

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>MARCOS DE LOS SANTOS</b>	:	ORDER
for Redetermination of Deficiencies or for Refund of	:	DTA NO. 826024
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 2009, 2010 and 2011.	:	

---

Petitioner, Marcos De Los Santos, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2009, 2010 and 2011.

On March 7, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On May 16, 2014, petitioner late filed a letter in opposition to dismissal.<sup>1</sup> On April 3, 2014, the Division of Taxation filed a letter requesting an extension of time within which to file its response. The Division of Tax Appeals granted an extension until May 22, 2014 for the Division of Taxation to respond to the Notice of Intent to Dismiss Petition. On May 19, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich) submitted affidavits and other documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on May 19, 2014. After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order.

---

<sup>1</sup> Pursuant to 20 NYCRR 3000.9(a)(4), parties have 30 days from the date of the Notice of Intent to Dismiss to submit written comments. Upon request of the Division of Taxation, its time was extended. Since petitioner did not request an extension of time, his late filed response will not be considered.

***ISSUE***

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

***FINDINGS OF FACT***

1. On December 28, 2013, petitioner, Marcos De Los Santos, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review notices of deficiency (assessment numbers L-038866429-4, L-038866430-4 and L-038866433-1), which were attached to the petition.

2. The subject notices of deficiency, dated February 21, 2013, were addressed to petitioner at a Longfellow Avenue, Bronx, New York, address.

3. On March 7, 2014, 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 deficiency issued to petitioner on February 21, 2013 and that the petition was not filed until December 28, 2013.

4. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the notices of deficiency under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated May 15, 2014, of Daniel A. Maney, a Taxpayer Services Specialist 4 and Manager of the Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated February 21, 2013; (iii) an affidavit, dated May 16, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; and (iv) a copy of a transcript of petitioner's New York State personal income tax

return (form IT-201) for the year 2011 electronically filed on April 17, 2012, which was the last filing from petitioner prior to the issuance of the notices of deficiency.

5. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney averred that he held his current position with the Division since January 2010 and is fully knowledgeable of past and present procedures for processing notices, which have not changed since 1992.

6. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR, using the year, the numeric ordinal day of the year and military time of day. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "2/21/13."<sup>2</sup> It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

7. 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 taxpayer assistance information on the back. The certified control number is also listed on the CMR under the

---

<sup>2</sup> In his affidavit, Mr. Maney states that "[i]n the upper left hand corner of Page 1 of the certified mail record, the date the notices were mailed was handwritten by personnel in the Department's mail room." In fact, the handwritten date of mailing appears in the upper *right* corner of the pages attached to the Maney affidavit.

heading "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 P.O. Address."

8. The CMR relevant to the notices of deficiency under protest consists of 64 pages and lists 700 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney noted that portions of the CMR that were attached to his affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. The date "Feb 21 2013" is stamped on many pages of the CMR, many of which dates were illegible. No legible postmarks appear on any pages of the CMR. The barely legible date "Feb 21 2013" is stamped on the last page of the CMR, page 64, which contained a statement of the total number of pieces received by the Postal Service for mailing.

9. Page 19 of the CMR indicates that three notices of deficiency with certified control numbers 7104 1002 9730 1498 4255, 7104 1002 9730 1498 4262 and 7104 1002 9730 1498 4279 and assessment numbers L-038866429, L-038866430 and L-038866433 were mailed to "DELOSSANTOSMATOS-MARCOS, MARCOS DE LOS SANTOS" at the Longfellow Avenue, Bronx, New York, address listed on the subject notices of deficiency.

10. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently Principal Mail and Supply Supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. 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. That staff member then weighs, seals and places 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 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 signature or initials on the CMR, indicating receipt by the post office. Here, as noted, many pages of the CMR contained the stamped date "Feb 21 2013" but no legible postmarks. The mail room further requested 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 last page of the CMR. Here, on the last page next to "TOTAL PIECES AND AMOUNTS LISTED" appears the printed number 700 which was circled. There is no amount next to "TOTAL PIECES RECEIVED AT POST OFFICE." There are circled handwritten initials under the number 700 on the last page.

11. According to both the Maney and Peltier affidavits, copies of the subject notices of deficiency were mailed to petitioner on February 21, 2013, as claimed.

12. Petitioner's 2011 Resident Income Tax Return, electronically filed on April 17, 2012, reported petitioner's name as Marcos De Los Santos Matos, his address as Longfellow Avenue, Bronx, New York, and his occupation as tax preparer. The paid preparer of this return was listed as petitioner, Marcos De Los Santos, whose address was listed as the same Bronx, New York, address. This was the last return filed by petitioner prior to issuance of the subject notices. This address corresponds with the address on the CMR and on the notices that were sent to petitioner.

13. In his petition, petitioner asserted that he had called and written letters to the Division but had not received any help or information. He further asserted that he needed orientation

because he did not know what to do, where to call or who to contact. No letters were attached to the petition.

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

A. There is a 90-day statutory time limit for filing a petition following the issuance of a Notice of Deficiency (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 (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006). In this case, it appeared upon receipt of the petition by the Division of Tax Appeals that it was filed late and a Notice of Intent to Dismiss Petition was issued pursuant to 20 NYCRR 3000.9(a)(4).

Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under 20 NYCRR 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss Petition. Accordingly, the instant matter shall be treated as a motion for summary determination, and “shall be granted if, upon all 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” (20 NYCRR 3000.9[b][1]).

B. 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 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 is produced and the burden of demonstrating proper mailing rests

with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

C. 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.*).

D. The affidavits of two Division employees, Daniel A. Maney and Bruce Peltier, provide adequate proof of the Division's standard mailing procedure for the mailing of notices of deficiency by certified mail. The affidavits generally describe the various stages of producing and mailing notices of deficiency.

E. The Division failed to present sufficient documentary proof, i.e., the CMR, to establish that the subject notices of deficiency were mailed as addressed to petitioner on February 21, 2013. Specifically, this document did not contain legible USPS postmarks on each page, indicating the mailing date of February 21, 2013, despite the fact that both the Peltier and Maney affidavits assert that a postmark was affixed to each page.<sup>3</sup> Rather, on many pages of the CMR, including the last page, page 64, the barely legible date "Feb 21 2013" was stamped. It is noted that no legible USPS postmarks appeared on any page of the CMR, including the last page, page 64, which set forth and verified vital information: the total number of pieces being mailed on the date contained in the USPS postmark.

---

<sup>3</sup> USPS Domestic Mail Manual 600 § 503[5.1.1] provides that each individual firm sheet (form 3877) is postmarked (round-dated) at the time of mailing; and the form(s) are then returned to the mailer and become the mailer's receipt, i.e., certificate of mailing. A "local" postmark shows the full name of the Post Office, a two-letter state abbreviation, ZIP CODE,<sup>TM</sup> and date of mailing (*see* USPS Handbook PO-408[1-1.3]).

In sum, the CMR was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Based upon the record presented, there appears to be a triable issue of fact and the Notice of Intent to Dismiss Petition, dated March 7, 2014, is withdrawn and the Division of Taxation shall have 75 days from the date of this Order to file an answer to petitioner's petition.

DATED: Albany, New York  
August 14, 2014

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE