

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SYLVESTER L. TUOHY : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 827853
of New York State Personal Income Tax under :
Article 22 of the Tax Law for the Year 2012. :

Petitioner, Sylvester L. Tuohy, filed a petition for redetermination of a deficiency or for a refund of New York State personal income tax under Article 22 of the Tax Law for the year 2012.

On October 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). In response to a request for additional time, the parties were granted until January 12, 2017 to respond to the proposed dismissal. On November 7, 2016, November 23, 2016 and January 5, 2017, petitioner, appearing pro se, submitted correspondence in opposition to dismissal. On December 30, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced January 12, 2017. After due consideration of the documents submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition following the issuance of a notice of deficiency.

FINDINGS OF FACT

1. On September 13, 2016, petitioner, Sylvester L. Tuohy, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Notice of Deficiency (notice

number L-044280631-6), issued by the Division of Taxation (Division), dated April 4, 2016.¹

2. On October 27, 2016, the Petition Intake Unit of the Division of Tax Appeals issued a notice of intent to dismiss petition (Notice of Intent) to petitioner. The Notice of Intent indicates that the relevant Notice of Deficiency was issued on April 4, 2016, but that the petition was not filed until September 13, 2016, or 162 days later.

3. In response to the Notice of Intent and to prove mailing of the Notice of Deficiency under protest, the Division submitted, among other documents, the following: (i) an affidavit of Christopher O'Brien, Esq., an attorney employed in the Office of Counsel of the Division, dated December 29, 2016; (ii) an affidavit, dated December 21, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) three pages of a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 4, 2016; (iv) an affidavit, dated December 28, 2016, of Melissa Kate Koslow, a supervisor in the Division's mail room; (v) an affidavit, dated December 28, 2016, of Heidi Corina, Legal Assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (vi) a Postal Service Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated December 1, 2016; (vii) a copy of the April 4, 2016 Notice of Deficiency with the associated mailing cover sheet; and (viii) a copy of petitioner's nonresident and part-year resident income tax return for the year 2014, dated April 11, 2015, and filed jointly with Yongjie Tuohy, which lists their address as 138 Twelfth Street, Cresskill, New Jersey, which is the same address as that listed on the subject notice.² The 2014 return was the

¹ The subject Notice of Deficiency was issued to both petitioner and petitioner's spouse, Yongjie Tuohy. The petition in this matter was filed by petitioner, Sylvester L. Tuohy, only.

² It is noted that the return lists petitioner's address as "Twelfth St" while the notice lists the address as "12 TH St."

last return filed with the Division by petitioner before the Notice of Deficiency was issued.

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 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 was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of "4/4/16." 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," 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 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."

6. According to the Nagengast affidavit, the CMR in the present matter consists of 291 pages. Ms. Nagengast notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She states that the USPS representative affixed a postmark to each page of the CMR, wrote and circled the number “3199” on page 291, and initialed or signed page 291. She adds that the total number of statutory notices mailed pursuant to the CMR was 3,199.

7. Attached to the Nagengast affidavit, as exhibit “A,” are copies of pages 1, 15 and 291 of the CMR. Pages 1 and 291 have a handwritten entry of “4/4/16” in the top right corner; however, page 15 does not have a similar entry.

8. Page 15 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0811 2039 and assessment ID number L-044280631 was mailed to petitioner at the Cresskill, New Jersey, address listed on the subject Notice of Deficiency. 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 Melissa Kate Koslow describes the Division’s mail room’s general operations and procedures. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Koslow confirms that a mailing cover sheet precedes each notice. A staff member receives 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 of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces of mail listed on the CMR, by checking those envelopes against the information listed 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 signature on the CMR, indicating receipt by the post office. 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. Pages 1, 15, and 291 of the CMR in exhibit "A" of the Nagengast affidavit each contain a USPS postmark of April 4, 2016. On page 291, corresponding to "Total Pieces and Amounts," is the preprinted number 3,199 and next to "Total Pieces Received At Post Office" is the handwritten entry "3199." There is a set of initials or a signature on page 291.

10. According to both the Nagengast and Koslow affidavits, a copy of the subject notice was mailed to petitioner on April 4, 2016, as claimed.

11. The affidavit of Heidi Corina describes the Division's requests to the USPS for delivery information on the subject Notice of Deficiency. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 0811 2039. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 0811 2039 and addressed to petitioner was delivered as addressed on April 6, 2016. Attached to the Corina affidavit as exhibit "A" is the Division's "Request For Delivery Information" for article number 7104 1002 9730 0811 2039. Exhibit "B" to the Corina affidavit is the USPS response to the Division's request indicating delivery of the same article on April 6, 2016 to "138 12TH" in "Cresskill, NJ 07626."

12. In petitioner's response to the Notice of Intent, he admitted receipt of the subject Notice of Deficiency.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a Notice of Deficiency (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).

B. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order 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 (*see 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).

C. 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).

D. Here, the Nagengast and Koslow affidavits establish the Division's standard mailing procedure. These affidavits and their exhibits, however, do not demonstrate that such procedures were followed in this case. Most importantly, a properly completed CMR is missing from the record. Exhibit "A" of the Nagengast affidavit contains three pages of an admittedly longer multi-page computer-generated CMR. Moreover, unlike in the procedure described in the Nagengast affidavit, the three pages in exhibit "A" are not physically connected and the pages are not consecutively numbered. For these reasons, the partial CMR submitted as exhibit "A" of the Nagengast affidavit does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

E. Such a flaw may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence of receipt in this matter. Specifically, the Corina affidavit, and the USPS delivery information accompanying it show that a copy of the notice at issue, addressed to petitioner and also listed on the CMR, was delivered as addressed on April 6, 2016. Furthermore, petitioner admits receipt of the notice. This additional evidence establishes the fact of receipt of the subject notice, as claimed, on April 6, 2016 (*see Matter of Winner's Garage, Inc.*, Tax Appeals Tribunal, May 20, 2010).

F. Where the Division fails to establish the exact date of mailing of a statutory notice, the 90-day period for filing a petition or request for conciliation conference is tolled until the date of actual notice (*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]). Here, the period within which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., April 6, 2016, and petitioner was required to file either a request for conciliation conference with the Bureau of Conciliation and Mediation Services, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commn. of the State of N. Y.*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). The petition in this matter was not filed until September 13, 2016, a date which falls beyond the required statutory period. As a matter of law, there is no jurisdiction to address the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

G. Petitioner's address on the Notice of Deficiency, corresponding mailing cover sheet, CMR, and USPS delivery information all conform with the address reported on petitioner's 2014 Nonresident and Part-Year Resident income tax return, dated April 11, 2015, which was the last document filed before the Notice of Deficiency was issued. While the return lists petitioner's address as "Twelfth St" and the Notice of Deficiency, cover sheet, CMR and USPS delivery information list the address as "12TH St," the difference is inconsequential (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994), especially in light of the fact that the USPS delivery information indicates that petitioner received the Notice at the listed address and petitioner confirmed such receipt. This satisfies the "last known address" requirement in Tax Law § 681.

H. In response to the Notice of Intent, petitioner apparently contends that he had on-going communications with the Division regarding the year at issue. However, petitioner failed

to present any evidence to show that he filed a petition with the Division of Tax Appeals within 90 days receipt of the subject notice. As such, the Division of Tax Appeals is without jurisdiction to consider the merits of the petition.

I. The petition of Sylvester L. Tuohy is hereby dismissed.

DATED: Albany, New York
April 6, 2017

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE