

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRANCIS A. ZARRO : **ORDER**
 : **DTA NO. 826589**
for Revision of Determinations or for Refund of Real :
Property Transfer Gains Tax under former Article 31-B of :
the Tax Law for the Periods July 2, 1985 and :
December 18, 1985 and for Sales and Use Taxes under :
Articles 28 and 29 of the Tax Law for the Periods Ending :
August 8, 1997, May 31, 1998, August 31, 1998, :
November 30, 1998 and February 28, 1999. :
:

Petitioner, Francis A. Zarro, filed a petition for revision of determinations or for refund of real property transfer gains tax under former Article 31-B of the Tax Law for the periods July 2, 1985 and December 18, 1985 and for sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ending August 8, 1997, May 31, 1998, August 31, 1998, November 30, 1998 and February 28, 1999.

On January 28, 2015, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the ground that the petition did not appear to be timely with respect to the statutory notices being petitioned. By request of the Division of Taxation, the 30-day period to respond to the Notice of Intent to Dismiss Petition was extended to April 23, 2015. On April 23, 2015, the Division of Taxation by Amanda Hiller, Esq. (Leo Gabovich) submitted a letter, together with affidavits and accompanying documents in support of dismissal of certain of the notices. On April 23, 2015, petitioner, appearing by Hodgson Russ, LLP (Elizabeth Pascal, Esq., of counsel) filed a letter and documents in

opposition to the dismissal.¹ Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on April 23, 2015. After due consideration of the documents and arguments submitted, and all pleadings filed, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. On October 24, 2014, the Division of Tax Appeals received a petition from petitioner, Francis A. Zarro, which protested the following notices of determination and notices of estimated determination:

Notice #	Period(s) Ending	Notice date	Tax Article
L-013644400	7/02/85 & 12/18/85	6/09/97	former 31-B
L-018437081	8/08/97	8/14/00	28 & 29
L-016826541	5/31/98	8/16/99	28 & 29
L-016826540	8/31/98	8/16/99	28 & 29
L-018735044	8/31/98	11/13/00	28 & 29
L-018735043	11/30/98	11/13/00	28 & 29
L-018735042	2/28/99	11/13/00	28 & 29

¹On May 4, 2015 petitioner submitted a reply in opposition to the Division of Taxation's April 23, 2015 filing. As petitioner neither requested permission, nor do the Tax Appeals Tribunal's Rules of Practice and Procedure provide for submission of a reply in response to papers submitted in support or in opposition to a Notice of Intent to Dismiss petition, petitioner's May 4, 2015 submission has not been considered in the rendering of this order.

2. The petition is dated October 24, 2014 and signed by petitioner's representative, Elizabeth Pascal. The envelope the petition was delivered in contains a United States Postal Service (USPS) postmark dated October 24, 2014.

3. The petition alleges that petitioner never received any of the notices being protested.

4. On January 28, 2015, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the subject petition was filed in protest of notices of determination and notices of estimated determination issued to petitioner more than 90 days prior to the petition being filed in this matter.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division indicated that it was only seeking to establish the timeliness of notices of estimated determination L-016826540 and L-016826541 and offered no proof with respect to the other five notices.² The Division submitted, among other documents, (i) an affidavit, dated April 23, 2015, of Leo Gabovich, a law clerk employed in the Office of Counsel of the Division; (ii) an affidavit, dated April 21, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Zip + 4 Minimum Discount Mail," (CMR) postmarked August 16, 1999; and (iv) an affidavit, dated April 21, 2015, of Bruce Peltier, a mail and supply supervisor in the Division's mail room.

6. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory

²The January 28, 2015 Notice of Intent is hereby rescinded as to notices L-013644400, L-018437081, L-018735044, L-018735043, and L-018735042.

notices. Ms. Nagengast is the 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 is manually changed on the first page of the CMR to conform to the date of delivery to the USPS. In this case, page one of the CMR shows a print date of August 5, 1999, which has been manually changed to August 16, 1999. In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the 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.

7. All notices are assigned a certified control number. The certified control number is 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 "Notice Number." The names and addresses of the recipients are listed under "Name of Addressee, Street, and P.O. Address."

8. The 26 - page CMR herein lists 11 items of mail on each of its pages except its final page, which lists 7 items, for a total of 282 items of mail corresponding to the 282 certified control numbers listed thereon, and there are no deletions from the list.

9. Information regarding the notices of estimated determination at issue is contained on

page 21 of the CMR. Specifically, corresponding to the certified control numbers P 911 005 987 and P 911 005 988 are the notice numbers L-016826540 and L-016826541, respectively, along with information listing petitioner's name and the address, "RR 2 Box 65 Duell Rd, Stamfordville [sic], New York 12581-9625." This information, including the address and certified control number, is identical to that listed on the subject notices of estimated determination.

10. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. The record herein does not include mailing cover sheets for the notices at issue nor is there any explanation given as to their use or purpose. 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. Staff members then weigh, seal and place postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. In this case the USPS employee initialed the last page of the respective CMR and affixed a postmark to each page of the CMR. The Center 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 in this case reveals that the USPS employee complied with this request by writing 282 to indicate the number of pieces received.

11. According to the Peltier affidavit, copies of the respective notices were mailed on the date indicated as claimed.

12. To establish the address used by the Division in issuing the notices of estimated determination was petitioner's last known address, the affidavit of Leo Gabovich references a one-page document, which Mr. Gabovich indicates is a copy of petitioner's 2012 personal income tax return. Mr. Gabovich states such return was filed on September 26, 2013 and bears the same address as that used to mail the notices at issue. A review of the document reveals it to be something other than a 2012 personal income tax return. Rather, it appears to be a transcript of petitioner's 1998 personal income tax return. There is no indication of whether the address listed thereon was petitioner's last known address on August 16, 1999, the date the notices were issued.

CONCLUSIONS OF LAW

A. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law § 1138 [a] [1]). 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). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction

to consider the merits of the protest (*see* Tax Law § 1138 [a] [1]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner's last known address (Tax Law § 1138 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notice by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *Matter of Katz*).

C. Here, the Division has failed to offer sufficient proof to establish the mailing of the statutory notices. While 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 Division has nonetheless failed to shoulder its burden of proving mailing. In this case the Division's affiants clearly reference mailing cover sheets but neither explain their purpose nor their absence from the record herein. This failure of proof raises questions as to "whether the Division's standard mailing procedure . . . was followed in this case" (*Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015).

D. In addition, based upon the record herein, it cannot be determined whether the notices

were mailed to petitioner's last known address at the time they were purportedly mailed. The Division's representative references a 2012 tax return filed in 2013 in his affidavit to establish petitioner's last known address in 1999. Compounding this error is that the document referred to in his affidavit is clearly not a return. Stated simply, the record is lacking any competent evidence that establishes what petitioner's last known address was at the time the notices were issued and whether the address utilized by the Division in issuing the subject notices was the same.

E. The Notice of Intent to Dismiss Petition is rescinded in accordance with Finding of Fact 5 and Conclusions of Law C and D, and the Division will have 75 days from the date of this order to file its Answer in this matter.

DATED: Albany, New York
July 9, 2015

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE