

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PATRICK SCALZO : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 827557
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2011. :

Petitioner, Patrick Scalzo, filed a petition for redetermination of a deficiency or for refund New York State personal income tax under Article 22 of the Tax Law for the year 2011.

On June 27, 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 July 20, 2016, the date by which the parties could file responses to the Notice of Intent To Dismiss Petition was extended to September 12, 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 August 19, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, 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, Patrick Scalzo, Notice of Deficiency L-042286352-4, dated February 2, 2015, which asserted a deficiency of personal income tax for the year 2011 in the amount of \$369.00, plus interest. The notice is addressed to “SCALZO-PATRICK W 17 HIGH ST # 2 BINGHAMTON, NY 13903-1944.” The mailing cover sheet of the Notice of Deficiency contains the certified control number 7104 1002 9730 0386 4223.

2. On March 25, 2016, the Division of Tax Appeals received a petition challenging the foregoing Notice of Deficiency. The petition lists petitioner’s address as South East 14th Avenue, Ocala, Florida 34471 and is hand-dated as signed by petitioner on February 15, 2016. The envelope in which the petition was filed, by first class mail, bears a machine metered (Pitney Bowes) postmark dated March 8, 2016.

3. On June 27, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge, issued a Notice of Intent To Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the relevant Notice of Deficiency was issued on February 2, 2015, but the petition was not filed until March 8, 2016, or 400 days later.

4. In response to the Notice of Intent To Dismiss Petition, the Division provided, among other documents, the following: (i) an affidavit of Christopher O’Brien, Esq., the Division’s representative, dated August 18, 2016; (ii) the affidavit, dated August 15, 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 August 16, 2016, of Bruce Peltier, Stores and Mail Operations Supervisor in the Division's mail room; (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated February 2, 2015, together with a copy of the Notice of Deficiency referenced in Finding of Fact 1; and (v) a copy of petitioner's address summary from the Division's e-MPIRE database.

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 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 "2/2/15." 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 United States Postal Service (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.

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 numbers are 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.”

7. The February 2, 2015 CMR relevant to the Notice of Deficiency under protest consists of 143 pages and lists 1,568 computer-printed 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 143, which contains 6 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 2, 2015 of the Colonie Center, New York, branch of the USPS to each page of the CMR and wrote and circled the number “1568” on the last page of the CMR next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE.” The USPS employee also wrote his or her initials directly beneath the postmark dated February 2, 2015 on page 143 of the CMR.

8. Page 104 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0386 4223 and reference number L-042286352, was issued to “Scalzo-Patrick W,” at the Binghamton, New York, 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.

9. The affidavit of Bruce Peltier, a supervisor in the Division’s mail room since 1999, 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 and fee amounts on each envelope. The first and last pieces of mail 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 2, 2015 to each page of the CMR and wrote his or her initials on page 143. 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 circling and writing the number "1568" on the last page of the CMR next to "TOTAL PIECES RECEIVED AT POST OFFICE."

10. Attachment 4 to Mr. O'Brien's affidavit is a copy of a printout from the Division's e-MPIRE database that shows that petitioner's address of "17 High St. #2, Binghamton, NY 13903-1944" was updated via the USPS National Change of Address database effective December 20, 2014. This was petitioner's last known address prior to the issuance of the subject Notice of Deficiency.

11. Petitioner did not respond to the Notice of Intent To Dismiss Petition. The petition filed in this matter addresses the substantive merits of the Notice of Deficiency.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time* (Tax Appeals Tribunal, September 13, 2012) the Tribunal held that the standard to employ for reviewing a Notice of Intent To Dismiss Petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]).

C. 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]; 689[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). In this case, there is no claim or evidence that petitioner filed a request for a conciliation conference with BCMS. Thus, the question presented is whether the petition herein was filed within 90 days after the issuance of

the Notice of Deficiency.

D. Where, as here, the timeliness of a petition 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*).

E. The Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's last known address on February 2, 2015. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure, as well as the relevant CMR, and therefore establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, petitioner's address on the subject Notice of Deficiency, corresponding mailing cover sheet, and CMR all conform with the address on the USPS National Change of Address database. As such, the address used satisfies the “last known address” requirement. It is thus concluded that the Division properly mailed the Notice of Deficiency on February 2, 2015, and the statutory 90-day time limit to file either a Request for Conciliation Conference or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170[3-a][a]; 681[b]; 689[b]). It is noted that

petitioner has not raised an issue with respect to the address used by the Division.

F. The subject Notice of Deficiency was, as set forth above, properly mailed on February 2, 2015. However, the petition in this matter was not filed until March 8, 2016, or some 400 days later. The petition was thus not timely filed and as a consequence, the Division of Tax Appeals is without jurisdiction to provide a hearing to address the substantive merits of this Notice of Deficiency. Accordingly, the Notice of Intent To Dismiss Petition is sustained as to this Notice of Deficiency and the petition is dismissed with respect thereto.

G. The Notice of Intent To Dismiss Petition is sustained and the petition of Patrick Scalzo is dismissed.

DATED: Albany, New York
December 01, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE