

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEAN R. ETIENNE	:	DETERMINATION DTA NO. 829997
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of Tax Law for Years 2016, 2017 and 2019.	:	

Petitioner, Jean R. Etienne, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under article 22 of Tax Law for years 2016, 2017 and 2019.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated November 17, 2020, on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition did not appear to have been filed in a timely manner. The parties were given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension, until March 17, 2021, to respond to said notice. The Division of Taxation, appearing by Amanda Hiller, Esq. (Colleen McMahan, Esq., of counsel) submitted documents in support of dismissal. Petitioner did not submit a response by March 17, 2021, which date triggered the 90-day deadline for issuance of this determination. The deadline for the issuance of the determination was extended 30 days for good cause. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioner filed a petition that was received by the Division of Tax Appeals on July 24, 2020. The envelope in which the petition was mailed bears a USPS postal mark indicating the petition was mailed on July 22, 2020.

2. The petition included a copy of: (i) a statement of proposed audit change, bearing assessment number L-045506567 that was issued by the Department of Taxation and Finance on October 6, 2016; (ii) a consolidated statement of tax liabilities, bearing assessment numbers L-047031153, L-045506567, and L-048400329, that was issued by the Department of Taxation and Finance on January 28, 2019; (iii) another consolidated statement of tax liabilities, bearing assessment numbers L-0473031153 and L-048400329, that was issued by the Department of Taxation and Finance on August 16, 2019; (iv) a notice and demand, bearing assessment number L-047031153 that was issued by the Department of Taxation and Finance on April 4, 2018; (v) a notice of deficiency, bearing assessment number L-045506567 that was issued by the Department of Taxation and Finance on January 11, 2017; and (vi) a notice of state tax warrant and enforced collection activity dated November 7, 2019.

3. On November 17, 2020, 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 petition did not appear to be timely filed and it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition.

4. In response to the issuance of the notice of intent, the Division submitted among other documents: (i) an affirmation, dated January 26, 2021, of Michele W. Milavec, an attorney employed by the Office of Counsel of the Division; (ii) two affidavits, each dated December 23, 2020, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iii) two affidavits, each dated December 29, 2020, 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 January 11, 2017 and a CMR postmarked October 30, 2017; (v) copies of the notices of deficiency, dated January 11, 2017 and October 30, 2017, together with associated mailing cover sheets; and (vi) a copy of the petitioner’s IT-201 for the tax year 2015.

5. The affidavits 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 each CMR in the present case to the actual mailing dates of January 11, 2017 and October 30, 2017, respectively. 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.

6. 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."

7. The January 11, 2017 CMR consists of 22 pages and lists 257 certified control numbers along with corresponding assessment numbers, names and addresses. The October 30, 2017 CMR consists of 28 pages and lists 375 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 22 of the January 11, 2017 CMR that consists of 2 entries and page 28 of the October 30, 2017 CMR that consists of 9 entries. Ms. Picard notes that the copies of the CMRs that are attached to her affidavits have 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 January 11, 2017 and October 30, 2017 to each page of the respective CMRs, and wrote the number "257" next to the heading "Total Pieces Received at Post Office" on page 22 of the January 11, 2017 CMR and "375" on page 28 of the October 30, 2017 CMR, and initialed or signed the first and last page of the CMRs.

8. Page 3 of the January 11, 2017 CMR indicates that a notice with a certified control number 7104 1002 9735 3355 2430 and reference number L-045506567 was mailed to petitioner at 15 JENNIFER CT, STATEN ISLAND, NY 10314-3762. Page 4 of the October 30, 2017

CMR indicates that a notice with a certified control number 7104 1002 9735 3886 3678 and reference number L-047031153 was mailed to petitioner at 15 JENNIFER CT, STATEN ISLAND, NY 10314-3762. The corresponding mailing cover sheets, attached to the Picard affidavits as exhibit "B," bear the certified control numbers and petitioner's name and address as noted.

9. The affidavits 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

CMRs attached to the Picard affidavits as Exhibit “A” contains a USPS postmark dated January 11, 2017 and October 30, 2017, respectively. In addition, she attests that the USPS employee’s initials or signature appear on the last pages of the CMRs. According to Mr. Saccocio, the affixation of the postmarks and the USPS employee’s initials indicates that all 257 articles of mail listed on the January 11, 2017 CMR and 375 articles of mail listed on the October 30, 2017 CMR, including the articles addressed to petitioner, were received by the USPS for mailing on January 11, 2017 and October 30, 2017, respectively.

10. According to the Picard and Saccocio affidavits, the notices were mailed to petitioner on January 11, 2017 and October 30, 2017, respectively, as claimed.

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

CONCLUSIONS OF LAW

A. 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).

B. 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.

C. 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]).

D. 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 conference 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.*).

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*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has 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*).

G. The Division has also presented sufficient documentary proof, i.e., properly completed CMRs to establish that the notices of deficiency were mailed as addressed on January 11, 2017 and October 30, 2017. Further, petitioner's address on the subject notices of deficiency, the corresponding mailing cover sheet and the CMRs all conform with the address listed on petitioner's IT-201 for the tax year 2015. This was the last return filed prior to the issuance of the notices. It is thus concluded that the Division properly mailed the notices of deficiency on January 11, 2017 and October 30, 2017, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date. 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).

H. The petition also includes a notice and demand, assessment number L-047031153 dated April 4, 2018. The notice and demand protested by petitioner here does not give rise to hearing rights (*see* Tax Law § 173-a [2]).

I. Additionally, the statement of proposed audit change, consolidated statement and warrant that were attached to the petition do not give rise to hearing rights before the Division of Tax Appeals (*see* Tax Law § 2000).

J. In sum, the Division has established that notices of deficiency L-045506567 and L-047031153 were properly mailed to petitioner at his last known address on January 11, 2017 and October 30, 2017, respectively. Having established that the notices of deficiency were properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was mailed on July 22, 2020, a date that falls beyond 90 days after the date of issuance of the notices of deficiency. Accordingly, the petition is untimely, and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

K. The petition of Jean R. Etienne is dismissed.

DATED: Albany, New York
July 15, 2021

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