

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAYMOND C. MORALES & GRISELDA TEJADA	:	DETERMINATION
		DTA NO. 831145
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2019.	:	

Petitioners, Raymond C. Morales and Griselda Tejada, 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 year 2019.

On June 30, 2023, the Division of Tax Appeals issued to petitioners a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The Division of Taxation, appearing by Amanda Hiller, Esq. (James Passineau, Esq., of counsel), submitted documents in support of dismissal. Petitioners, appearing pro se, did not submit a response by September 14, 2023, which date began the 90-day period for the issuance of this determination. After due consideration of the documents submitted, Alexander Chu-Fong, 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. The Division of Taxation (Division) issued to petitioners, Raymond C. Morales and Griselda Tejada, a notice of deficiency, bearing assessment number L-052808884, dated March 22, 2021, for the year 2019 (notice). The notice was issued to petitioners at an address in Yonkers, New York.

2. On March 28, 2022, petitioners filed a petition with the Division of Tax Appeals protesting the notice. The address listed on the petition mirrors the Yonkers, New York, address listed on the notice.

3. On June 30, 2023, the Division of Tax Appeals issued to petitioners a notice of intent to dismiss petition. The notice stated, in sum, that it appeared that the Division of Tax Appeals lacked jurisdiction to consider the merits of the petition on the basis that the petition did not appear to be timely filed. The notice of intent to dismiss petition stated that the notice was issued on March 22, 2021, but the petition was not filed until March 28, 2022, or in excess of 90 days later.

4. In response to the issuance of the notice of intent to dismiss petition, the Division submitted among other documents: (i) an affirmation, dated August 8, 2023, of James Passineau, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated July 25, 2023, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated July 25, 2023, of Susan Ramundo, a manager in the Division's mail room; (iv) a "Certified Record for – DTF-962-F-E – Not of Def Follow Up" (CMR) postmarked March 22, 2021; (v) a copy of the notice of deficiency, dated March 22, 2021, together with the associated mailing cover sheet; and

(vi) a copy of petitioners' e-filed form IT-201, New York State resident personal income tax return for the tax year 2019 (2019 tax return), filed on July 16, 2020. The 2019 tax return lists the same address as that listed on both the petition and the notice, and was the last known address for petitioners at the time the notice was issued.

5. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier was the Supervisor of Administrative Analysis from July 2019 through August 2022 and has been the Principal Administrative Analyst and Director of MAPS since July 2022. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier 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 "3/22." 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 Addressee, Street, and PO Address.”

7. The CMR, dated March 22, 2021, consists of 58 pages and lists 756 certified control numbers along with corresponding assessment numbers, names, and addresses. Ms. Denier 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 United States Postal Service (USPS) representative affixed a postmark dated March 22, 2021, to each page of the CMR, wrote the number “756” next to the heading “Total Pieces Received at Post Office” on page 58, and initialed or signed the last page of the CMR.

8. Page 17 of the CMR indicates that a notice with reference number L-052808884 and certified control number 7104 1002 9735 0517 4080 was mailed to petitioners at their Yonkers, New York, address. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit B, bears this certified control number and petitioners’ names and address as noted.

9. The affidavit of Susan Ramundo, 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 regarding 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 amounts on each envelope. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR, and 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 Denier affidavit as exhibit A contains a USPS postmark dated March 22, 2021, and the USPS's representative wrote the number "756" next to the heading "Total Pieces Received at Post Office" on page 58. In addition, Ms. Ramundo attests that the USPS employee's initials, or signature appear on the last page of the CMR. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee's initials indicate that all 756 articles of mail listed on the CMR, including the article addressed to petitioners, were received by the USPS for mailing on March 22, 2021.

10. According to the Denier and Ramundo affidavits, the notice was mailed to petitioners on March 22, 2021, as claimed.

11. Petitioners did not respond to the notice of intent to dismiss petition.

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 the Division's Bureau of Conciliation and Mediation Services (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.

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

D. Petitioners did not respond to the Division's motion. Accordingly, petitioners are deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioners have presented no evidence to contest the facts alleged in the affirmation of Mr. Passineau or the affidavits of Ms. Denier and Ms. Ramundo. Therefore, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d at 544; *Whelan v GTE Sylvania*).

E. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Denier and Ms. Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing statutory notices. The Division has also presented sufficient documentary proof, i.e., a properly completed CMR, to establish that the notice was mailed, as addressed, on March 22, 2021. Further, petitioners' address on the notice, the corresponding mailing cover sheet and the CMR all conform with the address listed on petitioners' 2019 tax return. This was petitioners' last known address prior to the issuance of the notice. Thus, it is concluded that the Division properly mailed the notice on March 22, 2021, 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 by filing a petition for a hearing within 90 days from the date of mailing of such notice (*see* Tax Law § 681 [b]; 689 [b]). Here, the petition was not filed until March 28, 2022, a date that falls beyond 90 days after the March 22, 2021, date of issuance of the notice. Accordingly, the petition was not timely filed, and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

F. The petition of Raymond C. Morales and Griselda Tejada is dismissed.

DATED: Albany, New York
November 30, 2023

/s/ Alexander Chu-Fong

ADMINISTRATIVE LAW JUDGE