

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JEAN R. ETIENNE : DECISION
for Redetermination of Deficiencies or for Refund of New : DTA NO. 829997
York State Personal Income Tax under Article 22 of the :
Tax Law for Years 2016, 2017 and 2019. :

Petitioner, Jean R. Etienne, filed an exception to the determination of the Administrative Law Judge issued on July 15, 2021. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Colleen McMahon, 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 letter brief in reply. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on January 7, 2022, the date petitioner's letter brief in reply 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 with the Division of Tax Appeals following the issuance of notices of deficiency.

FINDINGS OF FACT

We find the facts as determined by the Supervising Administrative Law Judge, except for finding of fact 8, which we have modified to more fully reflect the record. As so modified, the

Supervising Administrative Law Judge's findings of fact appear below.

1. Petitioner filed a petition that was received by the Division of Tax Appeals on July 24, 2020. The envelope in which the petition was mailed bears a United States Postal Service (USPS) postal mark indicating that the petition was mailed on July 22, 2020.

2. The petition included a copy of: (i) a statement of proposed audit change, bearing assessment number L-045506567, that was issued by the Department of Taxation and Finance on October 6, 2016; (ii) a consolidated statement of tax liabilities, bearing assessment numbers L-047031153, L-045506567, and L-048400329, that was issued by the Department of Taxation and Finance on January 28, 2019; (iii) another consolidated statement of tax liabilities, bearing assessment numbers L-0473031153 and L-048400329, that was issued by the Department of Taxation and Finance on August 16, 2019; (iv) a notice and demand, bearing assessment number L-047031153, that was issued by the Department of Taxation and Finance on April 4, 2018; (v) a notice of deficiency, bearing assessment number L-045506567, that was issued by the Department of Taxation and Finance on January 11, 2017; and (vi) a notice of state tax warrant and enforced collection activity, dated November 7, 2019.

3. On November 17, 2020, 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 petition did not appear to be timely filed and thus it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition.

4. In response to the issuance of the notice of intent, the Division submitted, among other documents: (i) an affirmation, dated January 26, 2021, of Michele W. Milavec, an attorney employed by the Office of Counsel of the Division; (ii) two affidavits, each dated December 23,

2020, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iii) two affidavits, each dated December 29, 2020, 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 January 11, 2017 and a CMR postmarked October 30, 2017; (v) copies of the notices of deficiency, dated January 11, 2017 and October 30, 2017, together with associated mailing cover sheets; and (vi) a copy of the petitioner’s IT-201 for the tax year 2015.

5. The affidavits 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 each CMR in the present case to the actual mailing dates of January 11, 2017 and October 30, 2017, respectively. 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.

6. 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.”

7. The January 11, 2017 CMR consists of 22 pages and lists 257 certified control numbers along with corresponding assessment numbers, names and addresses. The October 30, 2017 CMR consists of 28 pages and lists 375 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMRs includes 11 such entries, with the exception of page 22 of the January 11, 2017 CMR, which consists of two entries, and page 28 of the October 30, 2017 CMR, which consists of nine entries. Ms. Picard notes that the copies of the CMRs that are attached to her affidavits have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed postmarks dated January 11, 2017 and October 30, 2017 to each page of the respective CMRs, and wrote the number “257” next to the heading “Total Pieces Received at Post Office” on page 22 of the January 11, 2017 CMR and “375” on page 28 of the October 30, 2017 CMR, and initialed or signed the first and last page of the CMRs.

8. Page 3 of the January 11, 2017 CMR indicates that a notice with a certified control number 7104 1002 9735 3355 2430 and reference number L-045506567 was mailed to petitioner at a Staten Island, New York address. Page 4 of the October 30, 2017 CMR indicates that a notice with a certified control number 7104 1002 9735 3886 3678 and reference number L-047031153 was mailed to petitioner at the same Staten Island, New York address. The corresponding mailing cover sheets, attached to the Picard affidavits as exhibit “B,” bear the

certified control numbers and petitioner's name and address as noted. The Staten Island, New York address on the notices, mailing cover sheets and CMRs matches the address listed on petitioner's IT-201 for tax year 2015.

9. The affidavits 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 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 CMRs attached to the Picard affidavits as Exhibit "A" contains a USPS postmark dated January 11, 2017 and October 30, 2017, respectively. In addition, she attests that the USPS employee's

initials or signature appear on the last pages of the CMRs. According to Ms. Saccocio, the affixation of the postmarks and the USPS employee's initials indicates that all 257 articles of mail listed on the January 11, 2017 CMR and all 375 articles of mail listed on the October 30, 2017 CMR, including the articles addressed to petitioner, were received by the USPS for mailing on January 11, 2017 and October 30, 2017, respectively.

10. According to the Picard and Saccocio affidavits, the notices were mailed to petitioner on January 11, 2017 and October 30, 2017, respectively, as claimed.

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

THE DETERMINATION OF THE SUPERVISING ADMINISTRATIVE LAW JUDGE

The Supervising Administrative Law Judge noted that a taxpayer may protest a notice of deficiency by petitioning for a hearing with the Division of Tax Appeals within 90 days of the mailing of the notice of deficiency. The Supervising Administrative Law Judge also noted that in the alternative, a taxpayer may request a conciliation conference with Bureau of Conciliation and Mediation Services (BCMS) if the petition or request for conciliation is similarly made within 90 days from the date of mailing of the deficiency notice. Reviewing applicable law, the Supervising Administrative Law Judge noted that the 90-day time limit is strictly construed and that the standard of review for a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

Applying the summary determination standard, the Supervising Administrative Law Judge reviewed the evidence and concluded that the Division had sufficiently established that notices of deficiency L-045506567 and L-047031153 were properly mailed to petitioner at his last known address on January 11, 2017 and October 30, 2017, respectively. Having established that the notices of deficiency were properly mailed to petitioner, and that petitioner mailed his

petition on July 22, 2020, a date that falls beyond 90 days after the date of issuance of the notices of deficiency, the Supervising Administrative Law Judge found that the petition was untimely, and that applicable case law mandated that the Division of Tax Appeals was without jurisdiction to consider its merits. The Supervising Administrative Law Judge noted that the remaining notices mailed to petitioner did not, as a matter of law, give rise to hearing rights. Accordingly, the Supervising Administrative Law Judge dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner generally contends that he was not informed of his right to petition the notices of deficiency or the deadline to file such a petition. The Division argues that the Supervising Administrative Law Judge properly dismissed his petition to protest notice of deficiency L-045506567, the notice attached to the petition, and that although the Division submitted notice of deficiency L-047031153 out of an abundance of caution, there is no jurisdiction to consider a challenge to that notice or any other notice provided by the Division.

OPINION

Where the timeliness of the filing of a petition or request for BCMS conference is at issue, we first determine whether the Division has carried its burden of demonstrating the fact and date of the mailing of the relevant notices to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and, in addition, show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). We agree with the Supervising Administrative Law Judge that the Division has met its burden by offering proof

sufficient to establish the mailing of notices of deficiency L-045506567 and L-047031153 to petitioner's last known address on January 11, 2017 and October 30, 2017, respectively. The Division introduced sufficient evidence of its standard mailing procedures through the affidavits of its employees Ms. Picard and Ms. Saccocio, who are responsible for and experienced with the Division's processes in the mailing of such notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). The Division further produced evidence that the CMRs had been properly completed, which constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996).

Further, the address on the mailing cover sheets and CMR matches the one listed on petitioner's IT-201 for 2015, thus satisfying the "last known address" requirement. The law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider its merits (*see* Tax Law §§ 681 [b]; 689 [b]). Petitioner's petition was mailed on July 22, 2020, more than 90 days from the issuance of either of the notices. Therefore, the request was untimely, and we thus conclude that the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the petition (*see Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Accordingly, we affirm the conclusion of the Supervising Administrative Law Judge that since petitioner failed to file his petition protesting the notices of deficiency within 90 days of their issuance, such petition was untimely filed and properly dismissed.

The Supervising Administrative Law Judge also correctly found that the additional

notices challenged by petitioner namely, the notice and demand, assessment number L-0407031153, dated April 4, 2018; the statement of proposed audit change; and the consolidated statement and warrant that petitioner submitted as attachments to his petition do not give rise to hearing rights (*see* Tax Law §§ 173-a [2]; 2000; *Matter of Alesi*, Tax Appeals Tribunal, June 9, 2022). Accordingly, petitioner's protest of such notices is also properly dismissed.

With respect to the petitioner's claim that he was not informed that a taxpayer must protest a statutory notice within 90 days of the notice (*see* Tax Law §§ 681 [b]; 689 [b]), this claim is belied by the record. Petitioner was advised of his right to protest in the mailings that contained notices of deficiency L-047031153 and L-045506567 with the respective deadlines for filing a petition clearly listed among other information and resources for him to address any concerns. In any event, we have held that taxpayers are charged with knowledge of these time limitations (*Matter of Casa Di Pizza, Inc.*, Tax Appeals Tribunal, June 12, 2015).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jean R. Etienne is denied;
2. The determination of the Supervising Administrative Law Judge is affirmed; and
3. The petition of Jean R. Etienne is dismissed.

DATED: Albany, New York
July 7, 2022

/s/ Anthony Giardina
Anthony Giardina
President

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

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