

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARK AND KATHLEEN NORD : ORDER
for Redetermination of Deficiencies or for Refund of : DTA NO. 826725
New York State and New York City Personal Income Tax :
under Article 22 of the Tax Law and the New York City :
Administrative Code for the Years 2006 through 2008. :
:

Petitioners, Mark and Kathleen Nord, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 2006 through 2008.

On February 26, 2015, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). In response to a request for additional time, the parties were granted until May 14, 2015 to respond to the proposed dismissal. On May 13, 2015, petitioners, appearing by Hodgson Russ, LLP (Debra S. Herman, Esq., of counsel), submitted documents in opposition to dismissal. On May 13, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), submitted documents in support of dismissal. Upon application, petitioners were given until June 1, 2015 to file a reply. Petitioners' reply was filed on May 28, 2015. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced June 1, 2015. After due consideration of the documents submitted, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. On January 2, 2015, the Division of Tax Appeals received a petition from petitioners, Mark and Kathleen Nord, which protested the following notices of deficiency:

Notice #	Tax Year	Notice date
L-040667960	2006	3/4/14
L-040667961	2007	3/4/14
L-040621563	2008	2/24/14

2. The petition is dated December 30, 2014 and signed by petitioners' representative, Debra S. Herman. The petition was delivered via United States Postal Service (USPS) and is postmarked December 30, 2014.

3. The petition alleges that the notices of deficiency were never sent to petitioners' last known address.

4. On February 26, 2015, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioners 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 petitioners more than 90 days prior to the petition being filed in this matter.

5. To show proof of proper mailing of notices of deficiency L-040667960 and L-040667961, both dated March 4, 2014, the Division of Taxation (Division) provided the following with its motion papers: (i) an affidavit, dated May 11, 2015, of Mary Ellen Nagengast,

a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked March 4, 2014; and (iii) an affidavit, dated May 11, 2015, of Bruce Peltier, a Principal Mail and Supply Clerk in the Division's mail room.

6. To show proof of proper mailing of Notice of Deficiency L-040621563, dated February 24, 2014, the Division provided the following with its motion papers: (i) a second affidavit, dated May 4, 2015, of Mary Ellen Nagengast; (ii) pages 1, 132 and 1,741 of a CMR each postmarked February 24, 2014; (iii) a second affidavit, dated May 6, 2015, of Bruce Peltier; (iv) an affidavit, dated May 8, 2015, of Heidi Corina, a Legal Assistant II in the Division's Office of Counsel; and (v) an affidavit, dated May 12, 2015, of Leo Gabovich, a law clerk in the Division's Office of Counsel.

7. The Division also submitted a representation of the information that appeared on petitioners' electronically filed IT-201 return for the year 2011. Said return was filed on April 16, 2012 and was the last return filed prior to the issuance of the notices of deficiency at issue. This return shows an address of "155 Riverside Drive, New York, NY 10024." There is no indication of an apartment number on this return.

8. The affidavits of Mary Ellen Nagengast, who has been in her current position since October 2005, set forth the Division's general practice and procedure for processing statutory 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 and last page of the CMR. 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.

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 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 Addressee, Street, and PO Address."

10. The March 4, 2014 CMR consists of 30 pages and lists 329 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 30, which contains 10 entries. Ms. Nagengast 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 4, 2014 to each page of the CMR, and circled the preprinted number "329" on page 30 next to the heading "Total Pieces Received at Post Office." Ms. Nagengast adds that the total number of statutory notices mailed

pursuant to the CMR was 329.

11. Page 5 of the March 4, 2014 CMR indicates that notices of deficiency with certified control numbers 7104 1002 9730 0193 2351 and 7104 1002 9730 0193 2368 and reference numbers L-040667960 and L-040667961, respectively, were mailed to petitioners at "155 Riverside Drive Apt 10A, New York, NY 10024". The corresponding mailing cover sheets bear these certified control numbers and petitioners' names and address as noted. There is no indication as to why an apartment number was added to the address as reported on petitioners' 2011 income tax return.

12. As noted, the Division introduced pages 1, 132 and 1,741 of the CMR issued by the Division on February 24, 2014. Pages 1 and 1,741 have a handwritten entry of "2/24/14" in the top right corner; however, page 132 does not have a similar entry.

13. Page 132 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0161 0051 and assessment ID number L-040621563 was mailed to petitioners at "155 Riverside Drive Apt 10A, New York, NY 10024." The corresponding mailing cover sheets bear these certified control number and petitioners' names and address as noted. Again, there is no indication as to why an apartment number was added to the address as reported on petitioners' 2011 income tax return.

14. Each of the affidavits 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. 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. Each of the CMRs has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." 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 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. A review of page 1,741 of the February 24, 2014 CMR indicates that the USPS employee complied with this request by writing the number of pieces received and initialing same to indicate receipt.¹ The March 4, 2014 CMR reveals that the USPS employee complied with this request circling the number of pieces received and initialing same.²

15. According to the Peltier affidavits, copies of the respective notices were mailed on the dates indicated as claimed.

16. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the February 24, 2014 Notice of Deficiency (notice L-040621563). Specifically,

¹The May 4, 2015 affidavit asserts that 329 pieces were mailed on February 24, 2014 while the May 6, 2015 affidavit of Bruce Peltier asserts that 19,141 pieces were mailed on such date.

²Mr. Peltier notes that the names of both petitioners and their address would have been displayed in the window of the envelopes containing the statutory notices, and notes that the respective CMRs only lists the name of petitioner Mark Nord. Mr. Peltier explains that only Mr. Nord's name is listed on the CMR because it is standard procedure for the CMR to contain only the name of the primary taxpayer associated with the statutory notice.

using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 0161 0051, addressed to petitioners. The USPS response to the request indicates that the article bearing certified control number 7104 1002 9730 0161 0051 was delivered on April 14, 2014 to “12227 Returns Albany, NY”. Leo Gabovich’s affidavit states that this notice was returned to the Division as unclaimed.

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).

B. Where, as here, the timeliness of a taxpayer’s protest against a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice 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 (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). Where a notice of deficiency has been properly mailed, Tax Law § 681(a) does not require actual receipt by the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

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.*, Tax Appeals Tribunal, May 23, 1991).

D. The Division has failed its burden of establishing proper mailing. Specifically, the Division was required to mail the statutory notices to petitioners at their last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The phrase “last known address,” for purposes of the Division’s issuance of statutory notices carrying with them the right to a hearing, is defined as “the address given in the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address” (Tax Law § 691[b]). Thus, a taxpayer’s last known address is that provided to the Division by the taxpayer through his own filings or applications, or if there were no filings or applications, then such address as the Division may obtain through other means, methods, or efforts undertaken with reasonable diligence (*Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012; *see also Matter of Nelloquet Restaurant, Inc.*, Tax Appeals Tribunal, March 14, 1996). As indicated by the CMR and the affidavits of Bruce Peltier, the address on the notices of deficiency included an apartment number. By contrast, the petitioners did not provide an apartment number when electronically filing their 2011 personal income tax return, which was the last return filed by petitioners with the Division prior to the issuance of the notices of deficiency. The record herein includes no evidence or explanation as to why the Division changed petitioners’ address by adding an apartment number. There is no basis or explanation in support of such addition set forth in the record, and simply accepting that the addition of an apartment number, as here, resulted in a “better” or “more correct” address, would constitute a conclusion premised solely on

speculation. Based upon the record contained herein, the Division cannot be said to have mailed the statutory notices to petitioners' last known address.

E. In addition, it must also be pointed out that the Division's proof is further lacking with respect to the February 24, 2014 notice (L-040621563). In this case, a completed CMR is missing from the record. The Division's proof consists of three pages of what purports to be a longer multi-page computer-generated CMR. The three pages are not physically connected, the certified mail numbers run consecutively on each page but not from page to page, and the pages are not consecutively numbered. Moreover, the date on the top of pages 1 and 1,741 has been changed to February 24, 2014, but remains unchanged on page 132. Pages 1 and 1,741, therefore, bear a different date than page 132. As a result, the partial CMR does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). While the Division has attempted overcome the flaws in the incomplete CMR by providing USPS delivery information, this delivery information also falls short. The delivery information does not indicate delivery to petitioners; rather, it shows that the notice was mailed back to the Division.

F. The notice of intent to dismiss petition is hereby rescinded and the Division is hereby directed to serve its answer to the petition within 75 days of the date of this order.

DATED: Albany, New York
August 27, 2015

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE