alexei P. Mostovoi and Kayoko Mostovoi on April 6, 2015.

15. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel, details her filing of USPS form 3811-A (request for delivery information/return receipt after mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0443 8645 on April 6, 2015 from the Colonie, New York, branch of the USPS to “Mostovoi-Alexei” and “Mostovoi-Kayoko” at 104 Edgemont Rd., Scarsdale, NY 10583-2714. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 0443 8645 on April 8, 2015 at 1:53 p.m. in Scarsdale, New York 10583. The scanned image of the recipient’s signature as shown on the USPS response is “Kayoko Mostovoi.” The scanned address of the recipient indicates “104 EDGEMONT RD.”

16. Alexei and Kayoko Mostovoi's joint 2013 Resident Income Tax Return, filed on or about April 15, 2014, reported Mr. and Mrs. Mostovoi's address as 104 Edgemont Road, Scarsdale, New York 10583. This was the last return filed by petitioner and his spouse prior to the issuance of the subject notice of deficiency.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge first addressed petitioner's contention that the Division's motion for summary determination should be rejected because the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) prohibit a second motion for accelerated determination. The Administrative Law Judge concluded that petitioner's reading of the relevant regulation was incorrect as the Rules merely prohibit a second motion for dismissal of a petition, not summary determination, which was the form of accelerated determination for which the Division moved in its motion here at issue.

The Administrative Law Judge next described the legal standard for granting summary determination. The Administrative Law Judge observed that the proponent of motion for summary determination must make a prima facie showing of entitlement to judgment as a matter of law by offering evidence that eliminates any material issues of fact. She noted that, in order to defeat such a motion, the opponent must produce evidentiary proof in admissible form that raises a material question of fact requiring a trial on the merits.

The Administrative Law Judge also described the statutory requirement that any protest of a notice of deficiency must be filed within the 90-day time period following the issuance of the statutory notice. She noted that the time limit is strictly construed and a notice of deficiency becomes a fixed and final assessment unless a protest is timely filed. Where the timeliness of a petition is at issue, the Division must prove the date and fact of the mailing of the statutory notice



by showing a standard procedure for issuance of statutory notices and that such procedure was followed in the instance at issue.

The Administrative Law Judge concluded that the Division had shown adequate proof of both its mailing procedures and the date of mailing of the statutory notice here at issue through the affidavits and attachments it submitted in support of its motion. Because the Division established the date and fact of mailing of the notice of deficiency to the last known address of petitioner, the Administrative Law Judge found that the 90-day limitation period for filing a protest commenced on April 6, 2015. As the petition in this case was not mailed until August 26, 2015, the Administrative Law Judge concluded that petitioner's protest was untimely and the Division of Tax Appeals lacked jurisdiction to hear the merits of petitioner's protest of the notice of deficiency. The Administrative Law Judge noted that the Division not only proved the date and fact of mailing, but also actual receipt of the notice through submission of a USPS delivery confirmation. The Administrative Law Judge thus granted the Division's motion for summary determination.

#### ***ARGUMENTS ON EXCEPTION***

Petitioner argues that the mailing cover sheet rather than the notice of deficiency itself bore the certified control number 7104 1002 9730 0443 8645 and that there is no demonstrable relationship between the mailing cover sheet and the notice of deficiency here at issue. He also takes exception to the conclusions of law that the Division demonstrated actual receipt of the notice of deficiency and that the Division showed that it mailed the notice of deficiency on April 6, 2015 on the same basis. Petitioner asks that this Tribunal cancel the notice of deficiency.

The Division urges us to affirm the determination of the Administrative Law Judge. The Division argues that it met its burden of demonstrating proper mailing of the subject notice of

deficiency and that the petition here at issue was untimely. In support of its argument, the Division states that the CMR submitted was properly completed and constitutes evidence of both the date and fact of mailing to petitioner on April 6, 2015. As the petition giving rise to this exception was not filed until August 26, 2015, the Division argues that the Division of Tax Appeals does not have jurisdiction over the petition as it was filed in excess of 90 days from the issuance of the statutory notice. The Division asks this Tribunal to deny petitioner's exception and affirm the Administrative Law Judge's determination.

### ***OPINION***

As noted by the Administrative Law Judge in her determination, 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]). Section 3000.9 (c) of our Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the proponent of a motion for summary determination "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 [1980]). As we noted in *Matter of United Water New York, Inc.*:

"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).

To prevail against a proponent of 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], *quoting Zuckerman*).

There is, generally, a 90-day statutory time limit for filing a petition following the issuance of a notice of deficiency (*see* Tax Law § 689 [b], *cf.* Tax Law § 2008 [2]). Accordingly, the amount asserted in the notice of deficiency here at issue would be the amount assessed unless petitioner timely filed a petition with the Division of Tax Appeals within 90 days.

It is well established that where 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 (*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 Constr.*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

We agree with the Administrative Law Judge that the Division has produced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier,

Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices.

We also find that the Administrative Law Judge correctly determined that the CMR was properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see Matter of Montasanto*, Tax Appeals Tribunal, March 31, 1994). Specifically, this document lists certified control numbers and reference numbers with corresponding names and addresses and bears USPS postmarks dated April 6, 2015 on each page. As noted, the name, address, reference and the certified control numbers for petitioner appear on page 30 of the CMR. There are 1,158 pieces of mail listed on the CMR. On the last page of the CMR, a postal employee wrote his or her initials and also wrote “1158” to indicate receipt by the post office of all 1,158 pieces of mail listed thereon in accordance with the Division’s mailing procedure as described in the affidavits submitted in support of the motion for summary determination. We also note that the affidavit of Ms. Corina detailing her filing of USPS form 3811-A (request for delivery information/return receipt after mailing) and attached exhibit of the USPS’ confirmation of petitioner’s receipt of the statutory notice in this matter on April 8, 2015 confirm that an article of mail bearing the same certified control number as petitioner’s notice of deficiency as listed on the CMR was delivered to the address listed on petitioner’s 2013 New York personal income tax return. We thus conclude that the Division has presented sufficient documentary proof to establish that the subject notice of deficiency was mailed as addressed to petitioner on April 6, 2015.

We have considered petitioner’s arguments on exception, but deem them to be without merit. As for his contention that there was no certified control number associated with the notice of deficiency here at issue, we must disagree. The affidavit of Ms. Nagengast thoroughly

describes the information contained on the mailing cover sheet that corresponds with the notice of deficiency in the CMR, including how a certified control number is assigned to a mailing cover sheet that is associated with a specific notice. As mentioned above, a correctly completed CMR represents highly probative evidence of the date and fact of mailing of the subject notice (*Matter of Montesanto*). Thus, the Administrative Law Judge correctly determined that the notice of deficiency here at issue was sent to petitioner and his spouse at their last known address bearing certified control number 7104 1002 9730 0443 8645. Petitioner is also mistaken in his argument that the USPS delivery confirmation did not show actual receipt of the notice of deficiency. The USPS delivery confirmation showed that a Kayoko Mostovoi accepted an article of mail on April 8, 2015 at 1:53 PM bearing certified mail number 7104 1002 9730 0443 8645, which is the same certified control number associated with petitioner's notice on the CMR, at 104 Edgemont Road, Scarsdale, New York, which is the same address listed on petitioner's 2013 New York personal income tax return. Thus, even if the Division had not demonstrated proper mailing in this case, the 90-day statutory period would be measured from the date of receipt (*Matter of Bryant Tool & Supply*, Tax Appeals Tribunal, July 30, 1992; *Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992). In this case, however, even if one were to measure the 90-day period from the date of receipt, April 8, 2015, the petition would be untimely. We reject petitioner's assertion that the Division has not shown that the notice of deficiency here at issue was mailed on a date certain and deny his request to dismiss the Division's motion for summary determination.

We decline to address petitioner's argument made to the Administrative Law Judge that 20 NYCRR 3000.9 (a) precludes the Division from bringing a motion for summary determination after its motion to dismiss has been denied as petitioner did not raise this argument on exception.

A petition must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007). As the petition in this matter was not filed until August 27, 2015, which was beyond the 90-day statutory period, we find that the Division of Tax Appeals has no jurisdiction to entertain the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alexei P. Mostovoi is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Alexei P. Mostovoi is dismissed.

DATED: Albany, New York  
August 10, 2017

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner