

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>SYLVESTER L. TUOHY</b>	:	DECISION
	:	DTA NO. 827853
for Redetermination of a Deficiency or for Refund	:	
of New York State Personal Income Tax under	:	
Article 22 of the Tax Law for the Year 2012.	:	

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Petitioner, Sylvester L. Tuohy, filed an exception to the determination of the Administrative Law Judge issued on April 6, 2017. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on June 15, 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 petitioner filed a timely petition following the issuance of a notice of deficiency.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. We have also added two findings of fact, numbered 13 and 14 herein, to better address petitioner's arguments on exception. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

1. On September 13, 2016, petitioner, Sylvester L. Tuohy, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a notice of deficiency (notice number L-044280631) issued by the Division of Taxation (Division), dated April 4, 2016.<sup>1</sup>

2. On October 27, 2016, the Petition Intake Unit of the Division of Tax Appeals issued a notice of intent to dismiss petition (notice of intent) to petitioner. The notice of intent indicates that the relevant notice of deficiency was issued on April 4, 2016, but that the petition was not filed until September 13, 2016, or 162 days later.

3. In response to the notice of intent and to prove mailing of the notice of deficiency under protest, the Division submitted, among other documents, the following: (i) an affidavit of Christopher O'Brien, Esq., an attorney employed in the Office of Counsel of the Division, dated December 29, 2016; (ii) an affidavit, dated December 21, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) three pages of a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 4, 2016; (iv) an affidavit, dated December 28, 2016, of Melissa Kate Koslow, a supervisor in the Division's mail room; (v) an affidavit, dated December 28, 2016, of Heidi Corina, Legal Assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (vi) a Postal Service form 3811-A (request for delivery information/return receipt after mailing) and the USPS response to such request dated December 1, 2016; (vii) a copy of the April 4, 2016 notice of deficiency with the associated mailing cover sheet; and (viii) a copy of petitioner's nonresident and part-year resident income tax return for the year 2014, dated April 11, 2015, and filed jointly

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<sup>1</sup> The subject notice of deficiency was issued to both petitioner and petitioner's spouse, Yongjie Tuohy. The petition in this matter was filed by Sylvester L. Tuohy only.

with Yongjie Tuohy, which lists their address as 138 Twelfth Street, Cresskill, New Jersey, which is the same address as that listed on the subject notice.<sup>2</sup> The 2014 return was the last return filed with the Division by petitioner before the notice of deficiency was issued.

4. 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 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 was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of "4/4/16." 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 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.

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 CMR under the

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<sup>2</sup> It is noted that the return lists petitioner's address as "Twelfth St" while the notice lists the address as "12 TH St."

heading entitled “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 PO Address.”

6. According to the Nagengast affidavit, the CMR in the present matter consists of 291 pages. Ms. Nagengast notes that the portion 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. She states that the USPS representative affixed a postmark to each page of the CMR, wrote and circled the number “3199” on page 291, and initialed or signed page 291. She adds that the total number of statutory notices mailed pursuant to the CMR was 3,199.

7. Attached to the Nagengast affidavit, as exhibit “A,” are copies of pages 1, 15 and 291 of the CMR. Pages 1 and 291 have a handwritten entry of “4/4/16” in the top right corner; however, page 15 does not have a similar entry.

8. Page 15 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0811 2039 and assessment ID number L-044280631 was mailed to petitioner at the Cresskill, New Jersey, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

9. The affidavit of Melissa Kate Koslow describes the Division’s mail room’s general operations and procedures. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Koslow confirms that a mailing cover sheet precedes each notice. A staff member receives 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 of mail are checked against the

information on the CMR. A clerk then performs a random review of up to 30 pieces of 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. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. 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. Pages 1, 15, and 291 of the CMR in exhibit "A" of the Nagengast affidavit each contain a USPS postmark of April 4, 2016. On page 291, corresponding to "Total Pieces and Amounts," is the preprinted number 3,199 and next to "Total Pieces Received At Post Office" is the handwritten entry "3199." There is a set of initials or a signature on page 291.

10. According to both the Nagengast and Koslow affidavits, a copy of the subject notice was mailed to petitioner on April 4, 2016, as claimed.

11. The affidavit of Heidi Corina describes the Division's requests to the USPS for delivery information on the subject notice of deficiency. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 0811 2039. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 0811 2039 and addressed to petitioner was delivered as addressed on April 6, 2016. Attached to the Corina affidavit as exhibit "A" is the Division's "Request For Delivery Information" for article number 7104 1002 9730 0811 2039. Exhibit "B" to the Corina affidavit is the USPS response to the Division's request indicating delivery of the same article on April 6, 2016 to "138 12TH" in "Cresskill, NJ 07626."

12. In petitioner's response to the notice of intent, he admitted receipt of the subject notice of deficiency.

13. Also in response to the notice of intent, petitioner submitted copies of the following documents that he received from the Division regarding the assessment identification number at issue:

a. A letter dated March 24, 2016 that acknowledges correspondence from petitioner and states, in part: "No further collection or enforcement action will be taken on any assessment listed until the protest has been resolved."

b. A "response to taxpayer inquiry" dated July 11, 2016 that acknowledges correspondence from petitioner and states, in part, that "assessment L-044280631 is considered to be correct as issued and is sustained."

c. A "response to taxpayer inquiry" dated July 25, 2016 that acknowledges a telephone conversation with petitioner on July 14, 2016 and indicates an adjustment to the subject assessment.

d. A "response to taxpayer inquiry" dated September 6, 2016 that acknowledges a correspondence from petitioner dated July 28, 2016 and states that "assessment L-044280631 is considered to be correct as previously adjusted."

14. The notice of deficiency advises petitioner that, if he disagrees with the amount due, he may either request a conciliation conference with the Bureau of Conciliation and Mediation Services or file a petition with the Division of Tax Appeals. The notice further advises that such protest option must be exercised by July 3, 2016.

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

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of protests of statutory notices. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the statutory notice by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge determined that, while the Division had established its standard mailing procedure through affidavits submitted by Ms. Nagengast and Ms. Koslow, it had failed to prove that such standard procedure had been followed in issuing the subject notice. This was because the Division submitted only three pages of the 291-page CMR. The Administrative Law Judge thus determined that the Division failed to prove proper mailing of the subject notice.

The Administrative Law Judge found, however, that the Division did establish petitioner's actual receipt of the notice. Specifically, the Administrative Law Judge found that the Corina affidavit and the accompanying USPS delivery information established that the notice was delivered to petitioner as addressed on April 6, 2016. The Administrative Law Judge concluded that, under such circumstances, the 90-day period for filing a petition or request for conciliation conference commenced on the date of such delivery. As petitioner did not file his petition until September 13, 2016, which is more than 90 days from the date of receipt, the petition was late-filed and thus properly dismissed.

The Administrative Law Judge dismissed petitioner's reference to his correspondence

with the Division regarding the assessment at issue, noting that petitioner failed to show that he filed a timely petition with the Division of Tax Appeals in protest of the subject notice.

***SUMMARY OF ARGUMENTS ON EXCEPTION***

As he did below, petitioner references his ongoing correspondence with the Division regarding the assessment at issue. Petitioner emphasizes the statement in the March 24, 2016 letter from the Division indicating that no further collection or enforcement action would be taken until the protest had been resolved. Petitioner argues that it is unfair to dismiss his petition based on a delay when the Division previously stated that no action would be taken until the matter was resolved.

The Division contends that the Administrative Law Judge properly determined that the petition was untimely filed.

***OPINION***

The Supervising Administrative Law Judge's determination was issued following the Division of Tax Appeals' issuance to petitioner of a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The standard of review for such a notice is the same as that for a summary determination motion (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). Such a 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]).

With certain exceptions not relevant here, there is a 90-day statutory time limit for filing either a request of conciliation conference or a petition following the issuance of a notice of deficiency (Tax Law §§ 170 [3-a] [a]; 681 [b], 689 [b]). The Division of Tax Appeals lacks



jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see e.g. Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

If the timeliness of a taxpayer's protest against a notice of deficiency or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of such notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). We agree with the Administrative Law Judge's conclusion that the Nagengast and Koslow affidavits establish the Division's standard mailing procedure. We also agree with the Administrative Law Judge's conclusion that the submission of a partial CMR is insufficient to establish that the Division's standard mailing procedure was followed (*see Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

Such an inadequacy in the evidence submitted may be overcome by other evidence of mailing in the record (*see Matter of Rywin, Inc.*, Tax Appeals Tribunal, April 24, 2008). We agree with the Administrative Law Judge's conclusion that the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information, and the USPS response that the notice of deficiency was delivered to petitioner's last known address, as claimed, on April 6, 2016 (*see Matter of Ankh-Ha-Ra Sma-Ntr*, Tax Appeals Tribunal, April 14, 2016).

Under such circumstances, the 90-day period for filing a petition or request for conciliation conference commences with the date of delivery of the statutory notice (*Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011). Petitioner filed his petition on September 13, 2016, well in excess of 90 days from the April 6, 2016 date of delivery. The petition was therefore untimely filed. Accordingly, the Division of Tax Appeals lacks jurisdiction to consider

the merits of petitioner's protest (*Matter of Modica*).

Turning to petitioner's argument that it is unfair to dismiss his petition as untimely given his ongoing correspondence with the Division, we note first the well-established rules that "deadlines for filing petitions are strictly enforced" (*see Matter of LaManna*, Tax Appeals Tribunal, March 13, 2003) and that "extenuating circumstances do not provide a basis to excuse the late filing of a petition" (*Matter of Leibowitz*, Tax Appeals Tribunal, August, 13, 2015). More specifically, we reject this argument because the notice of deficiency here "clearly and unambiguously" advised petitioner that he needed to file either a request for conciliation conference or a petition to challenge the proposed assessment and expressly stated the deadline for such action (*see Winner's Garage, Inc. v Tax Appeals Trib. of the State of N.Y.*, 89 AD3d 1166, 1169-1170 [3d Dept] [2011] ["no confusion could have existed when petitioners received the notices of determination that clearly and unambiguously stated that they had 90 days from the date of the notices to challenge the Department's determination"], *lv denied* 18 NY3d 807 [2012]; *see also Matter of Ryan and Simons*, Tax Appeals Tribunal, September 12, 2013 [Division not estopped from asserting statutory time limitation set forth in a notice of deficiency even where an earlier letter from the Division to the taxpayers expressly stated that a longer limitations period was applicable]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sylvester L. Tuohy is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Sylvester L. Tuohy is dismissed.

DATED: Albany, New York  
November 22, 2017

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/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

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/s/ Anthony Giardina  
Anthony Giardina  
Commissioner