

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
OLEG OLSHANETSKIY : DETERMINATION
DTA NO. 828319
for Redetermination of a Deficiency or for Refund of New :
York State Personal Income Tax Under Article 22 of the :
Tax Law for the Periods Ended June 30, 2012 through :
December 31, 2014.

Petitioner, Oleg Olshanetskiy, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the periods ended June 30, 2012 through December 31, 2014.

On October 27, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition,¹ pursuant to 20 NYCRR 3000.9 (a) (4), on the grounds that the petition did not appear to be timely filed. By request of the Division of Taxation, the 30-day period for both parties to respond to the notice of intent to dismiss petition was extended to January 11, 2018. On January 8, 2018, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing by Financial Investigation Services, Inc. (Neil Cohen, EA), timely submitted letters in opposition to dismissal on November 20, 2017 and December 19, 2017.² Pursuant to 20 NYCRR 3000.5 (d)

¹ The notice of intent to dismiss petition referred to one assessment as L-043611582. This appears to be a typographical transposition and is referenced in this determination as L-043611852.

² A third letter was submitted on January 25, 2018. Since this letter was beyond the date to which responses were extended, and no additional time was requested, the content of that correspondence was not considered herein.

and 3000.9 (a) (4), the 90-day period for issuance of this determination commenced on January 11, 2018. After due consideration of the documents and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. On August 14, 2017, petitioner, Oleg Olshanetskiy, filed a petition with the Division of Tax Appeals protesting the issuance of the following 11 notices of deficiency issued to petitioner by the Division:

Assessment ID Number	For Period Ended
L-043911843	September 30, 2014
L-043911844	December 31, 2014
L-043911845	June 30, 2014
L-043911846	March 31, 2014
L-043911847	December 31, 2013
L-043911848	September 30, 2013
L-043911849	June 30, 2013
L-043911850	March 31, 2013
L-043911851	December 31, 2012
L-043911852	September 30, 2012
L-043911853	June 30, 2012

2. On October 27, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition, on the basis that the petition did not appear to be timely filed. The notice of intent indicated that the notices were issued on November 3, 2015, but that the petition was not filed until August 14, 2017, or 650 days later. There were no other notices attached to the petition.

3. In response to the issuance of the notice of intent, the Division submitted the affidavits of Deena Picard and Fred Ramundo, employees of the Division, dated November 27, 2017 and November 28, 2017, respectively. The Division also submitted copies of the eleven notices of deficiency issued to petitioner, a copy of the certified mail record (CMR) containing a list of eleven notices issued by the Division dated November 3, 2015, and a copy of form IT-203 Nonresident and Part-Year Resident Income Tax Return filed by petitioner for the tax year 2014, reflecting a Cliffside Park, New Jersey, address.

4. The affidavit of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS), sets forth the Division's general practice and procedure for processing statutory notices. As the Acting Director of MAPS, the unit responsible for the receipt and storage of CMRs, she 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 and last page of the CMR in the present case to the actual mailing date of "11/3/15." In addition, as described by Ms. Picard, 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 “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 November 3, 2015 CMR in the present matter consists of 212 pages and lists 2,324 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated November 3, 2015, to each page of the CMR. Pages 2 and 3 of the CMR indicate that the eleven notices of deficiency at issue, assigned the following certified control numbers and listed with their corresponding assessment numbers, were mailed to petitioner, at the Cliffside Park, New Jersey, address listed thereon:

Assessment ID Number	Certified Control Number
L-043911843	7104 1002 9730 0660 6127
L-043911844	7104 1002 9730 0660 6134
L-043911845	7104 1002 9730 0660 6141
L-043911846	7104 1002 9730 0660 6158

L-043911847	7104 1002 9730 0660 6165
L-043911848	7104 1002 9730 0660 6172
L-043911849	7104 1002 9730 0660 6189
L-043911850	7104 1002 9730 0660 6196
L-043911851	7104 1002 9730 0660 6202
L-043911852	7104 1002 9730 0660 6219
L-043911853	7104 1002 9730 0660 6226

The corresponding mailing cover sheets bear these same certified control numbers and petitioner's name and address as noted. The Cliffside, New Jersey, address for petitioner is the same address used by petitioner on his Form IT-203 filed with the Division for the tax year 2014, and on his petition. Pages 70 and 71 of the CMR indicate that the 11 notices of deficiency at issue, assigned the following certified control numbers and listed with their corresponding assessment numbers, were mailed to petitioner's then representative, at the New Hyde Park, New York, address listed thereon:

Assessment ID Number	Certified Control Number
L-043911843	7104 1002 9730 0661 3569
L-043911844	7104 1002 9730 0661 3576
L-043911845	7104 1002 9730 0661 3583
L-043911846	7104 1002 9730 0661 3590
L-043911847	7104 1002 9730 0661 3606
L-043911848	7104 1002 9730 0661 3613
L-043911849	7104 1002 9730 0661 3620
L-043911850	7104 1002 9730 0661 3637
L-043911851	7104 1002 9730 0661 3644

L-043911852	7104 1002 9730 0661 3651
L-043911853	7104 1002 9730 0661 3668

7. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December of 2013, and currently a Stores and Mail Operations Supervisor, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, once a notice and accompanying mailing cover sheet is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff retrieves the notice and mailing cover sheet and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. A 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 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." Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in the Albany, New York, area. A postal employee is requested to affix a postmark, and sign or initial the CMR, indicating receipt by the post office.

8. In this particular instance, the postal employee affixed a postmark dated November 3, 2015, to each page of the 212-page CMR. The postal employee also wrote and circled the number "2324" and initialed page 212 to indicate the total pieces of mail received at the post office.

9. Mr. Ramundo stated that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and

procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Ramundo's staff on the following day after its initial delivery and is then delivered to the originating office. The CMR is maintained by the Division in the regular course of business.

10. Based upon his review of the affidavit of Deena Picard, the exhibits attached thereto and the CMR, Mr. Ramundo stated that on November 3, 2015, an employee of the Mail Processing Center delivered 11 pieces of certified mail addressed to Oleg Olshanetskiy and 11 pieces of certified mail addressed to Mr. Olshanetskiy's representative to a branch of the USPS in the Albany, New York, area, in sealed envelopes for delivery by certified mail. He stated that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on November 3, 2015, for the records of the Division. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center 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 3, 2015.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

C. 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 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).

D. 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 (*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).

E. 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*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing

proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. Here, the Division has offered proof sufficient to establish the mailing of the notices to petitioner's last known address on November 3, 2015. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheet and CMR conforms with the address listed on petitioner's 2014 nonresident and part-year resident income tax return and on the petition, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notices when they were delivered into the custody of the USPS on November 3, 2015. Since they were properly addressed with the requisite amount of postage affixed, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 1138 681 [b]).

G. In sum, the Division has established that notices of deficiency L-043911843, L-043911844, L-043911845, L-043911846, L-043911847, L-043911848, L-043911849, L-043911850, L-043911851, L-043911852 and L-043911853 were properly mailed as addressed to petitioner at his last known address on November 3, 2015. Having established that the notices of deficiency were properly mailed to petitioner, it was incumbent upon petitioner to file either a

request for conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter. Petitioner did not file a request for conciliation conference with BCMS, but rather opted to file a petition for a hearing before the Division of Tax Appeals in the first instance. However, the petition was not filed until August 14, 2017, a date that falls far beyond 90 days after the date of issuance of the notices. Accordingly, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The petition Oleg Olshanetskiy is dismissed.

DATED: Albany, New York
April 5, 2018

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE