

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JESUS ABINADER	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 827457
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2014.	:	

Petitioner, Jesus Abinader, 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 April 8, 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 June 23, 2016 to respond to the proposed dismissal. On May 3, 2016, petitioner, appearing by Robert J. Fedor, Esq., submitted correspondence in opposition to dismissal. On June 2, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Alejandro Taylor, Esq., of counsel), 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 on June 23, 2016. After due consideration of the documents submitted, Barbara J. Russo, 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 19, 2016, petitioner, Jesus Abinader, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Notice of Deficiency (notice number L-043245432-5), issued by the Division of Taxation (Division) and dated June 26, 2015.

2. On April 8, 2016, the Petition Intake Unit 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 June 26, 2015, but that the petition was not filed until January 19, 2016, or 207 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 Alejandro Taylor, an attorney employed in the Office of Counsel of the Division, dated June 1, 2016; (ii) an affidavit, dated May 23, 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 June 26, 2015; (iv) an affidavit, dated May 31, 2016, of Bruce Peltier, a mail operations supervisor in the Division's mail room; (v) a copy of petitioner's e-filed Nonresident and Part-Year Resident Income Tax Return for the year 2014, filed jointly with Dieuwertje Abinader on April 15, 2015, which lists petitioner's address as 9913 Osprey Landing Dr., Orlando, Florida, 32832, which is the same address as that listed on the subject notice and (vi) a copy of the subject notice of deficiency and cover sheet. The 2014 return was the last return 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 page one of the CMR in the present case to the actual mailing date of "6/26/15." In addition, as described by Ms. Nagengast, the CMR for the block of statutory notices issued on June 26, 2015, including the notice issued to petitioner consists of one page. The page number on the CMR is noted in the upper right corner.

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 numbers are 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 one page and lists five certified control numbers along with corresponding assessment numbers, names and addresses. A portion of the CMR attached to Ms. Nagengast's affidavit has been redacted. The portion of the CMR relating to the notice at issue remains unredacted. A USPS representative affixed a postmark dated June 26, 2015 to the one-page CMR, circled the number "5" next to the heading "Total Pieces And

Amounts” and initialed the CMR. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was five.

7. The CMR indicates that a statutory notice with certified control number 7104 1002 9730 0489 1174 and reference number L-043245432 was mailed to “ABINADER - JESUS” at the 9913 Osprey Landing Drive, Orlando, Florida, 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 the name, “ABINADER - JESUS,” and address as noted.

8. 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 pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a review 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 United States Postal Service (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 June 26, 2015 to the CMR. 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. Here, the USPS employee complied with this request by circling the number “5” on the CMR next to the heading “Total Pieces And Amounts.”

9. According to the Peltier affidavit, the piece of certified mail addressed to petitioner at the Orlando, Florida address was delivered to the USPS in Albany, New York, in a sealed, postpaid, windowed envelope for delivery by certified mail on June 26, 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, as here, the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order 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 (*see 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 (*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 his last known address by certified mail on June 26, 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 June 26, 2015. There are five certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "5" on the line stating "Total Pieces And Amounts," that the post office received five items for mailing. In short, the Division established that it mailed the notice to petitioner by certified mail on June 26, 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 income tax return, which was the last return filed with the Division before the subject notice was issued. Although petitioner argues that the notice was mailed to the wrong address, petitioner has not presented any evidence to refute the documentary evidence presented by the Division showing that the Orlando, Florida, address appearing on the subject notice was the same address as that reported on petitioner's 2014 return.

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 June 26, 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 19, 2016, or 207 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. This determination, made pursuant to the Notice of Intent to Dismiss Petition and the evidence and arguments submitted by the parties, is the equivalent of an order in favor of the Division on a motion for summary determination for failure to timely file a petition, and precludes petitioner from having a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, 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. . . ."

Petitioner submitted no evidence that the petition was filed within the time frame required, i.e., within 90 days from the date the statutory notice was issued. Moreover, petitioner has failed to challenge the Division's proof of mailing of the notice with any evidence. The proper mailing of a statutory notice, as in the present matter, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002) and petitioner has failed to present any evidence to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

G. Without a timely filed petition, this agency does not have the jurisdiction to entertain the substantive issues presented in the petition. Therefore, it must be concluded that petitioner has failed to meet his burden of proof.

H. The petition of Jesus Abinader is dismissed.

DATED: Albany, New York
September 15, 2016

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE