

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ISSOUF DIARRA	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 827436
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2014.	:	

Petitioner, Issouf Diarra, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2014.

On May 17, 2016, 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 August 1, 2016 to respond to the proposed dismissal. On June 29, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing pro se, did not file a response to the proposed dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced August 1, 2016. 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 12, 2016, the Division of Tax Appeals received a petition from petitioner, Issouf Diarra. The petition is dated November 17, 2015. The envelope containing the petition bears a United States Postal Service (USPS) postmark of January 8, 2016. Attached to the petition is a Response to Taxpayer Inquiry from the Division of Taxation (Division) dated October 6, 2015 that references notice number L-042694521-4. Petitioner did not attach a copy of a notice of deficiency or notice of determination to the petition.

2. By letter dated April 5, 2016, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals advised petitioner that the petition was not complete in that it did not include a copy of the statutory notice at issue in this matter. Although petitioner was instructed how to obtain a copy of the underlying statutory notice from the Division, petitioner did not provide a copy of the statutory notice being petitioned.

3. On May 17, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a Notice of Intent to Dismiss Petition proposing to the dismiss the petition on the ground that because petitioner did not submit a copy of the required statutory notice, the petition does not appear to have been timely filed.

4. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted, among other documents, (i) an affidavit of Christopher O'Brien, an attorney employed in the Office of Counsel of the Division, dated June 28, 2016; (ii) an affidavit, dated June 15, 2016, 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 Non-Presort Manual Mail - Assessments Receivable" (CMR) postmarked May 28, 2015; (iv) an affidavit, dated June 17, 2016, of Bruce Peltier, a stores and mail operations supervisor in the

Division's mail room; (v) a copy of petitioner's e-filed resident income tax return for the year 2014 that lists petitioner's New York, New York, address, which is the same address as that listed on the subject notice. The 2014 return was the last return filed with the Division by petitioner before the notice was issued; and (vi) a copy of the subject notice of deficiency and cover sheet.

5. 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 is manually changed on the first and last pages of the CMR, in this case to May 28, 2015. 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.

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 taxpayer 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."

7. The May 28, 2015 CMR consists of 28 pages and lists 306 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee initialed each page of the CMR, and affixed a USPS postmark dated May 28, 2015 to each page as well.

8. Page five of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0476 7097 and assessment number L-042694521 was mailed to petitioner at the New York, New York, address listed thereon. The corresponding mailing cover sheet for the notice bears this certified control number and petitioner's name and address as noted.

9. The CMR also reflects that two pieces of mail were pulled from the run, and these deletions are reflected in the change to the listing for the total pieces received at the post office. A piece of mail may be pulled for any number of reasons including, but not limited to, a discrepancy in a name or address. Any piece of mail so pulled is segregated from the remaining group of statutory notices for correction and issuance at another time. The specific pulled items appear on pages 11 and 18, and a line has been drawn through the entries on the CMR for these items to indicate that they were pulled from the run. There are no such lines drawn on or near the CMR listing pertaining to petitioner. The preprinted number "306," as appearing next to the heading "Total Pieces and Amounts" on the last page of the CMR was crossed out and replaced with the handwritten number "304" to reflect the two pieces pulled from the run.

10. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a stores and mail operations supervisor, 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 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. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a review of up to 30 pieces of the certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Once the review of the CMR and envelopes is completed, 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 the CMR and affixed a postmark dated May 28, 2015 to each page of the CMR. 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. A review of the CMR indicates that the USPS employee complied with this request by handwriting the number "304" as well as circling the same to indicate the number received.

11. According to the Peltier affidavit, the piece of certified mail addressed to petitioner at his New York, New York, address was delivered to the USPS in Albany, New York, in a sealed, postpaid, windowed envelope for delivery by certified mail on May 28, 2015.

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 the timeliness of a taxpayer's protest against a notice of deficiency is in question, the initial inquiry is on the mailing of the notice of deficiency 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. In this case, 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 (Tax Law § 681[a]; *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 statutory notices, the Division has offered adequate proof to establish the fact that the notice at issue was actually mailed to petitioner at his last known address by certified mail on May 28, 2015, 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 copies 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 May 28, 2015. There are 306 certified mail control numbers listed on the CMR, minus the two pieces of mail pulled, for a total of 304. The USPS employee who initialed the CMR indicated, by writing and circling the number "304" on the line stating "Total Pieces Received at Post Office," that the post office received 304 items for mailing. In short, the Division established that it mailed the notice to petitioner by certified mail on May 28, 2015 (*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 2014 resident income tax return, which was the last return 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 May 28, 2015, 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 8, 2016, or 225 days later. Accordingly, the Division of Tax Appeals does not have the jurisdiction to entertain the substantive issues presented in the petition.

F. The petition of Issouf Diarra is dismissed.

DATED: Albany, New York
October 20, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE