

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>RUSSELL G. ALESI</b>	:	DECISION
	:	DTA NO. 829960
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22 of	:	
the Tax Law for the Years 2011 and 2014.	:	

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Petitioner, Russell G. Alesi, filed an exception to the determination of the Supervising Administrative Law Judge issued on June 17, 2021. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Maria Matos, Esq., of counsel).

Petitioner did not file a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for the issuance of this decision began on December 14, 2021, the due date for petitioner's reply brief.

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

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to address the merits of the petition.

***FINDINGS OF FACT***

We find the facts as determined by the Supervising Administrative Law Judge, except

that we have modified finding of fact 2 and added findings of fact 15 and 16 to reflect the record more fully.

1. Petitioner filed a petition that was received by the Division of Tax Appeals on June 1, 2020. The envelope containing the petition bears a United States Postal Service (USPS) postmark indicating the petition was mailed on May 20, 2020.

2. The petition included a consolidated statement of tax liabilities that was issued by the Division of Taxation (Division) to petitioner on May 4, 2020, pertaining to assessment numbers L-046038146, L-047692789 and L-051362066. The statement indicates that assessment L-047692789 and L-046038146 were subject to collection action and that the liabilities arising from assessment number L-051362066 had been determined to be due, although not yet subject to collection.

3. The petition included a notice and demand for payment of tax due (notice and demand) bearing assessment number L-051362066 that was issued to petitioner by the Division on May 4, 2020.

4. The petition also included a notice of additional tax due bearing assessment number L-051362066 that was issued to petitioner by the Division on March 27, 2020.

5. On July 17, 2020, the Division of Tax Appeals made a written request to petitioner, to see if petitioner had requested a conciliation conference with the Bureau of Conciliation and Mediation Service (BCMS) or had received a conciliation order. Petitioner did not respond to that request.

6. On January 11, 2021, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued a notice of intent to dismiss petition (notice of intent)

to petitioner, on the basis that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition.

7. In response to the issuance of the notice of intent, the Division submitted among other documents: (i) an affirmation, dated March 8, 2021, of Maria Matos, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated February 24, 2021, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated February 25, 2021, of Susan Saccocio, Manager of the Mail Room of the Department of Taxation and Finance; (iv) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked March 22, 2017; (v) a copy of a notice of deficiency, dated March 22, 2017, bearing assessment number L-046038146, together with associated mailing cover sheets; and (vi) a copy of the petitioner’s form IT-201 for the tax year 2015.

8. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor since February 2006, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 page of the CMR in the present case to the actual mailing date of March 22, 2017. 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.

9. 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 the 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 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 Address, Street, and PO Address."

10. The March 22, 2017 CMR consists of 775 pages and lists 11,128 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard notes that the copy 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. A USPS representative affixed a postmark dated March 22, 2017 to each page of the CMR, wrote the number "11,128" next to the heading "Total Pieces Received at Post Office" on page 775, and initialed or signed the first and last page of the CMR.

11. Page 465 of the CMR indicates that a notice with a certified control number 7104 1002 9735 3426 5667 and reference number L-046038146 was mailed to petitioner at a Jericho, New York address. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit B, bears this certified control number and petitioner's name and address as noted.

12. The affidavit of Susan Saccocio, a manager in the Division's mail room since 2017

and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the outgoing certified mail area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet show through the window. The staff member then weighs, seals and affixes the postage and fee amount on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the 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. A USPS employee affixes a postmark and places his or her initials or 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. As noted, each page of the CMR attached to the Picard affidavit as Exhibit A contains a USPS postmark dated March 22, 2017. In addition, she attests that the USPS employee's initials or signature appear on the last page of the CMR. According to Mr. Saccocio, the affixation of the postmarks and the USPS employee's initials indicates that all 11,128 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on March 22, 2017.

13. According to the Picard and Saccocio affidavits, the notice of deficiency bearing

assessment number L-046038146 was mailed to petitioner on March 22, 2017, as claimed.

14. Petitioner did not submit a response to the notice of intent.

15. The Division's submitted documents also include a notice of additional tax due issued in respect of assessment number L-047692789, dated February 1, 2018.

16. Each of the notices of additional tax due states, as the reason for its issuance, that petitioner failed to report federal changes to his income to New York State.

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

The Supervising Administrative Law Judge determined that the notice and demand and notices of additional tax due protested by the petition did not give rise to hearing rights in the Division of Tax Appeals. The Supervising Administrative Law Judge also determined that petitioner's protest of the notice of deficiency was untimely. The Supervising Administrative Law Judge dismissed the petition accordingly.

***ARGUMENTS ON EXCEPTION***

Petitioner contends that the notice of deficiency was not mailed on March 22, 2017. Petitioner makes no other argument in his exception. The Division agrees with the determination.

***OPINION***

The Supervising Administrative Law Judge's dismissal of the petition was made following the issuance of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for a notice of intent to dismiss is the same as that for a summary determination motion (*Matter of Victory Bagel Time, Inc.*, 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]).

“The proponent of a summary judgment [or determination] motion 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 (citations omitted)” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opponent of such a motion “must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The Tax Appeals Tribunal must “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of [the Tax Law]” (Tax Law § 2006 [4]). A request for a hearing is made by “the filing of a petition . . . protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due . . . or any other notice which gives a person the right to a hearing in the division of tax appeals” (Tax Law § 2008 [1]).

The form of a petition filed in the Division of Tax Appeals “shall be governed by such rules as [This Tribunal] shall prescribe (Tax Law § 689 [a]). According to our Rules of Practice and Procedure, a proceeding is commenced with the filing of a petition, including a legible copy of the statutory notice under protest (20 NYCRR 3000.3 [a], [b] [8]). A statutory notice is any notice of the Division, which advises a person of a tax deficiency, determination of tax due,

assessment or denial of a refund which gives the person a right to a hearing in the Division of Tax Appeals (20 NYCRR 3000.1 [k]).

The notices that petitioner included with his petition do not provide such hearing rights and thus are not statutory notices within the meaning of our Rules of Practice and Procedure. A consolidated statement of tax liabilities (*see* finding of fact 2) lists a taxpayer's past-due tax liabilities. Such a statement does not confer jurisdiction on the Division of Tax Appeals to consider the substantive merits of a taxpayer's protest (*Matter of Mostovoi*, Tax Appeals Tribunal, May 23, 2019). The Tax Law further provides that an authorized notice and demand and a notice of additional tax due asserting tax liability (*see* findings of fact 3, 4 and 15), must be construed as "specifically denying and modifying the right to a hearing" in the Division of Tax Appeals (Tax Law § 173-a [2]). The notices of additional tax due bearing assessment numbers L-047692789 and L-051362066 were authorized because petitioner failed to report federal changes to his income to New York State (*see* finding of fact 16). A taxpayer must report to the Division any change or correction to federal taxable income made by the Internal Revenue Service (Tax Law § 659). If a taxpayer fails to report such a federal change or correction required, the Division may assess a deficiency based on the federal changes by issuing a notice of additional tax due (Tax Law § 681 [e] [1]). Such a notice of additional tax due is not considered a notice of deficiency for purposes of Tax Law § 689 (b), which authorizes the filing of a petition with the Division of Tax Appeals to protest a notice of deficiency (Tax Law 681 [e] [2]). Hence, such a notice may not be contested by filing a petition in the Division of Tax Appeals. Petitioner's protest of assessment numbers L-047692789 and L-051362066 is thus properly denied under both Tax Law §§ 173-a (2) and 689 (e) (2).



Assessment number L-046038146 was assigned to a notice of deficiency, dated March 22, 2017. A notice of deficiency may be protested by timely filing a petition with the Division of Tax Appeals (Tax Law § 689 [b]). A petition must be timely filed to confer jurisdiction on the Division of Tax Appeals to consider the merits of the protest (*see e.g. Matter of Vargas*, Tax Appeals Tribunal, November 18, 2021; Tax Law § 2006 [4]).

Where the timeliness of a taxpayer's petition is in question following the issuance of a notice of deficiency, the Division has the burden to prove the date and fact of mailing of the notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division must show proof of a standard mailing procedure and proof that such procedure was followed in the instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by "producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)" (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

The Division has met its burden here. The affidavits of Ms. Picard and Ms. Saccocio establish the Division's standard mailing procedures in issuing notices of deficiency. The CMR postmarked March 22, 2017 has been properly completed and thus shows that the Division's standard mailing procedure was followed with respect to the mailing of the notice of deficiency to petitioner (*id.*). Furthermore, there is no dispute that the notice of deficiency bears petitioner's correct address. Accordingly, we agree with the Administrative Law Judge's conclusion that the notice of deficiency was properly mailed to petitioner on March 22, 2017, as claimed.

Pursuant to Tax Law § 689 (b), petitioner had 90 days from the March 22, 2017 mailing

of the notice of deficiency to file a petition with the Division of Tax Appeals. The petition in the present matter, filed on May 20, 2020, was filed well-beyond this time limit. Accordingly, even if petitioner had attached a copy of the March 22, 2017 notice of deficiency to his petition, we would lack jurisdiction to consider the merits of his protest (*see e.g. Matter of Chimiak*, Tax Appeals Tribunal, September 19, 2019).

The Supervising Administrative Law Judge thus properly dismissed the petition for lack of jurisdiction.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Russell G. Alesi is denied;
2. The determination of the Supervising Administrative Law Judge is affirmed; and
3. The petition of Russell G. Alesi is dismissed with prejudice.

DATED: Albany, New York  
June 9, 2022

/s/ Anthony Giardina  
Anthony Giardina  
President

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

/s/ Cynthia M. Monaco  
Cynthia M. Monaco  
Commissioner