

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MI NGAE	:	DETERMINATION DTA NO. 828169
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Tax Period Ending December 19, 2015.	:	

Petitioner, Mi Ngae, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the tax period ending December 19, 2015.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated May 25, 2017, on the ground that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition was untimely filed. Both parties requested an extension of time to respond. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Barry Weinstein, Esq., of counsel), submitted documents dated July 31, 2017, in support of the proposed dismissal. Petitioner, appearing by Barclay Damon, LLP (Gabriel M. Nugent, Esq., of counsel), submitted no response by the due date of September 11, 2017, which date commenced the 90-day period to issue this determination. Based upon the pleadings in this matter, and the affidavits and documents submitted by the Division of Taxation, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. Mi Ngae, petitioner, filed a petition on April 21, 2017, in which she asserts that she had no idea that selling cigarettes bought at an Indian reservation was actionable until she was charged by the police. Petitioner indicates that she has been punished with a criminal conviction, paid a large fine and humiliated. She opposes the \$37,500.00 penalty imposed by the Division of Taxation (Division), having already paid a “heavy price” for the activity in question. The issue of the timeliness of the petition is not addressed.

2. In reviewing the petition, the Supervising Administrative Law Judge of the Division of Tax Appeals determined that the petition appeared to have been untimely filed and notified petitioner of its finding by a notice of intent to dismiss (NOI) dated May 25, 2017. The NOI advised petitioner that the petition was filed on April 21, 2017, its date of mailing, which was 135 days after the issuance of the notice of determination (notice), assessment L-045805645, issued to petitioner dated December 7, 2016. The notice imposed a penalty upon petitioner in the amount of \$37,500.00 on the ground that petitioner was found to be in possession of unstamped or unlawfully stamped cigarettes and/or untaxed tobacco products on December 19, 2015.

3. To show proof of proper mailing of the December 7, 2016 notice, the Division provided the following with its motion papers, along with the July 31, 2017 affidavit of Barry Weinstein, Esq.: (i) an affidavit, dated July 6, 2017, of Deena Picard, a data processing fiscal systems auditor 3 (since February 2006), and the acting director of the Management Analysis and Project Services Bureau (MAPS) of the Division (since May 2017), who is familiar with the Case and Resource Tracking System (CARTS) and past and present procedures for generating statutory notices; (ii) an affidavit, dated July 12, 2017, of Fred Ramundo, a mail room supervisor in the Division (since December 2013); (iii) the “Certified Record for Presort Mail - Assessments

Receivable” (CMR) postmarked December 7, 2016; (iv) a copy of the Division’s notice issued to petitioner, dated December 7, 2016, bearing a cover letter with certified control number 7104 1002 9730 0065 0607, and petitioner’s address at 1021 N. Townsend St., Apt. 1, Syracuse, New York 13208-2646; (v) a copy of the request for conciliation conference filed by petitioner with the Bureau of Conciliation and Mediation Services (BCMS), dated April 14, 2017, and date-stamped as received by BCMS on April 21, 2017; (vi) the petition filed with the Division of Tax Appeals bearing a postmark of April 21, 2017, and date-stamped as received by the Division of Tax Appeals on April 25, 2017; and (vii) a representative copy of petitioner’s e-filed resident income tax return (Form IT-201) for tax year 2015, indicating a filing date of January 20, 2016.

4. Mr. Weinstein’s affidavit indicates that petitioner’s 2015 tax return was filed on January 20, 2016, and it was “the last return filed prior to the issuance of the Notice.” The return bears a mailing address of 1021 N. Townsend St., Apt. 1, Syracuse, New York 13208, which address is the same as that on the notice, the request for conciliation conference and the petition.

5. The affidavit of Deena Picard sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and 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 a 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.”

Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing, allowing for a manual review of the notices prior to 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 reflect the actual mailing date of “12/7/16.”

6. According to the Picard affidavit, the CMR in the present matter consists of 133 pages and lists 1,458 certified control numbers along with the corresponding assessment numbers, names and addresses. In addition, Ms. Picard stated 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 her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page. Ms. Picard notes that the portion of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, wrote and circled “1458” on page 133, and initialed the same page.

7. Page 128 of the CMR indicates that a statutory notice with certified control number 7104 1002 9730 0065 0607 and assessment ID number L-045805645 was mailed to petitioner, Mi Ngae, at 1021 N. Townsend St., Apt. 1, Syracuse, New York 13208-2646.

8. The affidavit of Fred Ramundo, the mail and supply supervisor, describes the operations and procedures with respect to the mailing of notices. After the statutory notices are placed in an “Outgoing Certified Mail” basket, a member of the mail room staff weighs, seals

and places postage on each envelope. 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. A random review of thirty or fewer pieces of certified mail listed on the CMR are verified against the information contained on the certified mail record. A member of the mail room then delivers the envelopes and the certified mail record to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and also may place his or her initials or signature on the certified mail record indicating receipt by the post office. Here the postal employee affixed a postmark to each page of the certified mail record, circled the number "1458" beside the "Total pieces received at post office" and initialed or signed the certified mail record on that page to indicate that there were 1,458 total pieces, including the one addressed to petitioner, received at the post office on December 7, 2016.

9. The affidavits of Deena Picard and Fred Ramundo concluded that the procedures described by them were the normal and regular procedures for mailing items of certified mail by the Division on December 7, 2016, and such procedures were followed by the Division on that date for the mailing of petitioner's notice.

10. Petitioner's Syracuse, New York, address on the petition, the CMR, the notice and its cover sheet matches the address listed on petitioner's 2015 personal income tax return: 1021 N. Townsend St., Apt. 1, Syracuse, NY 13208. This was the last return petitioner filed with the Division before the issuance of the notice.

CONCLUSIONS OF LAW

A. Tax Law § 478 provides, in relevant part, as follows:

"Any determination [of tax due on cigarettes and tobacco products] made pursuant to this section shall finally and irrevocably fix the tax unless the person against

whom it is assessed shall, within ninety days after the giving of notice of such determination, petition the division of tax appeals for a hearing.”

The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

B. Where, as here, the timeliness of a taxpayer’s petition following the issuance of a statutory notice is in question, the initial inquiry focuses 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; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 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). When a notice is found to have been properly mailed by the Division to a petitioner’s last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

C. The mailing evidence required 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.*).

In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Deena Picard and Fred Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency. The Division also presented sufficient documentary proof, i.e., the respective CMR, to establish that the subject notice was mailed as addressed to petitioner on the date claimed. Specifically, with respect to the notice in issue, the CMR lists a certified control number with petitioner's name and address, and bears USPS postmarks dated December 7, 2016. Additionally, a postal employee circled "1458" as the "total pieces received at post office," and added his or her initials to the CMR to indicate receipt by the post office of all pieces of mail listed thereon.

D. In the instant matter, petitioner did not respond to the Division's motion; she is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v F.W. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals*, 99 AD2d 227 [1st Dept 1984]). Moreover, petitioner presented no evidence to contest the facts alleged in the Picard and Ramundo affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v F.W. Baiden*).

E. The Division has established that the notice dated December 7, 2016 was mailed to petitioner at the address appearing on her 2015 New York personal income tax return, electronically filed January 20, 2016, which was the last return filed by petitioner as of the date of issuance of the December 7, 2016 notice. Here, the Division's response in support of the proposed dismissal of the alleged untimely petition included adequate documentary evidence which established that the notice in this case was properly mailed to petitioner, as claimed, at the correct address on December 7, 2016. Accordingly, since the petition was not filed with the Division of Tax Appeals until April 21, 2017, beyond the 90-day requirement, petitioner's

protest of the notice was untimely, must be dismissed and there is no jurisdiction to proceed with this matter (Tax Law § 2006 [4]).

F. The petition of Mi Ngae is hereby dismissed.

DATED: Albany, New York
December 7, 2017

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE