STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MEI ZHEN ZHENG	:	ORDER DTA NO. 827936
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2006.	:	

Petitioner, Mei Zhen Zheng, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2006.

On January 13, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4). The parties were granted an extension of time to April 14, 2017 to respond to the proposed dismissal. Petitioner, appearing pro se, responded by letter on February 22, 2017. On April 13, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), submitted 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 determination began on April 14, 2017. After due consideration of the documents submitted, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a Relief from Joint Liability Determination.

FINDINGS OF FACT

1. On November 7, 2016, petitioner, Mei Zhen Zheng, filed a petition with the Division of Tax Appeals challenging a Relief from Joint Liability Determination, Assessment Number L-029313474, dated July 29, 2016, and date-stamped August 1, 2016 (Relief Determination). The Relief Determination pertains to the filing period ending December 31, 2006, and states:

> "We have denied your request for Innocent Spouse Relief, Separation of Liability or Equitable Relief.
>
> We have completed our review of your Form IT-285 Request for Innocent Spouse Relief (and Separation of Liability and Equitable Relief).
>
> We cannot grant your request for the following reasons:
>
> 1 We requested additional information and you did not comply."

2. On January 13, 2017, Daniel J. Ranalli, then Supervising Administrative Law Judge of the Division of Tax Appeals, issued a notice of intent to dismiss petition to petitioner. The notice of intent to dismiss petition indicates that:

> "The protest of a joint liability determination issued under Article 22 of the Tax Law must be filed within ninety (90) days following the issuance of the notice (***see*** Tax Law § 689[b]).
>
> Here, the Relief from Joint Liability Determination, Assessment No. L-029313474, appears to have been issued on July 29, 2016. However, the petition was not filed with the Division of Tax Appeals until November 7, 2016, or one hundred and one (101) days later. As such, the Division of Tax Appeals is without jurisdiction to consider the merits of the petition."

3. In order to prove mailing of the Relief Determination, the Division of Taxation (Division) provided the following documents: (i) an affidavit of Mary Hurteau, Esq., an attorney employed in the Office of Counsel of the Division, dated April 11, 2017; (ii) an affidavit, dated March 28, 2017, of Tammy Weinstock, a Tax Technician II in the Division's Income Desk Audit Bureau, Audit Group 2 Innocent Spouse Unit; (iii) a certified mail record, PS Form 3877 (CMR);

(iv) a copy of the Relief Determination, assessment number L-029313474, with a typed date of July 29, 2016, and date-stamped August 1, 2016; (v) an affidavit, dated March 29, 2017, of Heidi Corina, Legal Assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (vi) a Postal Service Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated February 6, 2017; and (vii) a copy of petitioner's Request for Innocent Spouse Relief (and Separation of Liability and Equitable Relief), Form IT-285 (Request), dated May 1, 2016. The Request lists the same Dunkirk, New York, address for petitioner as that listed on the Division's Relief Determination denying the request.

4. The affidavit of Tammy Weinstock, who has been employed with the Division since 1999, and has worked as a Tax Technician II in the Division's Income Desk Audit Bureau Innocent Spouse Unit since December 16, 2008, sets forth the Division's general practice and procedure for certified mailings of denials for innocent spouse relief as conducted in the regular course of business in August 2016. According to Ms. Weinstock, technicians prepare the denial letters with cover sheets and a CMS-1 form (request for Bureau of Conciliation and Mediation Services [BCMS] conference). The denial letters, in duplicate, are then taken to the Division's clerical unit and placed in a "disallowance basket" that is used for denials and disallowance letters to be mailed certified. Ms. Weinstock states that when a clerk removes each denial letter from the basket, each copy is stamped with a date stamp for the day of the week and one denial letter is inserted into an envelope with the CMS-1. Ms. Weinstock further states that the clerk types a CMR by opening an application on the computer and choosing "certified" to indicate the mailing class. According to Ms. Weinstock, after the initials space, the clerk puts in the date for postmark and date of receipt and completes a PS Form 3877 with the name of addressee, street

and post office address and zip code along with the certified article number for each envelope, total number of pieces listed by sender, and affixes the certified mail number sticker to each envelope. Ms. Weinstock states that the clerk prints three copies of the PS Form 3877 after it is filled out; two of the copies go around the envelope and one is for the clerk to keep until a copy is sent back by the post office for confirmation to be filed in a white binder for the record. Ms. Weinstock states that the clerk then places the envelope containing the denial letter into a wired bin basket designated for certified mail for pick-up by a mailroom employee. The second copy of the denial letter and CMS-1 are then returned to the technician who issued the letter. According to Ms. Weinstock, following delivery of the certified mail, a copy of PS Form 3877 is returned to the clerical unit where the information is logged into the white binder.[1]

5. Ms. Weinstock concludes that, based upon her knowledge of the certified mailing procedures for denial letters, as well as a review of the CMR, "with the total number of pieces received at the Post Office written in as '1' and the Post Office employee's initials," the proper procedures were followed in mailing the subject Relief Determination.

6. A copy of the denial letter, dated-stamped August 1, 2016, which is the subject Relief Determination at issue, is attached to Ms. Weinstock's affidavit as Exhibit A. The Relief Determination does not contain a certified control number and no cover sheet is included with the Relief Determination. Also attached to Ms. Weinstock's affidavit, as Exhibit B, is a copy of the CMR. The CMR does not contain a legible postmark.[2] The CMR lists one piece of certified

---

[1] Ms. Weinstock's affidavit is silent as to the mailroom's procedures for pick-up of the certified mail from the "wired bin basket", she does not describe how or if the certified mail is delivered to the USPS, and does not identify any instructions or requests made by the Division to the USPS for identifying items received by the USPS for certified mailing or procedures for filling out the CMR by the USPS.

[2] The postmark appearing on the CMR states "Colonie Center, NY, USPS 12205" and the legible portion of the postmark date is "1 2016." The month of the postmark is not legible.

mail, bearing article number 7009 1410 000 1618 3742 and addressee "Mei Sheng, 36 Armadillo St, Dunkirk NY 14048." The CMR does not reference an assessment number. At the bottom of the CMR, corresponding to "Total Number of Pieces Listed by Sender," is the preprinted number "1" and next to "Total Number of Pieces Received At Post Office" is the handwritten entry "1," as well as initials in the box corresponding to "Postmaster, Per (name of Receiving Employee)."

7. The affidavit of Heidi Corina describes the Division's requests to the USPS for delivery information on the subject Relief Determination. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7009 1410 0000 1618 3742. The USPS response to this request indicates that the article bearing certified control number 7009 1410 0000 1618 3742 was delivered on August 5, 2016, in Dunkirk, New York. Attached to the Corina affidavit as exhibit "A" is the Division's "Request For Delivery Information" for article number 7009 1410 0000 1618 3742. Exhibit "B" to the Corina affidavit is the USPS response to the Division's request indicating delivery of the same article on August 5, 2016 to "Dunkirk, NY 14048."

CONCLUSIONS OF LAW

A. The standard of review for a notice of intent to dismiss is the same as that for a motion for summary determination (***Matter of Victory Bagel Time***, Tax Appeals Tribunal, September 13, 2012). A summary determination motion "shall 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" (20 NYCRR 3000.9[b][1]).

Section 3000.9(c) of the Tax Appeals Tribunal's Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant for summary determination

"must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], ***citing Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). As the Tribunal noted in ***Matter of United Water New York***:

> "Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is 'arguable' (***Glick & Dolleck v Tri-Pac Export Corp.***, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see Gerard v Inglese***, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court 'to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist' (***Daliendo v Johnson***, 147 AD2d 312 [1989])" (***Matter of United Water New York, Inc.***, Tax Appeals Tribunal, April 1, 2004).

To prevail against a proponent of a motion for summary judgment, the opponent must produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1992], ***quoting Zuckerman***). Regardless of the sufficiency of the opposing papers, however, the failure of the proponent of the motion to make a prima facie showing of entitlement to judgement as a matter of law requires denial of the motion (***Winegrad*** at 853).

B. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a statutory notice, including the Relief Determination at issue here (Tax Law §§ 170[3-a][a]; 689; 2006[4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (***see Matter of Voelker***, Tax Appeals Tribunal, August 31, 2006; ***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is on the mailing of the statutory notice 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 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).

D. 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).

E. In this case, the Division has failed to introduce adequate proof of its standard mailing procedures and has failed to present sufficient documentary proof to establish that the subject Relief Determination was mailed to petitioner at her last known address on August 1, 2016.

The affidavit of Ms. Weinstock fails to establish the Division's standard mailing in that it does not describe the Division's procedure whereby pieces of certified mail and the CMR are delivered to the USPS for mailing. The affidavit is silent as to the Division's procedures for pick-up of the certified mail from the "wired bin basket" and does not describe how or if the certified mail is delivered to the USPS. The Division has not included an affidavit from a mailroom employee describing such procedure. Additionally, Ms. Weinstock's affidavit does not

identify any instructions or requests made by the Division to the USPS for identifying items received by the USPS for certified mailing or procedures for filling out the CMR by the USPS; it does not describe the procedure whereby a USPS employee affixes a postmark to the CMR nor describe the procedures the USPS employee follows to indicate receipt of the certified mail items at the post office. As such, the Division has failed to establish proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures.

Moreover, the documentary evidence presented by the Division is insufficient to establish proper mailing of the statutory notice. Specifically, the postmark on the CMR is not legible: the only portion of the postmark that is visible is "[ ] 1 2016" and the month is entirely blank. As such, the Division has failed to present sufficient proof that the statutory notice was mailed as alleged on August 1, 2016.

Additionally, although the Weinstock affidavit states that the denial notices are prepared with cover sheets, the Division failed to present the cover sheet into the record. In ***Matter of Alvarenga***, the Tax Appeals Tribunal found that the absence of a mailing cover sheet raised a material factual issue of whether the Division's standard mailing procedure was followed because without the cover sheet, the address and certified control number for a particular statutory notice or order cannot be verified against the CMR (***see Matter of Alvarenga***, Tax Appeals Tribunal, May 28, 2015). In the instant case, no copy of the cover sheet was provided and the Relief Determination does not have a certified control number listed on it. While the CMR lists a certified control number, the notice number of the Relief Determination is not referenced on the CMR. Thus, the notice at issue cannot be verified against the CMR. Similarly, although the Corina affidavit and attached exhibits indicate that an item with certified

control number 7009 1410 0000 1618 3742 was delivered on August 5, 2016 in Dunkirk, New York, in the absence of a cover sheet or other evidence linking the Relief Determination to that certified control number, there remains a question of fact as to whether the item delivered was the subject Relief Determination. As a result, this failure of proof raises material questions as to "whether the Division's standard mailing procedure . . . was followed in this case" (***Matter of Alvarenga***).

F. Finally, proper mailing of the statutory notice includes proof of mailing to the taxpayer's last known address (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). The Division bears the burden of showing that the statutory notice was sent to the taxpayer's last known address as part of its proof that it followed its own mailing procedures in this case.

The last known address of a taxpayer has been defined for federal purposes as the taxpayer's last permanent address or legal residence known by the Internal Revenue Service (IRS) or the last known temporary address of a definite duration to which the taxpayer has directed the IRS to send all communications (***see Alta Sierra Vista, Inc. v Commr. of Internal Revenue***, 62 TC 367, 374 [1974], ***affd sub nom. Alta Sierra Vista, Inc. v C. I. R.***, 538 F.2d 334 [1976]).[3] Generally, the last known address will be the address listed on the taxpayer's last tax return filed with the IRS, unless there is "clear and concise notification" by the taxpayer of a change of address (***id.***, ***see also Weinroth v Commr. of Internal Revenue***, 74 TC 430, 435 [1980]). The last known address of a particular taxpayer is the address to which, in light of all

[3] Terms under Article 22 of the Tax Law are given the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required (Tax Law § 607 [a]). Here, where the effect of a statutory notice conferring protest rights is at issue, it is appropriate to refer to federal case law and statutes regarding issuance of analogous statutory notices to clarify the meaning of the term "last known address."

the surrounding facts and circumstances, the IRS reasonably believed the taxpayer wished the notice to be sent (***id.***, ***cf. Looper v Commr.***, 73 TC 690 [1980], concluding that the IRS' designation of a temporary address as the taxpayer's last known address was unreasonable in light of the circumstances).

The Division's attorney avers in her affidavit in support of the notice of intent to dismiss petition that "the Relief from Joint Liability Determination was . . . delivered to the petitioner on August 5, 2016 at her last known address of record, 36 Armadillo St., Dunkirk, NY 14048. This same address appears on the Petition." The problem with this statement is that the petition was filed on November 7, 2016, a date *subsequent* to the date the subject Relief Determination was allegedly issued. As such, the address on the petition is not evidence of petitioner's last known address at the time of the issuance of the Relief Determination. While the Division also submitted a copy of petitioner's request for innocent spouse relief, dated May 1, 2016, which bears the same address for petitioner as that appearing on the Relief Determination, the Division does not affirmatively state that the address on the request was petitioner's last known address at the time the statutory notice was issued. As such, the Division's proof "fails to meet the exacting standard demanded of proponents of an accelerated determination" (***see Matter of Campos-Liz***, Tax Appeals Tribunal, January 12, 2017).

G. The notice of intent to dismiss petition issued to Mei Zhen Zheng dated January 13, 2017, is withdrawn and the Division shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
July 6, 2017

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE