

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CRYSTAL L. STEVERSON : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 827621
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, Crystal L. Steverson, 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 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 August 19, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), having been granted an extension to do so, submitted documents in support of dismissal. On August 25, 2016, petitioner, appearing by Waverly Lane, Jr., EA, 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 22, 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 her petition with the Division of Tax Appeals following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. Petitioner, Crystal L. Steverson, filed a petition with the Division of Tax Appeals. The petition was mailed by United States Postal Service (USPS) first class mail, and the envelope in which the petition was mailed bears a USPS postmark dated May 9, 2016. The petition and envelope are date stamped as received by the Division of Tax Appeals on May 11, 2016.

Petitioner lists her address on the petition as 1925 Harrison Avenue, Apt. #4H, Bronx, NY, 10453-4547.

2. The petition (at item five thereof) specifically identifies the notice at issue as “Assessment No. ID # L-042479244-3,” and in addition to briefly stating the substantive basis upon which the petition was filed, further indicates (at item seven thereof) that a conciliation conference was not requested.

3. Attached to the petition was a Notice of Deficiency, dated March 25, 2015, bearing assessment No. ID L-042479244-3, and addressed to petitioner at the above-noted Bronx address. This notice asserts additional New York State and New York City personal income tax due for the year 2011 in the amount of \$4,242.00, plus interest.

4. On June 27, 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. ID L-042479244-3, issued to petitioner on March 25, 2015, that the petition was not filed until May 9, 2016, or some 411 days later, and was therefore untimely. As

a result, according to the Notice of Intent to Dismiss Petition, the Division of Tax Appeals lacked jurisdiction to consider the merits of the petition.

5. In order to prove mailing of the foregoing Notice of Deficiency to petitioner on March 25, 2015, the Division of Taxation (Division) provided the following documents: (i) an affidavit, dated August 18, 2016, of Christopher O'Brien, Esq.; (ii) an affidavit, dated August 15, 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 August 16, 2016, of Bruce Peltier, a stores and mail operations supervisor and a supervisor in the Division's mail room; (iv) the 75-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (v) a copy of the Notice of Deficiency dated March 25, 2015 together with its associated mailing cover sheet; and (vi) a copy of petitioner's e-filed Form IT-201 (Resident Income Tax Return) for the year 2013, filed on February 27, 2014.

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 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" 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 P.O. 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 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 March 25, 2015, including the notice addressed to petitioner, consists of 75 cut sheet pages. Each of these pages includes in its upper left corner the preprinted year/day/time "run" listing of "20150771700" (*see* Finding of Fact 8). Appearing in the upper right corner of the CMR on pages 1 and 75 is the handwritten date

“3/25/15,” indicating the manually inserted date of actual mailing (*see* Finding of Fact 8). Each of the foregoing 75 pages includes a legible USPS postmark of the Colonie Center Postal Service branch office, dated March 25, 2015 and listing zip code “12205,” and each such postmark has been initialed. Each page of the CMR includes 11 entries for pieces of mail, except for page 75 (the final page), which includes 2 entries for pieces of mail, thus resulting in 816 entries for pieces of mail in total.

11. In this instance, certified control number 7104 1002 9730 0438 3020 was assigned to the reference (i.e., assessment) number L-042479244, and was to be mailed to petitioner, Crystal L. Steverson, at 1925 Harrison Ave, Apt. 4H, Bronx, NY, 10453-4547. This information appears on the Notice of Deficiency and on the cover sheet associated therewith, and also appears at page 13 of the CMR.¹

12. Appearing below the two entries on page 75 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 816, 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 816 is handwritten and circled. Appearing at the lower right area of page 75 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately below this stamped instruction reflects the aforementioned March 25, 2015 USPS postmark as well as initials affixed by the postal clerk.

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.

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). 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, Crystal L Steverson, on March 25, 2015, as described. The record also includes petitioner's New York State Resident Income Tax Return (Form IT-201) as e-filed for the year 2013 on February 27, 2014 (*see* Finding of Fact 5). This return was the last return filed by petitioner prior to the date of issuance of the notice at issue, and it lists petitioner's address as 1925 Harrison Ave., Apt. 4H, Bronx, NY, 10453-4547. This address consistently appears on the notice, the cover letter, the CMR and the petition.

15. Petitioner responded to the Notice of Intent to Dismiss Petition by a letter from her representative, Waverly Lane, Jr., EA, dated August 25, 2016, in which petitioner denies having received the Notice of Deficiency at her mailing address and claims she was unaware of the same.²

² The record includes a power of attorney form appointing Waverly Lane, Jr., EA, as petitioner's representative in this matter. This power of attorney was executed on April 18, 2016, i.e., well after the claimed date of issuance of the Notice of Deficiency at issue herein.

CONCLUSIONS OF LAW

- A. 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 a 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 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, May 23, 1991). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*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 required 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 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*).

F. The Division has offered proof sufficient to establish that the Notice of Deficiency at issue here (L-042479244-3) was properly mailed to petitioner's last known address on March 25, 2015 (*see* Findings of Fact 6 through 14). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR, and thereby

establish the Division's general mailing procedure and the fact that the same was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). 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). Further, the address on the Mailing Cover Sheet and CMR conforms with petitioner's last known address immediately prior to mailing of the notice, and thus satisfies the "last known address" requirement (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008).

G. The notice was properly mailed when it was delivered into the custody of the USPS on March 25, 2015, properly addressed and with the requisite amount of postage affixed, and it is this date which commenced the 90-day period within which a protest against the notice had to have been filed. In fact, the cover letter that accompanied the notice, together with the notice itself, apprised petitioner of the 90-day time frame for filing either a request for a conference with BCMS or a petition with the Division of Tax Appeals following issuance of the notice. Further, and with regard to petitioner's allegation of nonreceipt of the notice (*see* Finding of Fact 15), where a notice of deficiency has been properly mailed, Tax Law § 681(b) does not require actual receipt of the notice by the taxpayer. Rather, that section provides that a notice of deficiency is binding unless the same is challenged within 90 days after the notice is issued. Issuance in this context means mailing (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, September 12, 1991). The 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing of the Notice of Deficiency, i.e., on March 25, 2015, and petitioner's alleged nonreceipt of such notice does not act to toll the statute (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014).

H. In sum, the Division has established that Notice of Deficiency L-042479244-3 was properly mailed as addressed to petitioner at her last known address on March 25, 2015. Having established that the Notice of Deficiency was properly mailed to petitioner, it was incumbent upon petitioner to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter. Petitioner did not file a Request for Conciliation Conference with BCMS, but rather opted to file a petition for a hearing before the Division of Tax Appeals in the first instance. However, the petition was not filed until May 9, 2016, a date that falls far beyond 90 days after the date of issuance of the notice. Accordingly, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*).

I. The petition of Crystal L. Steverson is hereby dismissed.

DATED: Albany, New York
December 15, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE