

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition                        | : |                       |
| of   | : |                       |
| <b>JUAN AND YOCAIRA BRUNO</b>                        | : | <b>DETERMINATION</b>  |
|  | : | <b>DTA NO. 828844</b> |
| for Redetermination of a Deficiency or for Refund of | : |                       |
| Personal Income Tax under Article 22 of the          | : |                       |
| Tax Law for the Years 2009 and 2014.                 | : |                       |

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Petitioners, Juan and Yocaira Bruno, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2009 and 2014.

On November 7, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), filed a motion seeking to have the petition dismissed, or, in the alternative, granting summary determination in the above-captioned matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Colleen McMahon, Esq., sworn to on November 6, 2019, with annexed exhibits. Petitioners, appearing pro se, were granted an extension until December 23, 2019 to respond to the Division of Taxation's motion, but they did not respond. The 90-day period for issuance of this determination commenced on December 23, 2019. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jessica DiFiore, Administrative Law Judge, renders the following determination.

***ISSUES***

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

II. Whether the Division's motion for dismissal or, in the alternative, motion for summary determination as to the notice of additional tax due is proper where an order dismissing the appeal of this notice has previously been issued.

***FINDINGS OF FACT***

1. Petitioners, Juan and Yocaira Bruno, filed a petition with the Division of Tax Appeals on August 8, 2018. The petition protested a notice of deficiency, assessment number L-040614127, dated February 24, 2014 (notice of deficiency), that was issued to Juan Bruno, a notice of additional tax due, assessment L-047684066, dated January 31, 2018, that was issued to Juan and Yocaira Bruno, and a notice and demand for payment of tax due (notice and demand) dated March 12, 2018, bearing the same assessment identification number as that appearing on the notice of additional tax due.

2. On March 8, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued a notice of intent to dismiss petition (notice of intent) to petitioners on the basis that the petition did not appear to be timely filed and that the Division of Tax Appeals lacked jurisdiction. The notice of intent indicated that the notice of deficiency was issued on February 24, 2014, but that the petition was not filed until August 8, 2018, or in excess of 90 days later, and that the notice and demand and notice of additional tax due were not statutory notices that provided a right to a hearing. The Division of Taxation (Division) did not submit any proof of mailing of any of the notices at issue in response to the notice of intent.

3. By order dated August 8, 2019, the undersigned dismissed the petition as to petitioners' challenge of the notice of additional tax due for assessment L-047684066, dated January 31, 2018, and the notice and demand dated March 12, 2018, bearing the same assessment number as that appearing on the notice of additional tax due, holding that the Division of Tax Appeals lacked jurisdiction to review these notices (*see Matter of Bruno*, Division of Tax Appeals, August 8, 2019). The Division had 75 days from the date of the order, however, to file an answer regarding the notice of deficiency.

4. On October 9, 2019, the Division filed its answer to the petition affirmatively alleging, among other things, that petitioner Juan Bruno's petition challenging the notice of deficiency was untimely.

5. On November 7, 2019, the Division filed a motion seeking the dismissal of the petition, or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9 (a) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. In support of the motion, the Division provided the following documents: (i) an affidavit of Colleen McMahon, Esq., sworn to on November 6, 2019; (ii) an affidavit of Deena Picard, sworn to on May 14, 2019; (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked February 24, 2014; (iv) a copy of the notice of deficiency mailed to petitioner Juan Bruno with the associated mailing cover sheet; (v) an affidavit of Fred Ramundo, sworn to on May 16, 2019; (vi) a copy of petitioners' electronically filed 2008 New York resident income tax return; and (vii) a copy of the notice of additional tax due.

6. The affidavit of Colleen McMahon, an attorney in the Office of Counsel of the Division, asserts that petitioners' 2008 resident income tax return was filed on April 15, 2009,

and that this was the last return filed prior to the Division's issuance of the notice of deficiency. Petitioners' address on the return is the same address as that listed on the notice of deficiency.

7. The affidavit of Deena Picard, who has been the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS) since May 2017, and a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is familiar with the Division's Case and Resource Tracking System (CARTS), which generates statutory notices prior to mailing. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with the Division's past and present procedures as they relate to statutory notices.

8. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. Each notice, with accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

9. Each batch of notices is accompanied by a CMR. The CMR lists each notice in the order the notices are generated in the batch. The certified control number is listed on the CMR under the heading entitled "Certified No." 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 CMR and associated batch of statutory notices are forwarded to the mail room together.

10. All pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (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.

11. Here, the CMR for the notices issued by the Division on February 24, 2014, including the notice of deficiency, consists of 1,741 pages and lists 19,141 certified control numbers along with corresponding assessment numbers, names and addresses. Each page consists of 11 entries, with the exception of page 1,741, which contains 1 entry. 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. 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 page of the CMR in the present case to the actual mailing date of "2/24/14." A USPS representative affixed a postmark, dated February 24, 2014, to each page of the CMR, wrote "19,141 pieces" on page 1,741 next to the heading "Total Pieces Received at Post Office," and initialed the page.

12. Page 879 of the CMR indicates that the notice of deficiency with certified control number 7104 1002 9730 0169 2231, was mailed to petitioner at the South Ozone Park, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and petitioner Juan Bruno's name and address as noted.

13. The affidavit of Fred Ramundo, a supervisor in the Division's mail room, describes the mail room's general operations and procedures. Mr. Ramundo has been in this position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. 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. That staff member then weighs, seals and places 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 also places his or her initials or 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other department personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

14. Mr. Ramundo avers that each page of the CMR in exhibit "A" of the Picard affidavit contains a postmark of February 24, 2014. On page 1,741, corresponding to "Total Pieces and Amounts," is the preprinted number 19,141 and next to "Total Pieces Received At Post Office" is the handwritten entry "19,141." There is also a set of initials on page 1,741.

15. Based on his review of the affidavit of Ms. Picard and the exhibits attached thereto, including the CMR, and his personal knowledge of the procedures of the mail room, Mr.

Ramundo stated that on February 24, 2014, an employee of the mail room delivered one piece of certified mail addressed to petitioner at his South Ozone Park, New York, address, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery. He also stated that the CMR delivered to the USPS on February 24, 2014 was returned to the Division. Mr. Ramundo attested that the procedures described in his affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner on February 24, 2014.

#### ***CONCLUSIONS OF LAW***

A. The Division brings this motion to dismiss the petition pursuant to section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, or, in the alternative, summary determination under section 3000.9 (b). As the issue is whether the petition was timely filed, and thus, whether the Division of Tax Appeals has jurisdiction over the subject matter of the petition, a motion to dismiss is the proper application to consider the timeliness of petitioner Juan Bruno's appeal of the notice of deficiency (*see* 20 NYCRR 3000.9 [a]).

B. There is, generally, a 90-day statutory time limit for filing a petition following the issuance of a notice of deficiency (*see* Tax Law §§ 681 [b]; 689 [b]; *Matter of Mostovoi*, Tax Appeals Tribunal, August 10, 2017). Accordingly, the amount asserted in the notice of deficiency here is fixed and final unless petitioner timely filed a petition with the Division of Tax Appeals within 90 days (*see id.*).

C. Where, as here, the timeliness of a taxpayer's protest of a notice of deficiency is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the

taxpayer's last known address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

D. Pursuant to Tax Law § 681 [a], the Division shall mail a notice of deficiency by certified or registered mail to the taxpayer at his or her last known address. Generally, the Division is entitled to rely on the address listed on the last return filed with the Division as the last known address, unless the taxpayer has clearly informed the Division of a change of address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2007; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996).

E. Here, the Division has met its burden of showing its standard mailing procedure through the affidavits of Ms. Picard and Mr. Ramundo, Division employees possessing knowledge of the process of generating and issuing notices of determination during the period at issue. With regard to the notice of deficiency issued on February 24, 2014, the Division has met its burden of showing that its standard mailing procedure was followed through the properly completed CMR. The properly completed CMR, together with proof of the Divisions standard mailing procedure, constitute highly probative evidence of both the date and fact of mailing (*see Matter of Feliciano*). The notice of deficiency dated February 24, 2014 was sent to petitioner



Juan Bruno at the address provided on his 2008 personal income tax return, filed on or about April 15, 2009, which was his last return filed before issuance of this statutory notice.

Accordingly, the Division mailed the notice of deficiency to petitioner on February 24, 2014 at his last known address (*see id.*).

F. A petition must be timely filed for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007). As the petition in this matter was not filed until August 8, 2018, which was well beyond the 90-day statutory period after the notice of deficiency was issued, the petition was untimely and Division of Tax Appeals does not have jurisdiction to entertain the petition. Accordingly, the petition of the notice of deficiency is dismissed.

G. Although the Division also sought to have the petition dismissed, or, in the alternative, summary determination, regarding the notice of additional tax due with assessment number L-047684066, this assessment was previously dismissed because the Division of Tax Appeals lacked jurisdiction to review such assessment (*see Matter of Bruno*, Division of Tax Appeals, August 8, 2019). As this issue has already been decided by a previous order, it will not be addressed herein pursuant to the doctrine of the law of the case (*see generally Matter of Kasparaitis*, Tax Appeals Tribunal, July 21, 2005).

DATED: Albany, New York  
March 12, 2020

/s/ Jessica Difiore  
ADMINISTRATIVE LAW JUDGE