

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

JACOB LEIBOWITZ :

DECISION
DTA NO. 826112

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 2011 through November 30, 2011. :

Petitioner, Jacob Leibowitz, filed an exception to the determination of the Administrative Law Judge issued on August 28, 2014. Petitioner appeared by Simon Leibowitz. The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition on February 4, 2015. Petitioner filed a letter brief in reply on February 27, 2015. Oral argument was not requested. The six-month period for the issuance of this decision began on February 27, 2015.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. On February 6, 2014, petitioner, Jacob Leibowitz, mailed a petition via United States Postal Service Priority and Certified Mail to the Division of Tax Appeals. It was received on February 10, 2014. The petition sought an administrative hearing to review a notice of determination (assessment number L-040313653), which was attached to the petition.

2. The subject notice of determination, dated November 7, 2013, was addressed to petitioner at a Monsey, New York address.

3. On March 20, 2014, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition (notice of intent) on the ground that the petition was not timely filed. The notice of intent indicated that the subject petition was filed in protest of the notice of determination issued to petitioner on November 7, 2013 and that the petition was not filed until February 6, 2014.

4. In response to the issuance of the notice of intent and to prove mailing of the notice of determination under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated May 21, 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) postmarked November 7, 2013; (iii) an affidavit, dated May 21, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; and (iv) a copy of petitioner's New York State personal income tax return (form IT-201) for the year 2012 dated March 8, 2013, which was the last filing from petitioner prior to the issuance of the notice of determination.

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 has 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 "11/7/13."¹ 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 United States Postal Service (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 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."

¹ 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.

8. The CMR relevant to the notice of determination under protest consists of 49 pages and lists 531 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 49, which contains 3 such entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated November 7, 2013 of the Colonie Center branch of the USPS to each page of the CMR and also wrote his or her initials on each such page.

9. Page 12 of the CMR indicates that a notice of determination, assigned certified control number 7104 1002 9730 0097 2747 and assessment number L-040313653, was to be mailed to “Leibowitz-Jacob” at the Monsey, New York address listed thereon. The corresponding mailing cover sheet bears this certified control number and the name, “Leibowitz-Jacob,” and the Monsey, New York address.

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, the USPS employee affixed a postmark dated November 7, 2013 and his or her initials to each page of the CMR. 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, the USPS employee complied with this request by circling the number “531” on the last page next to the heading “TOTAL PIECES AND AMOUNTS.”

11. Based upon his review of the affidavit of Daniel A. Maney and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on November 7, 2013, an employee of the mail room delivered a piece of certified mail addressed to petitioner in Monsey, New York to a branch of the USPS in Albany, New York in a sealed postpaid envelope for delivery by certified mail. Mr. Peltier stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on November 7, 2013 for the records of the Division’s CARTS Control Unit. He asserted that the procedures described in his affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to petitioner on November 7, 2013.

12. Petitioner’s 2012 New York resident income tax return, dated March 8, 2013, reported the same Monsey, New York address for petitioner as that listed on the CMR and the subject notice of determination. The 2012 return was the last return filed by petitioner prior to the issuance of the subject notice of determination.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of petitions. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the notice of determination by mailing such notice to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, in order to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division met the foregoing standards and established that the subject notice of determination was properly mailed to petitioner on November 7, 2013. The Administrative Law Judge also concluded that the period for the filing of a petition with the Division of Tax Appeals to protest the notice of determination expired 90 days from the date of such mailing, or on February 5, 2014. The Administrative Law Judge found that the subject petition was filed with the Division of Tax Appeals on February 6, 2014, the date of the USPS postmark on the envelope in which it was mailed and, accordingly, that such petition was untimely filed. The Administrative Law Judge thus determined that the Division of Tax Appeals lacked jurisdiction to consider the merits of petitioners's protest.

ARGUMENTS ON EXCEPTION

On exception, petitioner asserts that, due to a snowstorm during the week of February 3, 2014, which lasted a few days and resulted in school closings, he was not able to leave his house to mail the petition. Petitioner notes that Governor Cuomo, declared a "State Disaster Emergency" for Rockland County on February 5, 2014, and argues that he should not be required to leave his house on those days, especially considering his age (83 years) and the fact that he was dealing with serious health issues at that time.

Petitioner also argues that the Division has not demonstrated sufficient documentary proof that the notice of determination was mailed as addressed to petitioner, and that, as a signature is not required, the Division has not proved delivery. Petitioner further contends that there is an ongoing issue with his local post office, in which mail intended for petitioner is occasionally delivered to his neighbor. Petitioner argues that this was the case in the instant matter.

The Division argues that it established that the notice of determination was properly mailed by evidence of the standard mailing procedure and affidavits of Division employees. The Division also argues that ill health and inclement weather does not excuse the late filing of a petition. Finally, the Division contends that, as petitioner never made the argument that the notice of determination was delivered to his neighbor in response to the notice of intent to dismiss petition below, he cannot now argue it on exception. The Division thus asserts that the Administrative Law Judge correctly dismissed the petition.

OPINION

We affirm the determination of the Administrative Law Judge.

There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (Tax Law § 1138 [a] [1]). Pursuant to that provision, a notice of determination is binding upon a taxpayer unless such taxpayer files a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

As the Administrative Law Judge correctly noted, it is well established that, where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice or

conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). We agree with the Administrative Law Judge that the Division has met this burden through the properly completed CMR and the affidavits of Mr. Maney and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination. We thus concur in the Administrative Law Judge's conclusion that the subject notice of determination was properly mailed to petitioner on November 7, 2013.

As noted, Tax Law § 1138 (a) (1) provides that a notice of determination is binding unless a petition is filed "within such ninety day period applied to the division of tax appeals for a hearing." Issuance of a notice in this context means mailing by certified or registered mail (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992; Tax Law § 1138 [a] [1]). Accordingly, the 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing, November 7, 2013. There is no question that the petition in this matter was filed on February 6, 2014, i.e., the date of the USPS postmark stamped on the envelope in which it was mailed (*see* 20 NYCRR 3000.22 [a] [1]). Unfortunately for petitioner, February 6, 2014 fell 91 days after the date of issuance of the notice of determination. The petition was therefore late-filed. We note that deadlines for filing petitions are strictly enforced and that petitions even one day late must be dismissed (*see Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003). Furthermore, ill health or extenuating circumstances do not provide a basis to excuse the late filing of a petition (*see Matter of Perillo*, Tax Appeals Tribunal, August 2, 1990; *Matter of Rathgaber*, Tax Appeals Tribunal, April 5, 1990).

Accordingly, while we acknowledge that the snowstorm may have made it difficult for petitioner to mail his petition, we simply lack jurisdiction over a petition filed beyond the 90-day deadline (*see Matter of Sak Smoke Shop*). Moreover, we have no authority to extend that deadline.

In his arguments on exception, petitioner references Governor Cuomo's Executive Order declaring a disaster emergency in connection with a winter storm affecting Rockland County and many surrounding areas on February 5, 2014 (*see* Executive Order [Cuomo] No 126 [Feb 5, 2014]). Tax Law § 171 twenty-eighth (a) provides that where the governor declares such an emergency, the Commissioner of Taxation and Finance has the authority to extend certain filing deadlines, including deadlines for filing a petition with the Division of Tax Appeals. It does not appear, however, that the Commissioner exercised such authority following the issuance of Executive Order No 126 (*cf.*, NY St Dept of Taxation & Fin Important Notice N-14-14 [November 2014] ["Announcement Regarding Lake Effect Snow Storms"]; N-12-11 [October 2012] ["Announcement Regarding Hurricane Sandy"]; N-08-17 [December 2008] ["Announcement Regarding the Ice Storm"]). In the absence of any such extension of filing deadlines, petitioner's petition remained subject to the statutory 90-day period.

Petitioner's factual assertion of an issue with his local post office and the possibility that the subject notice was delivered to his neighbor was raised for the first time on exception. While this Tribunal has permitted the raising of new legal issues on exception, we have not allowed the raising of new factual issues after the record has been closed (*see Matter of Crow and Sutton Assoc.*, Tax Appeals Tribunal, January 10, 2013). Allowance of such new factual issues on exception is improper because it deprives the opposing party of the opportunity to offer evidence in opposition to the new factual claim (*see Coram Diner Corp.*, Tax Appeals Tribunal, March 12, 2015). Accordingly, we decline to address this new factual issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jacob Leibowitz is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Jacob Leibowitz is dismissed, with prejudice.

DATED: Albany, New York
August 13, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner