

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MANE DUPLAN : **DETERMINATION**
for Redetermination of a Deficiency or for Refund of : **DTA NO. 826764**
New York State and New York City Personal Income Tax :
under Article 22 of the Tax Law and the New York City :
Administrative Code for the Year 2012. :
:

Petitioner, Mane Duplan, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2012.

On February 26, 2015, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). In response to a request for additional time, the parties were granted until May 14, 2015 to respond to the proposed dismissal. On March 11, 2015, petitioner, appearing by Ballon, Stoll, Bader and Nadler, P.C. (Norman R. Berkowitz, Esq., of counsel), submitted documents in opposition to dismissal. On May 11, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced May 14, 2015. After due consideration of the documents submitted, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. On January 23, 2015, petitioner, Mane Duplan, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Notice of Deficiency (notice number L-040811486), issued by the Division of Taxation (Division), dated April 22, 2014.

2. On February 26, 2015, Supervising Administrative Law Judge Daniel J. Ranalli of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent indicates that the relevant Notice of Deficiency was issued on April 22, 2014, but that the petition was not filed until January 23, 2015, or 276 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted, among other documents, (i) an affidavit of Leo Gabovich, a law clerk employed in the Office of Counsel of the Division, dated May 12, 2015; (ii) an affidavit, dated May 4, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 22, 2014; (iv) an affidavit, dated May 6, 2015, of Bruce Peltier, a Principal Mail and Supply Clerk in the Division's mail room; and (v) petitioner's 2012 Payment Voucher for Income Tax Returns (payment voucher) filed on October 15, 2013, which lists the same address for petitioner as that listed on the subject notice and the petition filed herein. The payment voucher was the last document filed with the Division by petitioner before the notice 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 page of the CMR in the present case to the actual mailing date of "4/22/14." 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 United States Postal Service (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 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 P.O. Address."

6. The CMR in the present matter consists of 38 pages and lists 416 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 38, which contains 9 entries. Ms. Nagengast 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 initialed or signed and affixed a postmark dated April 22, 2014 to each page of the CMR, and circled the preprinted number “416” on page 38 next to the heading “Total Pieces and Amounts.” Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 416.

7. Page 4 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0231 4545 and reference number L-040811486 was mailed to petitioner at the New York, New York, 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.

8. Page 4 of the CMR also indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0231 4569 and assessment ID number L-040811486 was sent to “Norman Berkowitz, Esq, 729 Seventh Ave, 17th Fl, New York, NY 10019.” An enclosure with the notice states that a copy of the notice was forwarded to Mr. Berkowitz because the Division’s records indicate that a power of attorney is on file for the tax matters at issue in the notice.

9. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply clerk, describes the mail room’s general operations and procedures. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. 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. Staff members then weigh, seal and place 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 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed or signed and affixed a postmark dated April 22, 2014 to each page of the CMR. The Center further requests that the USPS employee either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. Here, the USPS employee complied with this request by circling the number “416” on the last page next to the heading “Total Pieces and Amounts.”

10. According to the Peltier affidavit, a copy of the subject notice was mailed to petitioner on April 22, 2014, as claimed.

11. In response to the Notice of Intent to Dismiss Petition, petitioner submitted a letter alleging that the Division cannot sustain its burden of proving proper issuance of the Notice of Deficiency. No evidence was submitted to establish that the petition was otherwise timely filed.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a Notice of Deficiency (Tax Law §§ 681[b]; 689[b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

B. Where, as here, the timeliness of a taxpayer’s protest against a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a

presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). Where a notice of deficiency has been properly mailed, Tax Law § 681(a) does not require actual receipt by the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be 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).

D. Notwithstanding petitioner’s claims to the contrary, the Division has met its burden of establishing proper mailing. Specifically, the Division was required to mail the statutory notice to petitioner at his last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and 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, the Division has offered adequate proof to establish the fact that the notice at issue was actually mailed to petitioner at her last known address by certified mail on April 22, 2014, the date appearing on the CMR. The affidavits described the various stages of producing and mailing notices and attested to the authenticity and accuracy of the copy of the notice and the CMR submitted as evidence of actual mailing. These documents

established that the general mailing procedures described in the Nagengast and Peltier affidavits were followed with respect to the notice issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the notice, appear on the CMR, which bears a USPS date stamp of April 22, 2014. There are 416 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "416" on the line stating "Total Pieces and Amounts," that the post office received 416 items for mailing. In short, the Division established that it mailed the notice to petitioner by certified mail on April 22, 2014 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). Additionally, the Division established that the notice was mailed to petitioner's last known address, being the same address as that reported on petitioner's 2012 payment voucher, which was the last document filed with the Division before the subject notice was issued.

E. A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the notice was properly mailed when it was delivered into the custody of the USPS on April 22, 2014, and it is this date that commenced the 90-day period within which a protest had to have been filed. Petitioner's protest was not filed until January 23, 2015 or 276 days later. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. The petition of Mane Duplan is dismissed.

DATED: Albany, New York
August 6, 2015

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE