

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GARY M. AND WILLOW R. BROST	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 826296
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2009.	:	

Petitioners, Gary M. and Willow R. Brost, 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 2009.

On July 29, 2014, 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 October 14, 2014 to respond to the proposed dismissal. On August 23, 2014, petitioners, appearing by Richard J. Wright, Jr., CPA, submitted documents in opposition to dismissal. On October 14, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), 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 commenced October 14, 2014. After due consideration of the documents submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. On May 20, 2014, petitioners, Gary M. Brost and Willow R. Brost, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Notice of Deficiency (notice number L-039135953), issued by the Division of Taxation (Division), dated May 1, 2013.

2. On July 29, 2014, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioners. The Notice of Intent indicates that the relevant Notice of Deficiency was issued on May 1, 2013, but that the petition was not filed until May 20, 2014, or 384 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted, among other documents, (i) an affidavit of Leo Gabovich, a law clerk employed in the Office of Counsel of the Division, dated October 8, 2014; (ii) an affidavit, dated October 7, 2014, 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 Presort Mail - Assessments Receivable" (CMR) postmarked May 1, 2013; (iv) an affidavit, dated October 8, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's mail room; and (v) petitioners' resident income tax return for the year 2011, dated October 10, 2012, which lists the same address for petitioners as that listed on the subject notice. The 2011 return was the last return filed with the Division by petitioners before the notice was issued.

4. 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 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 was manually changed on the first page of the CMR in the present case to the actual mailing date of "5/1/13." 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 United States Postal Service (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.

5. 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."

6. The CMR in the present matter consists of 65 pages and lists 710 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 65, which contains 6 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 May 1, 2013 to each page of the CMR, circled the preprinted number "710" on page 65 next to the heading "Total Pieces

Received at Post Office” and initialed or signed page 65. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 710.

7. Page 57 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 1541 5017 and reference number L-039135953 was mailed to petitioners at the Buffalo, New York, address listed on the subject Notice of Deficiency. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit “B,” bears this certified control number and petitioners’ names and address as noted.

8. 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. 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. Here, as noted, the USPS employee initialed page 65 and affixed a postmark dated May 1, 2013 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. Here, the USPS

employee complied with this request by circling the number “710” on the last page next to the heading “Total Pieces Received at Post Office.”

9. According to the Peltier affidavit, a copy of the subject notice was mailed to petitioners on May 1, 2013, as claimed. Mr. Peltier notes that the names of both petitioners and their address would have been displayed in the window of the envelope containing the statutory notice, and notes that the CMR only lists the name of petitioner Gary M. Brost. Mr. Peltier explains that only Mr. Brost’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. Since both petitioners filed a joint return as husband and wife, listing Mr. Brost’s social security number for the primary taxpayer, only Mr. Brost’s name appears on the CMR.

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 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 has been produced and the burden of demonstrating proper mailing rests with the Division (*see 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. In this case, the Division has met its burden of establishing proper mailing. Specifically, the Division was required to mail the statutory notice to petitioners at their last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices, the Division has offered adequate proof to establish the fact that the notice at issue was actually mailed to petitioners at their last known address by certified mail on May 1, 2013, the date appearing on the CMR. The affidavits described the various stages of producing and mailing notices and attested to the authenticity and accuracy of the copy of the notice and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Nagengast and Peltier affidavits were followed with respect to the notice issued to petitioners. Petitioner Gary M. Brost's name and petitioners' address, as well as the numerical information on the face of the notice, appear on the CMR, which bears a

USPS date stamp of May 1, 2013.¹ There are 710 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number “710” on the line stating “total pieces received at post office,” that the post office received 710 items for mailing. In short, the Division established that it mailed the notice to petitioners by certified mail on May 1, 2013 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). Additionally, the Division established that the notice was mailed to petitioners’ last known address, being the same address as that reported on petitioners’ 2011 resident income tax return, which was the last return filed with the Division before the subject notice was issued.

E. A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the notice was properly mailed when it was delivered into the custody of the USPS on May 1, 2013, and it is this date that commenced the 90-day period within which a protest had to have been filed. Petitioners’ protest was not filed until May 20, 2014, or 384 days later. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioners’ protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. This determination, made pursuant to the notice of intent to dismiss petition and the evidence and arguments submitted by the parties, is the equivalent of an order in favor of the Division on a motion for summary determination for failure to timely file a petition, and precludes petitioner from having a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, such a

¹ As noted in Finding of Fact 9, the CMR lists only Mr. Brost’s name, which is the Division’s standard procedure for joint filers. The mailing cover sheet of the Notice of Deficiency, with the same certified control number as that listed on the CMR, lists both petitioners’ names.

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.”

Petitioners submitted no evidence that the petition was filed within the time frame required, i.e., within 90 days from the date the statutory notice was issued. Moreover, petitioners have failed to challenge the Division’s proof of mailing of the notice with any evidence. The proper mailing of a statutory notice, as in the present matter, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002) and petitioners have failed to present any evidence to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

G. Without a timely filed petition, this agency does not have the jurisdiction to entertain the substantive issues presented in the petition. Therefore, it must be concluded that petitioners have failed to meet their burden of proof.

H. The petition of Gary M. and Willow R. Brost is dismissed.

DATED: Albany, New York
December 18, 2014

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE