

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
EDWARD BODOR, JR. : DETERMINATION
 : DTA NO. 828725
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 Year 2016. :

Petitioner, Edward Bodor, Jr., 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 New York City administrative code for the year 2016.

On August 24, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). By request of the Division of Taxation, the 30-day period for both parties to respond to the notice of intent to dismiss petition was extended to November 8, 2018, which date commenced the 90-day period for issuance of this determination. The Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted an affidavit and other documentation in support of the dismissal. Petitioner, appearing pro se, submitted a letter and documentation opposing the dismissal.¹ After due consideration of the documents submitted, James P. Connolly,

¹ The petition listed Mr. Stephen Boccio as petitioner's representative. Mr. Boccio is not authorized to represent petitioner under the Tax Appeals Tribunal Rules of Practice and Procedure because petitioner has not provided an executed Division of Tax Appeals power of attorney form appointing him. Petitioner was so notified by letter dated December 14, 2018. The Division of Tax Appeals received a letter, postmarked October 15, 2018, in response to the notice of intent to dismiss petition. Because the letter is unsigned, undated, and lacks any return address on the envelope, it is unclear if the letter was from petitioner or Mr. Boccio. By letter dated December 31, 2018, the Division of Tax Appeals advised petitioner that the Division of Tax Appeals would assume that the letter

Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. On May 17, 2018, petitioner, Edward Bodor, Jr. filed a petition with the Division of Tax Appeals protesting the issuance of a notice of deficiency dated December 14, 2017, and a notice and demand for payment of tax due (notice and demand) dated March 30, 2018. Both notices bear assessment number L-046976847 and are addressed to petitioner at a Lakeshore Drive address in Massapequa Park, New York. Petitioner's name appears as Edward A. Bodor, Jr., on both notices.

2. On August 24, 2018, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition (notice of intent).² The notice of intent stated, in sum, that as the petition had been filed in excess of ninety days after issuance of the notice of deficiency, the petition was not timely filed and that a notice and demand is insufficient to confer jurisdiction upon the Division of Tax Appeals to consider the merits of the petition.

3. In response to the issuance of the notice of intent, the Division of Taxation (Division) submitted, among other documents: (i) an affidavit, dated October 12, 2018, of Christopher

postmarked October 15, 2018, was from him and would thus consider the letter's contents unless he replied by January 10, 2019. Petitioner has not responded to the December 31, 2018 letter and, as a result, the undersigned has taken into account the letter postmarked October 15, 2018, in rendering this determination.

² On July 31, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition, on the basis that the petition was not filed in proper form because an appropriate statutory notice did not accompany the petition. After submission of the statutory notices at issue, the Division of Tax Appeals rescinded the July 31, 2018 notice of intent to dismiss petition in writing to both parties on August 13, 2018.

O'Brien, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated November 2, 2018, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for DTF-962-F-E - Not of Def Follow Up - DTF-963-E - Notice of Determination" (CMR) postmarked December 14, 2017; (iv) an affidavit, dated November 2, 2018, of Fred Ramundo, a supervisor of the Division's mail room; (v) a copy of the notice of deficiency with the associated mailing cover sheet addressed to petitioner; and (vi) a copy of petitioner's resident income tax return (IT-201) for the tax year 2016. This tax return lists the same address for petitioner as that listed on the notice of deficiency, except that the street address appears as "Lake Shore Drive." That return was the last tax return filed by petitioner prior to the issuance of the notice of deficiency.³

4. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor starting February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 their mailing. 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 page of the CMR in the present case to the actual mailing date of "12/14/17." In addition, as

³ Petitioner used his middle initial, "A," on the return.

described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of 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 the 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. The CMR in the present matter consists of 17 pages and lists 206 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR consists of between 11 and 15 entries, with the exception of page 17, which contains 7 entries. Ms. Picard notes that the copy 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. A USPS representative affixed a postmark dated December 14, 2017, to each page of the CMR, wrote the number "206" next to the heading "Total Pieces Received at Post Office" on page 17, and initialed or signed page 17 of the CMR.

7. Page 11 of the CMR indicates that a statutory notice with a certified control number 7104 1002 9735 4021 4468 and reference number L-046976847 was mailed to petitioner at the

Massapequa Park, New York, address listed on the notice of deficiency. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as on the notice of deficiency.

8. The affidavit of Fred Ramundo describes the general operations and procedures within the Division’s mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. 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, so that the address and certified number from the mailing cover sheet shows through the window. 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 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 places his or her initials or signature on the CMR, indicating receipt by the post office. The delivering mail room employee 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. As noted, each page of the CMR attached to the Picard affidavit as exhibit “A” contains a USPS postmark dated December 14, 2017, and the last page contains the handwritten number “206” in the blank for the “Total Pieces Received at Post Office.” According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials and the handwritten number for the total of the pieces received at the

post office indicate that all 206 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on December 14, 2017.

9. According to the Picard and Ramundo affidavits, the notice of deficiency was mailed to petitioner on December 14, 2017, as claimed.

10. In his response to the issuance of the notice of intent, petitioner asserts that he has submitted a properly filed petition and requests that, therefore, the Division of Tax Appeals grant him a hearing.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals 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. 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 (*see* 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 (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

D. Where, as here, the timeliness of a taxpayer’s protest of 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).

E. 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). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner’s last known address on December 14, 2017. 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). The affidavits submitted by the Division adequately describe the Division’s general mailing procedure as well as the relevant CMR and thereby establishes that the general mailing procedure was followed in this

case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheets and CMR conforms with the address listed on petitioner's last resident income tax return (IT-201), which satisfies the "last known address" requirement.⁴ It is thus concluded that the Division properly mailed the notice when it was delivered into the custody of the USPS on December 14, 2017, and the statutory 90-day time limit to file either a request for conciliation conference with Division's Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals commenced on that date (*see* Tax Law § 170 [3-a] [a]; 681 [b]).

G. In sum, the Division has established that notice of deficiency L-046976847 was properly mailed as addressed to petitioner at his last known address on December 14, 2017. Because the Division has made that showing, petitioner must establish that, within 90 days thereafter, he either filed a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals. 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. However, the petition was not filed until May 17, 2018, a date that falls beyond 90 days after the date of issuance of the notice of deficiency. Furthermore, the notice and demand also protested by petitioner here, bearing the same assessment identification number as the notice of deficiency and issued after the notice of deficiency, does not give rise to hearing rights (*see* Tax Law § 681 [b], [c]). Accordingly, the petition is untimely and the Division of Tax Appeals is without

⁴The use of "Lakeshore Drive" in the address on the notice of deficiency, instead of "Lake Shore Drive" as in petitioner's last resident income tax return (finding of fact 3), is determined to be an inconsequential error (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The petition of Edward A. Bodor, Jr. is dismissed.

DATED: Albany, New York
January 31, 2019

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE