

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TERRY MELTZER : DETERMINATION
 : DTA NO. 827669
for Redetermination of a Deficiency or for Refund of :
New York State and New York City Personal Income :
Tax under Article 22 of the Tax Law and the New :
York City Administrative Code for the Years 2008, :
2013, and 2014. :
:

Petitioner, Terry Meltzer, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 2008, 2013, and 2014.

On October 4, 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 grounds that the petition did not appear to be timely with respect to the three of the four statutory notices being petitioned and that the Division of Tax Appeals lacked jurisdiction to hear the merits of the fourth notice being petitioned. By request of the Division of Taxation, the 30-day period to respond to the Notice of Intent to Dismiss Petition was extended to December 19, 2016. On November 30, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), submitted an affidavit, together with other affidavits and accompanying documents in support of dismissal of three of the notices. Petitioner, appearing pro se, failed to file a timely response to the Notice of

Intent to Dismiss Petition.¹ Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on December 19, 2017. After due consideration of the documents and arguments submitted, and all pleadings filed, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction over a notice and demand for payment of tax due.

II. Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of certain notices of deficiency.

FINDINGS OF FACT

1. On June 8, 2016, the Division of Tax Appeals received a petition from petitioner, Terry Meltzer, which protested the following notices:

Notice #	Notice type	Tax Year	Notice Date
L-037367450	Deficiency	2008	3/7/12
L-041205489	Deficiency	2012	7/1/14
L-042621729	Deficiency	2013	5/12/15
L-043934665	Demand	2014	11/16/15

2. The petition is dated June 5, 2016, and signed by petitioner. The envelope in which the petition was delivered bears a United States Postal Service (USPS) postmark of June 7, 2016.

3. The petition alleges that the amounts asserted in the notices were incorrectly calculated and that the Division of Taxation (Division) improperly applied payments previously made by

¹ Petitioner filed a response on January 9, 2017. Since the response was late filed, it has not been considered in the rendering of this determination.

petitioner.

4. On October 4, 2016, Daniel J. Ranalli, then- 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 indicated that the subject petition was filed in protest of three notices of deficiency issued to petitioner more than 90 days prior to the petition being filed in this matter and that the Division of Tax Appeals lacks jurisdiction to hear petitioner's challenge to the fourth notice, a notice and demand.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division indicated that petitioner was statutorily prohibited from filing a petition on a notice and demand and that it was only seeking to establish the timeliness of notices L-037367450 and L-042621729 and offered no proof with respect to notice L-041205489.²

6. To show proof of proper mailing of Notice of Deficiency L-037367450, the Division provided the following: (i) an affidavit, dated November 2, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked March 7, 2012; (iii) an affidavit, dated November 4, 2016, of Bruce Peltier, a supervisor in the Division's mail room; and (iv) a copy of petitioner's IT-201 resident income tax return for the year 2009 that lists petitioner's Bayside, New York, address, which is the same address as that listed on the subject notice.³ According to the affidavit of Mary Hurteau, this

² By letter dated December 2, 2016, the Division of Tax Appeals informed petitioner that the October 4, 2016 Notice of Intent to Dismiss Petition was rescinded as to notice L-041205489. Petitioner's challenge to L-041205489 has been severed, assigned DTA# 827694, and is not the subject of the determination herein.

³ Petitioner filed a joint return with her late husband, Bernard Meltzer, for the 2009 tax year.

address was the last known address for petitioner prior to this notice being issued.

7. To show proof of proper mailing of Notice of Deficiency L-042621729, dated May 12, 2015, the Division provided the following: (i) a second affidavit, dated November 2, 2016, of Mary Ellen Nagengast; (ii) a CMR postmarked May 12, 2015; (iii) a second affidavit, dated November 4, 2016, of Bruce Peltier; (iv) an affidavit, dated November 9, 2016, of Heidi Corina, a Legal Assistant II in the Division's Office of Counsel; and (v) a copy of petitioner's IT-201 resident income tax return for the year 2013 that lists petitioner's Bellerose, New York, address, which is the same address as that listed on the subject notice.⁴ According to the affidavit of Mary Hurteau, this address was the last known address for petitioner prior to this notice being issued.

8. The affidavits of Mary Ellen Nagengast, who has been in her current position since October 2005, set 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 is manually changed on the first and last pages of the CMR. In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1,"

⁴ Petitioner filed a joint return with her late husband, Bernard Meltzer, for the 2013 tax year.

and are noted in the upper right corner of each page.

9. 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 Division's 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 PO Address."

10. The March 7, 2012 CMR consists of 25 pages and lists 264 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated March 7, 2012 to each page of the CMR. Page 11 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 1009 2039 and assessment number L-037367450, was mailed to Bernard Meltzer at the Bayside, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and Bernard Meltzer and petitioner's names and address as noted.

11. The May 12, 2015 CMR consists of 27 pages and lists 292 certified control numbers, along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated May 12, 2015 to each page of the CMR. Page 17 of the CMR indicates that a Notice of Deficiency, assigned certified

control number 7104 1002 9730 0458 0153 and assessment number L-042621729, was mailed to Bernard Meltzer at the Bellerose, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and Bernard Meltzer's and petitioner's name and address as noted.

12. Each of the affidavits 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 retrieves the notices and mailing cover sheets and 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. 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 the information contained on the CMR. Each of the CMRs has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." 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. In this case, the USPS employee affixed a postmark to each page of the respective CMR. The last page of the March 7, 2012 CMR is initialed while all pages of the May 12, 2015 CMR have been initialed. 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. A review of the March 7, 2012 and May 12, 2015 CMRs indicate that the

USPS employee complied with this request by writing and circling the number of pieces received.

13. According to the Peltier affidavits, copies of the respective notices were mailed on the dates indicated as claimed. Mr. Peltier notes that the names of both petitioner and her late spouse Bernard Meltzer and their address would have been displayed in the window of the envelope containing the respective statutory notice, and notes that the CMRs only list the name of petitioner's late spouse. Mr. Peltier explains that only Mr. Meltzer's name is listed on the CMRs because it is standard procedure for the CMR to contain only the name of the primary taxpayer associated with the statutory notice. Since petitioner filed joint returns with her husband, and his social security number is listed in the place designated for the primary taxpayer, only his name appears on each of the CMRs.

14. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the May 12, 2015 Notice of Deficiency (L-042621729) addressed to Bernard Meltzer and Terry Meltzer. Specifically, using PS Form 3811-A, the Division requested delivery information for the article of mail bearing certified control number 7104 1002 9730 0458 0153 addressed to the Meltzers as detailed in Finding of Fact 11. The USPS response to this request indicates that the notice was delivered on May 14, 2015 to petitioner's address in Bellerose, New York.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is a forum of limited jurisdiction (Tax Law § 2008; ***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom New York State Department of Taxation and Fin. v. Tax Appeals Tribunal***, 151 Misc 2d 326 [Sup

Ct, Albany County 1991, Keniry, J.]). Its power to adjudicate disputes is exclusively statutory (*id.* at 332). The Tax Appeals Tribunal has the power to provide a hearing as a matter of right to any petitioner pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal, unless a right to a hearing is specifically provided for, modified or denied by another provision of law (*see* Tax Law § 2006 [4]).

B. A proceeding in the Division of Tax Appeals is commenced by filing a petition “protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund . . . or any other notice which gives a person the right to a hearing” (Tax Law § 2008[1]).

C. In this case, one of the notices petitioner has petitioned, notice L-043934665, is a notice and demand. Tax Law § 173-a , applying to notices and demands and notices of additional tax due, specifically provides that a taxpayer shall not be entitled to a hearing before the Division of Tax Appeals with respect to either of such notices. Accordingly, the petition is dismissed as to this notice.

D. Next, addressing the timeliness of petitioner’s challenge to the Notices of Deficiency numbered notices L-037367450 and L-042621729, there is a 90-day statutory time limit for filing a petition following the issuance of such (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).

E. Where the timeliness of a taxpayer’s protest against a notice is in question, the initial inquiry is 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). 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). 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).

F. 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).

G. The Division has met its burden of establishing proper mailing. Specifically, the Division was required to mail the statutory notices to petitioner at her last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMRs 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 notices at issue were actually mailed to petitioner at her last known address by certified mail on March 7, 2012 and May 12, 2015, respectively, the dates appearing on the respective CMRs. The affidavits described the various stages of producing and mailing notices and attested to the authenticity and accuracy of the copies of the notices and the CMRs 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 notices issued to petitioner. In short, the Division established that it mailed the notices to petitioner by certified mail on March 7, 2012 and May 12, 2015 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).⁵

H. 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 (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the notices were properly mailed when they were delivered into the custody of the USPS on March 7, 2012 and May 12, 2015, respectively.

I. Since the petition was not filed until June 7, 2016, or well in excess of 90 days from the issuance of notices of deficiency L-037367450 and L-042621729, the petition is untimely and the Division of Tax Appeals is without jurisdiction to provide a hearing to address the merits of these notices.

J. The petition of Terry Meltzer is hereby dismissed.

DATED: Albany, New York
March 16, 2017

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE

⁵It should also be noted that the Division, through the affidavit of Heidi Corina, also conclusively established delivery of the May 12, 2015 Notice of Deficiency.