

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EMMANUEL ETERE	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of Tax Law for Year 2018.	:	DTA NO. 830270

Petitioner, Emmanuel Etere, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of Tax Law for year 2018.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated August 6, 2021, on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition did not appear to have been filed in a timely manner. The parties were given, upon extension, until October 21, 2021 to respond to said notice. The Division of Taxation, appearing by Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response by October 21, 2021, which date triggered the 90-day deadline for issuance of this determination. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Emmanuel Etere, a notice of deficiency bearing assessment number L-051511952, dated July 29, 2020, for the year 2018.

2. On February 12, 2021, a petition protesting assessment number L-051511952 was received by the Division of Tax Appeals. Attached to the petition was notice of deficiency number L-051511952. The envelope in which the petition was mailed bears a USPS postal mark indicating the petition was mailed on February 9, 2021.

3. On August 6, 2021, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued a notice of intent to dismiss petition (notice of intent) to petitioner on the basis that the petition did not appear to be timely filed. The notice of intent indicated that the notice of deficiency was issued on July 29, 2020, but the petition was not filed until February 9, 2021, or in excess of 90 days later.

4. In response to the issuance of the notice of intent, the Division submitted among other documents: (i) an affirmation, dated October 20, 2021, of Colleen McMahon, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated October 5, 2021, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated October 7, 2021, of Susan Saccocio, Manager of the Mail Room of the Department of Taxation and Finance; (iv) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked July 29, 2020; (v) a copy of the notice of deficiency, dated July 29, 2020 together with associated mailing cover sheets; and (vi) a copy of the petitioner’s IT-201 for the tax year 2019.

5. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor since February 2006, sets forth the

Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 and last page of the CMR in the present case to the actual mailing date of July 29, 2020. 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.

6. 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 the 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 Address, Street, and PO Address."

7. The July 29, 2020 CMR consists of 510 pages and lists 6,791 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard 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 July 29, 2020, to each page of the CMR, wrote

the number “6,791” next to the heading “Total Pieces Received at Post Office” on page 510, and initialed or signed the first and last page of the CMR.

8. Page 317 of CMR indicates that a notice with a certified control number 7104 1002 9735 0048 0001, with reference number L-051511952, was mailed to petitioner at 430 SPUR DR, N BAY SHORE NY 11706-3432. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

9. The affidavit of Susan Saccocio, a manager in the Division’s mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amount on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 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 places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room

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. As noted, each page of the CMR attached to the Picard affidavit as Exhibit “A” contains a USPS postmark dated July 29, 2020. In addition, she attests that the USPS employee’s initials or signature appear on the last page of the CMR. According to Mr. Saccocio, the affixation of the postmarks and the USPS employee’s initials indicates that all 6,791 articles of mail listed on the July 29, 2020 CMR, including the article addressed to petitioner, were received by the USPS for mailing on July 29, 2020.

10. According to the Picard and Saccocio affidavits, the notice was mailed to petitioner on July 29, 2020, as claimed.

11. Petitioner did not submit a response to the notice of intent.

CONCLUSIONS OF LAW

A. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (*see* Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such hearing has not elapsed” (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996).

B. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals 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.

C. 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]).

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 conference 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.*).

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; 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. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Ms. Saccocio, Division employees involved in and possessing knowledge of the process of generating reviewing and issuing (mailing)

statutory notices (*see Matter of Victory Bagel Time*).

G. The Division has also presented sufficient documentary proof, i.e., a properly completed CMR, to establish that the notice of deficiency was mailed as addressed on July 29, 2020. Further, petitioner's address on the subject notice of deficiency, the corresponding mailing cover sheet and the CMR all conform with the address of 430 Spur Dr., N Bay Shore, NY 11706-3432, which is listed on petitioner's IT-201 for the tax year 2019. This was petitioner's last known address prior to the issuance of the notice. It is thus concluded that the Division properly mailed the notice of deficiency on July 29, 2020, and 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. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (*see* Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS "if the time to petition for such hearing has not elapsed" (Tax Law § 170 [3-a] [a]). As noted, the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced.

H. In sum, the Division has established that notice of deficiency, L-051511952, was properly mailed to petitioner at his last known address on July 29, 2020. Having established that the notice of deficiency was properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not filed until February 9, 2021, a date that falls beyond 90 days after the date of issuance of the notice of deficiency. 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).

I. The petition of Emmanuel Etere is dismissed.

DATED: Albany, New York
January 13, 2022

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE