

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RUSSELL G. ALESI :
 : DETERMINATION
 : DTA NO. 829960
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 2011 and 2014. :
_____ :

Petitioner, Russell G. Alesi, 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 2011 and 2014.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated January 11, 2021, on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition. The parties were given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension until March 27, 2021 to respond to said notice. The Division of Taxation, appearing by Amanda Hiller, Esq. (Maria Matos, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to address the merits of the petition.

FINDINGS OF FACT

1. Petitioner filed a petition that was received by the Division of Tax Appeals on June 1, 2020. The envelope containing the petition bears a United States Postal Service (USPS) postmark indicating the petition was mailed on May 20, 2020.

2. The petition included a consolidated statement of tax liabilities that was issued by the Department of Taxation and Finance on May 4, 2020, pertaining to assessment numbers L-046038146, L-047692789 and L-051362066.

3. The petition included a notice and demand for payment of tax due (notice and demand) bearing assessment number L-051362066 that was issued by the Department of Taxation and Finance on May 4, 2020.

4. The petition also included a notice of additional tax due bearing assessment number L-051362066 that was issued by the Department of Taxation and Finance on March 27, 2020.

5. On July 17, 2020, a written request was made by the Division of Tax Appeals, to petitioner, to see if petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Service (BCMS) or had a conciliation order. Petitioner has not responded to the written request.

6. On January 11, 2021, 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 petitioner, on the basis that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition.

7. In response to the issuance of the notice of intent, the Division submitted among other documents: (i) an affirmation, dated March 8, 2021 of Maria Matos, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated February 24, 2021, of Deena

Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated February 25, 2021, of Susan Saccocio, Manager of the Mail Room of the Department of Taxation and Finance; (iv) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked March 22, 2017; (v) a copy of the notice of deficiency, dated March 22, 2017, together with associated mailing cover sheets; and (vi) a copy of the petitioner’s form IT-201 for the tax year 2015.

8. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor since 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 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 page of the CMR in the present case to the actual mailing date of March 22, 2017. 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.

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 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 Address, Street, and PO Address."

10. The March 22, 2017 CMR consists of 775 pages and lists 11,128 certified control numbers along with corresponding assessment numbers, names and addresses. 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 March 22, 2017 to each page of the CMR, wrote the number "11,128" next to the heading "Total Pieces Received at Post Office" on page 775, and initialed or signed the first and last page of the CMR.

11. Page 465 of the CMR indicates that a notice with a certified control number 7104 1002 9735 3426 5667 and reference number L-046038146 was mailed to petitioner at 16 22nd ST., JERICHO NY 11753-2537. 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 noted.

12. The affidavit of Susan Saccocio, a manager in the Division's mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to 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. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and

certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amount on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information contained 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 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. As noted, each page of the CMR attached to the Picard affidavit as Exhibit A contains a USPS postmark dated March 22, 2017. In addition, she attests that the USPS employee's initials or signature appear on the last page of the CMR. According to Mr. Saccocio, the affixation of the postmarks and the USPS employee's initials indicates that all 11,128 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on March 22, 2017.

13. According to the Picard and Saccocio affidavits, the notice was mailed to petitioner on March 22, 2017, as claimed.

14. Petitioner did not submit a response to the notice of intent.

CONCLUSIONS OF LAW

A. The petition challenges the notice and demand number L-051362066. 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]) unless such right is specifically modified or denied by another provision of this chapter (*see* Tax Law § 2006 [4]; 20 NYCRR 3000.9 [a]). The notice and demand protested by petitioner here does not give rise to hearing rights (*see* Tax Law §173-a [2]).

B. 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 Trib.*, 151 Misc 2d 326 [Sup Ct, Albany County 1991, Keniry, J.]). Its power to adjudicate disputes is exclusively statutory (*id.*). The Division of Tax Appeals is authorized “[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006 [4]). Tax Law § 2008 limits the jurisdiction of the Division of Tax Appeals to matters

“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 credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.”

C. Pursuant to 20 NYCRR 3000.3 (b) (8), a petition shall contain, “for the sole purpose of establishing the timeliness of a petition, a legible copy of the order of the conciliation conferee if issued; if no such order was previously issued, a legible copy of any other statutory notice being protested.”

D. The petition in this case did not include a required statutory notice or conciliation order and, therefore, fails to present a notice for which the Division of Tax Appeals has jurisdiction (*see* Tax Law § 2008). As petitioner failed to identify or attach a notice, the

Division of Tax Appeals lacks jurisdiction of the subject matter of the petition and the dismissal is warranted (*see* 20 NYCRR 3000.9 [a] [4] [i]).

E. The Division has also introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Ms. Saccocio, Division employees involved in and possessing knowledge of the process of generating reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*).

F. The Division has also presented sufficient documentary proof, i.e., a properly completed CMR to establish that the notice of deficiency for notice number L-046038146 was mailed as addressed on March 22, 2017. Further, petitioner's address on the subject notice of deficiency, the corresponding mailing cover sheet and the CMR all conform with the address listed on petitioner's form IT-201 for the tax year 2015. This was the last return filed prior to the issuance of the notice. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (see Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS "if the time to petition for such hearing has not elapsed" (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (see e.g. *Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). The notice of deficiency for notice number L-046038146 was mailed to the petitioner on March 22, 2017, but the petition was not filed with the Division of Tax Appeals until May 20, 2020. Thus, it is untimely.

G. Additionally, while the petition included a copy of a consolidated statement of tax and notice of additional tax due, these notices are insufficient to confer jurisdiction upon the Division of Tax Appeals to consider the merits of the petition and are not statutory notices that offer rights to a hearing in the Division of Tax Appeals (see Tax Law §§ 173-a [2]; 2008 and 20 NYCRR 3000.1 [k]).

H. The petition of Russell G. Alesi is dismissed.

DATED: Albany, New York
June 17, 2021

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE