

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RAPHAEL CARTY : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 827612
of New York State and New York City :
Personal Income Taxes under Article 22 of the :
Tax Law and the New York City Administrative :
Code for the Year 2011. :

Petitioner, Raphael Carty, 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 New York City Administrative Code for the year 2011.

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). On July 15, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), having been granted an extension to do so, submitted documents in support of dismissal. On August 25, 2016 and on September 12, 2016, petitioner, appearing pro se, responded in opposition to the Notice of Intent to Dismiss Petition. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination began on September 12, 2016. After due consideration of the documents submitted in response to the Notice of Intent to Dismiss Petition, and all pleadings and proceedings had herein, Dennis M. Galliher, 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. Petitioner, Raphael Carty, filed a petition with the Division of Tax Appeals. The petition was mailed by United States Postal Service (USPS) priority express mail, and the envelope in which the petition was mailed bears a USPS postmark dated May 2, 2016. The petition and envelope are date stamped as received by the Division of Tax Appeals on May 5, 2016. Petitioner lists his address on the petition as “225 W. 12th Street, 3 C, NY, NY, 10011.”

2. The petition (at item five thereof) specifically identifies the notice at issue as “Assessment ID # L-043631770-6,” and further indicates (at item seven thereof) that a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) was not requested.

3. Attached to the petition was a Notice of Deficiency, dated October 27, 2015, bearing assessment ID L-043631770-6, and addressed to petitioner at the above-noted New York City address. This notice asserts additional personal income tax due for the year 2011 in the amount of \$5,546.00, plus interest and penalty.

4. 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. The Notice of Intent to Dismiss Petition indicates that the subject petition was filed in protest of a Notice of Deficiency, Assessment No. L-043631770-6, issued to petitioner on October 27, 2015, that the petition was not filed until May 2, 2016, or some 181 days later, and was therefore untimely and subject to dismissal.

5. In order to prove mailing and delivery of the foregoing Notice of Deficiency to petitioner on October 27, 2015, the Division of Taxation (Division) provided the following documents: (i) an affidavit, dated July 12, 2016 of Mary Hurteau, Esq.; (ii) an affidavit, dated June 24, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated June 28, 2016, of Bruce Peltier, a Stores and Operations Supervisor and a supervisor in the Division's mail room; (iv) pages "1," "131," and "1,883" of a "Certified Record for Presort Mail - Assessments Receivable" (CMR); (v) a copy of the Notice of Deficiency dated October 27, 2015 together with its associated mailing cover sheet; (vi) a copy of petitioner's address summary from the Division's e-MPIRE database showing the petitioner's address as updated via the USPS National Change of Address database effective December 20, 2014 and assertedly representing petitioner's last known address prior to issuance of the Notice of Deficiency at issue; (vii) an affidavit, dated June 28, 2016, of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel; and (viii) a USPS Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the response thereto.

6. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of deficiency such as that at issue herein, and other such notices during the period here in question, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page "Mailing Cover Sheet" (Form DTF-997) generated for each such notice, and that sheet bears a bar code, the taxpayer's mailing address and a

departmental return address on the front, and taxpayer assistance information on the back.

CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit with the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

7. The CARTS-generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first columnar heading entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading, entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third columnar heading entitled "Name of Addressee, Street and PO Address." Remaining columnar headings list appropriate postage and fee amounts. Each certified mail record and associated batch of statutory notices are forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded together when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

8. As noted, each statutory notice is predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. This CMR listing specifically sets forth, at the upper left corner of the CMR, the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room

to reflect that the preprinted date on the CMR conforms to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

9. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the Division's mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. 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, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is delivered back to the Division for storage and retention in the regular course of its business.

10. The CMR for the batch of notices to be issued on October 2, 2015, including the notice addressed to petitioner, allegedly consists of 1,883 cut sheet pages. However, the

Division's submission in response to the Notice of Intent to Dismiss Petition includes only pages "1," "131," and "1,883." Each of the pages provided includes, in its upper left corner, the preprinted year/day/time "run" listing of "20152931700" (*see* Finding of Fact 8). Appearing in the upper right corner of the CMR on pages numbered "1" and "1,883" is the handwritten date "10/27," indicating the manually inserted date of actual mailing (*see* Finding of Fact 8). Each of the three CMR pages submitted includes a legible USPS postmark of the Albany, New York USPS General Mail Faculty, dated October 27, 2015 and listing zip code "12212." Pages "1" and "131" of the CMR include 11 entries for pieces of mail, while page "1,883" (the final page), includes 4 entries for pieces of mail.

11. In this instance, certified control number 7104 1002 9730 0639 4154 was assigned to the reference (i.e., assessment) number L-043631770, and was to be mailed to petitioner, Raphael Carty at 225 W 12th St., Apt 3 C, New York, NY, 10011-7759. This information appears on the Notice of Deficiency and on the cover sheet associated therewith, and also appears at page 131 of the CMR.¹

12. Appearing below the four entries on page 1,883 of the CMR is the preprinted heading "Total Pieces and Amounts," to the right of which appear preprinted columns headed "Pieces," "Postage," and "Fees." These columns reflect the preprinted number of pieces of mail for this CMR, here 20,706, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading "Total Pieces Received At Post Office," to the right of which the number 20,706 is handwritten. Appearing at the lower right area of page 1,883 is a stamped box bearing the instruction "POST OFFICE Hand write total # of pieces and initial. Do

¹ The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

Not stamp over written areas.” The area immediately above and to the right of this stamped instruction reflects the aforementioned October 27, 2015 USPS postmark as well as initials affixed by the postal clerk.

13. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division’s MAPS Bureau, and Bruce Peltier, an employee and Supervisor in the Division’s mail room (*see* Finding of Fact 5), and upon review of the three CMR pages submitted by the Division. Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as that at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

14. The record includes a copy of the Notice of Deficiency allegedly mailed by certified mail to petitioner, Raphael Carty, on October 27, 2015, as described. The record also includes a one-page Division “e-MPIRE” database document, dated June 2, 2014, listing petitioner’s name, taxpayer identification number, and mailing address as “225 W 12th St Apt 3 C, New York, NY, 10011-7759.” This document is described, in the Hurteau affidavit, as “petitioner’s address summary from the Division’s e-MPIRE database [showing petitioner’s address] as updated via the United States Postal Service National Change of Address database effective December 20, 2014.” This document lists some eight prior addresses for petitioner, and reflects the above-noted address “usage” as “personal income tax,” “current,” “phys. & mail,” and as having an “effective date/time stamp” of “12/20/2014 at “16:42:48.” The record includes no other information or explanation concerning the document. The specified address, however, consistently appears on the notice, the cover letter, the CMR at page 131, and the petition.

15. The affidavit of Heidi Corina, a legal assistant in the Division's office of counsel, details her preparation and filing of a USPS form 3811-A with respect to the Notice of Deficiency at issue in this matter. Filing USPS form 3811-A commences a process by which post-mailing return receipt delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, the form 3811-A sought such information for the item mailed by the Division, under the certified mail number listed above (7104 1002 9730 0639 4154; *see* Finding of Fact 11), on October 27, 2015 from the Albany, New York, USPS General Mail Facility, 30 Old Karner Rd., Albany, NY 12288, to petitioner at his above-listed address. In response, the USPS confirmed delivery of the specified item of certified mail in question to petitioner at the specified address on October 30, 2015 at 1:16 p.m., and included the scanned signature image and hand-printed address (225 W. 12th, NY, NY 10011) of the recipient.

16. Petitioner responded to the Notice of Intent to Dismiss Petition by letters dated August 22, 2016 and September 12, 2016. Petitioner does not dispute his receipt of the subject notice, but rather maintains that the necessity of addressing serious personal medical issues left him unable to respond to the Notice of Deficiency within 90 days of its issuance.

CONCLUSIONS OF LAW

A. This matter proceeds by way of a Notice of Intent to Dismiss Petition upon the premise that the petition was not filed within 90 days after issuance of the relevant statutory document giving rise to the right to a hearing, i.e., the Notice of Deficiency. In ***Matter of Victory Bagel Time, Inc.***, (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 may 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 a notice (Tax Law §§ 681[b]; 2006[4] [Tax Appeals Tribunal is authorized “(t)o provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter”]). Alternatively, a taxpayer may protest a notice of deficiency by filing a request for a conciliation conference with the Division of Taxation’s 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 statutory time limits for filing either a petition or a request for a conciliation conference are 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 statutory notice, to which protest rights attach, becomes fixed and final, and consequently, BCMS and the Division of Tax Appeals are without jurisdiction to consider the substantive merits of the protest (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. It is well settled that where the timeliness of a taxpayer’s protest is at issue, the initial inquiry is whether the Division has given proper notice to the taxpayer. Specifically, the question presented is whether the Division has carried its burden of demonstrating the fact and date of

proper mailing of the notice being protested (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, November 25, 1992). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*). In the case of a notice of deficiency, proper mailing requires mailing of the notice by registered or certified mail (Tax Law § 681 [a]), and it is the Division's initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured.

E. The Division may meet its burden of proving proper mailing by providing 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). The mailing evidence is two-fold, and 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 notices 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*).

F. In this case, the Division has offered proof sufficient to establish its standard mailing procedure, specifically via the Nagengast and Peltier affidavits (*see Findings of Fact 6 through 9, 13*). However, the submission of a partial (or truncated) CMR, as here, is not sufficient to establish that the Division's standard mailing procedure was followed (*see Matter of Ankh-Ka-Ra Sma-Ntr f/k/a Andre Williams*, Tax Appeals Tribunal, April 14, 2016; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Hence, the proof submitted fails to establish that the Notice of

Deficiency was properly mailed, as claimed, on October 27, 2015, and thus the period within which a protest could be filed was not triggered as of such date.

G. Consideration of this matter does not end with the foregoing. That is, an inadequacy in the evidence of mailing, as above, may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing, the 90-day period for filing either a request or a petition is tolled until such time as the taxpayer actually receives the notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest will commence (*Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

H. Notwithstanding the described evidentiary failure with regard to mailing, the Division has nonetheless established, via the Corina affidavit and the accompanying USPS form 3811-A and USPS response thereto, that the notice was mailed by certified mail and was, in fact, thereafter delivered to and accepted by petitioner on October 30, 2015 (*see* Finding of Fact 15). As a result, the period within which to challenge the Notice of Deficiency commenced to run on the October 30, 2015 date of such actual receipt, and in order to be timely, a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, had to have been filed within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York; Matter of Rosen*). In turn, 90 days after the October 30, 2015 date of actual receipt of the notice was January 28, 2016, and in order to be considered timely, petitioner's protest had to

have been filed on or before such date. Here, the petition was not filed until May 2, 2016 (*see* Finding of Fact 1), a date that falls beyond the statutory period within which a timely protest had to have been filed. Unfortunately, as a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*Matter of Modica; Matter of Luckacs; Matter of Sak Smoke Shop*).

I. The petition of Raphael Carty is hereby dismissed.²

DATED: Albany, New York
December 8, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

² Petitioner may not be entirely without recourse in this matter. That is, petitioner may pay the disputed amounts of tax sought by the Division and thereafter file a claim for refund of such amount paid. If such claim for refund is denied, petitioner may then proceed with a timely petition for a hearing to contest the refund denial.