

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SAHRAN HAMIT	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 827531
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Year 2011.	:	

Petitioner, Sahran Hamit, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2011.

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) on the basis that the petition did not appear to have been filed in a timely manner. By a letter dated May 2, 2016, the date by which the parties could file responses to the Notice of Intent to Dismiss was extended to June 23, 2016, which date commenced the 90-day period for issuance of this determination (20 NYCRR 3000.5[d]; 3000.9[a][4]). Petitioner, appearing pro se, did not submit a response to the Notice of Intent to Dismiss Petition. On June 7, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), submitted affidavits and other documents in support of dismissal. After due consideration of the documents and arguments submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Sahran Hamit, Notice of Deficiency L-043629214-1, dated October 27, 2015, which asserted a deficiency of personal income tax for the year 2011 in the amount of \$483.00, plus interest and penalty. The notice is addressed to “HAMIT-SAHRAN A, 3001 BRANCH AVE APT 334, TEMPLE HILLS, MD 20748-1031.” The mailing cover sheet of the Notice of Deficiency contains the certified control number 7104 1002 9730 0656 8944.

2. On March 3, 2016, the Division of Tax Appeals received a petition challenging the foregoing Notice of Deficiency. The petition lists petitioner’s address as “3001 Branch Ave, Apt 334, Temple Hills, NY [sic] 20748,” and is hand-dated as signed by petitioner on February 27, 2016. Petitioner’s return address is listed as “3001 Branch Ave, Apt 334, Temple Hills, MD 20785” on the envelope in which the petition was sent by First Class Mail; however, such envelope does not bear a U.S. Postal Service (USPS) postmark.

3. To show proof of proper mailing of the Notice of Deficiency dated October 27, 2015, the Division provided, among other documents, the following: (i) an affidavit of Mary Hurteau, Esq., the Division’s representative, dated June 6, 2016; (ii) the affidavit, dated May 27, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) the affidavit, dated May 31, 2016, of Bruce Peltier, Stores & Mail Operations Supervisor in the Division’s mail room; (iv) pages 1, 1,720 and 1,883 of a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked

October 27, 2015; (v) a copy of the petition; (vi) an affidavit, dated June 2, 2016, of Heidi Corina, Legal Assistant 2 in the Division's Office of Counsel and involved in making requests to the USPS for delivery information; (vii) Postal Service form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated June 2, 2016; and (viii) a copy of petitioner's address summary from the Division's e-MPIRE database.

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 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 "10/27." 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.

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 “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 relevant to the present matter consists of 1,883 pages and lists certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Nagengast notes that portions of the CMR that are attached to her affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated October 27, 2015 to each of the three pages of the CMR provided, handwrote “20706” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE” on page 1,883 of the CMR and initialed the same page.

7. Page 1,720 of the CMR indicates that Notice of Deficiency, assigned certified control number 7104 1002 9730 0656 8944 and reference number L-043629214 was mailed to “HAMIT-SAHRAN A” at the Temple Hills, Maryland, address listed thereon. 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. The affidavit of Bruce Peltier, a supervisor in the Division’s mail room since 1999 and currently Stores & Mail Operations Supervisor 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, each of the three pages provided contain such postmarks. 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 last page of the CMR. Here, the USPS employee complied with this request by writing the number "20706" on the last page of the CMR.

9. Attachment 4 to Ms. Hurteau's affidavit is a copy of petitioner's address summary from the Division's e-MPIRE database that shows the address of "3001 Branch Ave., Apt. 334, Temple Hills, MD 20748-1031" was updated via the USPS National Change of Address database effective October 10, 2015. This was petitioner's last known address prior to the issuance of the subject Notice of Deficiency.

10. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0656 8944 on October 27, 2015 from the Albany, New York, branch office of the USPS to petitioner at 3001 Branch Ave. Apt. 334, Temple Hills, MD 20748-1031. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 0656 8944 on

November 7, 2015, at 10:08 A.M., in Temple Hills, MD 20748. The scanned image of the recipient's signature as shown on the USPS response is "Sahran Hamit." The scanned address of the recipient indicates "3001 - 334 Branch"

CONCLUSIONS OF LAW

A. Where, as here, the timeliness of a taxpayer's petition following the issuance of a statutory notice is in question, the initial inquiry focuses 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; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 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). When a notice is found to have been properly mailed by the Division to a petitioner's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Malpica; see also Matter of Ruggerite, Inc. v. State Tax Commission*, 64 NY2d 688, 690 [1984]).

B. The affidavits of two Division employees, Mary Ellen Nagengast and Bruce Peltier, provide adequate proof of the Division's standard mailing procedure for the mailing of statutory notices by certified mail. The affidavits generally describe the various stages of producing and mailing notices. On the last page of the CMR, the number of pieces indicated as received has

been handwritten by a USPS employee. However, only 3 of the 1,883 pages of the CMR were submitted in evidence. The presence of the USPS postmark on the three pages of the CMR is insufficient to show that the items of mail listed were actually delivered to the USPS. Prior cases of the Tax Appeals Tribunal establish that the presence of a USPS postmark on a selected page of a longer certified mail record is not sufficient to prove that an item listed on that page was delivered to the USPS on the postmark date (*Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In *Matter of Roland* (Tax Appeals Tribunal, February 22, 1996), a USPS postmark appeared on each page of the certified mail record, including the page bearing the subject taxpayer's name and address. Nonetheless, the Division's proof was found inadequate to prove that the item of mail addressed to the taxpayer was actually delivered to the USPS. Delivery of a particular item listed in the certified mail record is proven when an employee of the USPS acknowledges receipt of the items listed by circling the total number of pieces received or writing the total number of pieces received, as requested by the Mail Processing Center. A USPS date stamp alone placed on one or more pages of the certified mail record is not sufficient (*see Matter of Cal-Al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998; *see also Matter of Roland*; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995). Therefore, it is concluded that the Division has not met its burden of establishing proper mailing of the notices.

C. In the present matter, however, the Division does not seek to establish the date of issuance of the statutory notices, but rather the date of receipt of the Notice of Deficiency by the taxpayer. Under such circumstances, that is, where the date of mailing is not established, the 90-day period for filing a petition or request for conciliation conference commences with the date of

actual notice to the taxpayer (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]).

D. Here, the record shows that petitioner received actual notice of the subject Notice of Deficiency on November 7, 2015. Specifically, the Nagengast and Peltier affidavits establish the Division's standard mailing procedure, including the assigning of a certified control number to the Notice of Deficiency, the listing of such certified control number on the mailing cover sheet as well as the CMR, and the inclusion of such mailing cover sheet along with the Notice of Deficiency in the windowed envelope for mailing. A review of the mailing cover sheet related to the Notice of Deficiency mailed to petitioner confirms that the certified control number listed thereon is consistent with the certified control number listed on the CMR and the USPS response to the Division's request for delivery information. The documentation provided to the Division by the USPS shows that an article of mail bearing such certified control number was delivered to petitioner's Temple Hills, Maryland, address on November 7, 2015. Petitioner thus received actual notice of the subject Notice of Deficiency on that date.

E. Petitioner's petition was filed on March 3, 2016, a date beyond 90 days from actual notice, i.e., 90 days ended on February 5, 2016. The request was therefore untimely filed (*see Matter of Hyatt Equities, LLC*; *see also* Tax Law §§ 689[b]; 170[3-a][a]). As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest of the Notice of Deficiency (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

F. The petition of Sahran Hamit is hereby dismissed.

DATED: Albany, New York
September 15, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE