

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WINSTON M. MAXWELL : DETERMINATION
for Redetermination of Deficiencies or for Refund : DTA NO. 825156
of New York State Personal Income Tax under Article :
22 of the Tax Law for the Years 2005 and 2006. :

Petitioner, Winston M. Maxwell, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2005 and 2006.

On March 24, 2016, the Division of Taxation, by Amanda Hiller, Esq., (Charles Fishbaum, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affirmation of Charles Fishbaum, Esq., dated March 24, 2016, and annexed exhibits. Petitioner, appearing pro se, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination began on April 25, 2016, the due date for petitioner's response.¹ After due consideration of the affidavits and documents presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

¹ Since the 30-day period in which to respond expired on Saturday, April 23, 2016, petitioner's response was due on Monday, April 25, 2016 (*see* General Construction Law §§ 20, 25-a).

ISSUE

Whether petitioner filed a timely petition following the issuance of two notices of deficiency.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of two notices of deficiency dated February 27, 2012 and addressed to petitioner, Winston M. Maxwell, at an Elizabeth, New Jersey, address. The first Notice of Deficiency, notice number L-037143990-9, asserted additional New York State personal income tax due for the year 2005 in the amount of \$10,390.00, plus interest and penalty, for a balance due of \$22,487.20. The second Notice of Deficiency, notice number L-037143991-8, asserted additional New York State personal income tax due for the year 2006 in the amount of \$10,913.00, plus interest and penalty, for a balance due of \$21,450.59. The mailing cover sheets for the foregoing notices of deficiency contain certified control numbers 7104 1002 9730 1002 0797 and 7104 1002 9730 1002 0803, respectively.

2. On June 18, 2012, the Division issued notices and demands for payment of tax due, assessment ID numbers L-037143990-9 and L-037143991-8, for the years 2005 and 2006, respectively.

3. On July 30, 2012, the Division of Tax Appeals received a petition seeking redetermination of the deficiencies issued in this matter. The petition lists petitioner's address as the same Elizabeth, New Jersey, address, and is hand-dated as signed by petitioner on July 27, 2012. The envelope in which the petition was sent by First Class Certified Mail bears a United States Postal Service (USPS) stamp dated July 27, 2012.

4. On March 20, 2013, the Division filed its answer, in which it denied making any errors

in issuing the notices under protest and affirmatively stating that the petition is untimely, as it was filed more than 90 days from the date the notices were issued.

5. The subject notices of deficiency were issued to petitioner due to his failure to file New York State tax returns for the years 2005 and 2006. In April 2013, petitioner filed a chapter 7 bankruptcy petition in New Jersey. Due to the filing of the bankruptcy petition, the Division of Tax Appeals placed this matter on hold. In a letter, dated February 23, 2016, Brian J. McCann, Esq., a supervising attorney in the Division's Office of Counsel, Litigation Section, advised that petitioner was discharged in the bankruptcy case on August 2, 2013; however, the discharge did not cover the 2005 and 2006 deficiencies because no income tax returns were filed with New York State for those years. Mr. McCann's letter also requested that this matter proceed to a hearing, "[i]n view of the termination of the bankruptcy matter and petitioner's continued liability" for the subject notices of deficiency.

6. In support of the motion and to prove proper and timely mailing of the notices of deficiency under protest, the Division submitted the following: (i) the affirmation of Charles Fishbaum, Esq., the Division's representative, dated March 24, 2016; (ii) the affidavit, dated March 21, 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 February 27, 2012; (iv) the affidavit, dated March 23, 2016, of Bruce Peltier, Principal Mail and Supply Clerk in the Division's mail room; (v) a copy of the petition filed with the Division of Tax Appeals on July 27, 2012, and the envelope in which the petition was sent; and (vi) a copy of petitioner's New York State Nonresident and Part-Year Resident Income Tax Return (form IT-203) for the year 2010, electronically filed on or about April 11, 2011, which was the last filing from petitioner prior to

the issuance of the notices 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 "2/27/12." 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 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. The CMR relevant to the notices of deficiency under protest consists of 222 pages and

lists 2,431 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 222, which contains no 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. A USPS employee affixed a postmark dated February 27, 2012 of the Albany, New York, General Mail Facility branch of the USPS to each page of the CMR, wrote the number "2431" on page 222 below the heading "TOTAL PIECES RECEIVED AT POST OFFICE" and initialed or signed next to the handwritten number "2431." Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 2,431.

10. Page three of the CMR indicates that two notices of deficiency, assigned certified control numbers 7104 1002 9730 1002 0797 and 7104 1002 9730 1002 0803 and reference numbers L-037143990 and L-037143991, respectively, were mailed to "MAXWELL-WINSTON M," at the same Elizabeth, New Jersey, address listed on the subject notices of deficiency. The corresponding mailing cover sheets, attached to the Nagengast affidavit as "Exhibit B," bear these certified control numbers and petitioner's name and address as noted above.

11. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently Principal Mail and Supply Clerk in the Division's mail room, 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 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 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 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee affixed a postmark dated February 27, 2012 to each page of the CMR and initialed or signed on page 222. 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 writing the number "2431" on the last page of the CMR. The affixation of postmarks, the postal service employee's initials or signature, and the writing of the number indicating that all such pieces were received, confirm that the subject notices of deficiency dated February 27, 2012 were received by the USPS on that date.

12. Mr. Peltier's affidavit states that the CMR is the Division's record of receipt, by the USPS for 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.

13. According to both the Nagengast and Peltier affidavits, copies of the subject notices of deficiency were mailed to petitioner on February 27, 2012, as claimed.

14. Petitioner's 2010 New York State Nonresident and Part-Year Resident Income Tax Return electronically filed on or about April 11, 2011, reported petitioner's address as being located in Elizabeth, New Jersey 07201. This was the last return filed by petitioner prior to the

issuance of the subject notices of deficiency. This address corresponds to the address on the CMR and on the notices of deficiency that were issued to petitioner.

CONCLUSIONS OF LAW

A. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law § 681[b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) “if the time to petition for such hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner’s last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and date of mailing of the subject notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the

issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

C. In this case, the Division has introduced 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, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

D. The 222-page CMR provides sufficient documentary proof that the notices of deficiency dated February 27, 2012 were mailed by certified mail to petitioner at his last known address on February 27, 2012. Specifically, each page of this 222-page CMR listed certified control numbers with corresponding notice numbers, names and addresses and bore a USPS postmark dated February 27, 2012. A postal service employee handwrote the number “2431” below the heading “TOTAL PIECES RECEIVED AT POST OFFICE,” thereby indicating that all 2,431 pieces listed on the CMR were received at the post office. The notices addressed to petitioner were among the 2,431 pieces so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

E. The Division established that the notices of deficiency were mailed to petitioner’s last known address, being the same address as reported on petitioner’s 2010 New York State Nonresident and Part-Year Resident Income Tax Return, which was the last return filed with the Division before the subject notices of deficiency were issued (Tax Law § 681[a]; *see* Finding of Fact 14). It is concluded that the subject notices of deficiency were properly mailed and thus,

the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on February 27, 2012 (Tax Law §§ 170[3-a][a]; 681[b]).

F. The documents show that the notices of deficiency were mailed on February 27, 2012, but petitioner's protest (petition) was not mailed until July 27, 2012, a date well beyond the 90-day period, i.e., ended on May 29, 2012,² for protesting the two notices of deficiency.

Consequently, the Division of Tax Appeals has no jurisdiction over this matter and the petition must be dismissed. (*See Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late].)

G. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the disputed taxes and, within two years of payment, file a claim for refund (Tax Law § 687[a]). If the claim for refund is disallowed, petitioner may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowances (Tax Law §§ 689[c]; 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

H. The Division of Taxation's motion to dismiss is hereby granted, rendering its motion for summary determination moot, and the petition of Winston M. Maxwell is dismissed.

DATED: Albany, New York
July 7, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

² May 27, 2012 is the due date for a request for conciliation conference or petition as listed on each Notice of Deficiency. However, since May 27, 2012 was a Sunday, and Monday May 28, 2012 was a public holiday, Memorial Day, the petition or request for a conciliation conference was required to be filed on Tuesday, May 29, 2012 (*see* General Construction Law §§ 20, 24, 25-a; *Matter of American Express Co.*, Tax Appeals Tribunal, July 3, 1991).