

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ALEXEI P. MOSTOVOI : ORDER
for Redetermination fo a Deficiency or for Refund of : DTA NO. 827171
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2011. :

Petitioner, Alexei P. Mostovoi, 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 2011.

On March 11, 2016, the Division of Taxation, by Amanda Hiller, Esq., (Michele W. Milavec, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affirmation of Michele W. Milavec, Esq., dated March 11, 2016, and annexed exhibits. Petitioner, appearing pro se, submitted the affidavit of Alexei Mostovoi, dated April 9, 2016, and documents in opposition to the Division's motion on April 11, 2016, which date commenced the 90-day period for issuance of this order.¹ After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order.

¹ On April 14, 2016, petitioner filed a Motion to Impose Sanctions. Petitioner's motion will be addressed in this order as well.

ISSUE

Whether petitioner filed a timely petition following the issuance of a Notice of Deficiency

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner, Alexei P. Mostovoi's, protest of a Notice of Deficiency dated April 6, 2015 and addressed to Alexei P. Mostovoi and Kayoko Mostovoi at "104 Edgemont Rd, Scarsdale, NY 10583-2714." The Notice of Deficiency, notice number L-042384146-7, asserted additional New York State personal income tax due for the year 2011 in the amount of \$679.00, plus interest, for a balance due of \$848.38. The mailing cover sheet of the Notice of Deficiency contains the certified control number 7104 1002 9730 0443 8645.

2. On August 26, 2015, petitioner mailed a petition by FedEx Express standard overnight shipping to the Division of Tax Appeals. It was received on August 27, 2015. The petition lists petitioner's address as 104 Edgemont Road, Scarsdale, New York 10583.

3. Initially, petitioner elected to have the proceeding in this matter conducted as a small claims hearing. On February 10, 2016, petitioner was notified that the small claims hearing scheduled for March 31, 2016 would confine itself to the issue of the timeliness of the request for conference or the petition filed in this matter. By faxed letter dated February 24, 2016, petitioner requested to have this matter proceed before an Administrative Law Judge.

4. In support of the motion and to prove proper and timely mailing of the Notice of Deficiency under protest, the Division submitted the following: (i) the affirmation of Michele W. Milavec, Esq., the Division's representative, dated March 11, 2016; (ii) the affidavit, dated February 29, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record

for Presort Mail - Assessments Receivable” (CMR) dated April 6, 2015; (iv) the affidavit, dated March 2, 2016, of Bruce Peltier, Principal Mail and Supply Clerk in the Division’s mail room; (v) a copy of the petition filed with the Division of Tax Appeals on August 27, 2015, and the FedEx Express Standard Overnight shipping envelope in which the petition was sent; and (vi) a copy of petitioner and his spouse, Kayoko Mostovoi’s joint New York State resident income tax return (form IT-201) for the year 2013, filed on April 15, 2014, which was the last filing from petitioner and his spouse prior to the issuance of the Notice of Deficiency.

5. 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 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 pages of the CMR in the present case to the actual mailing date of “4/6/15.” 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 U.S. Postal Service (USPS) and remain so when returned to its office. 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 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."

7. The CMR relevant to the Notice of Deficiency under protest consists of 106 pages and lists 1,158 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. The date "APR - 6 2015" is stamped on all of the pages of the CMR. No legible postmarks appear on any pages of the CMR. The date "APR - 6 2015" is stamped on the last page of the CMR, page 106, which also contained a statement of the total number of pieces received by the Postal Service for mailing.

8. Page 30 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0443 8645 and reference number L-042384146, was issued to "Mostovoi-Alexei P," at the 104 Edgemont Road, Scarsdale, New York, address listed thereon.² The corresponding mailing cover sheet, attached to the Nagengast affidavit as "Exhibit B," bears this certified control number, petitioner's name, "Mostovoi-Alexei P," his spouse's name, "Mostovoi-Kayoko," and the address as noted above.

² The certified mail record lists only the name Alexei P. Mostovoi because it is standard procedure for the certified mail record to set forth the name of the primary taxpayer associated with the statutory notice. Thus, when as here, a husband and wife file a joint personal income tax return wherein the husband's social security number is listed in the place designated for the primary taxpayer, only the husband's name will appear on the certified mail record.

9. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently Principal Mail and Supply Clerk 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 and fee amounts 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 initials or signature on the CMR, indicating receipt by the post office. Here, as noted, all pages of the CMR contained the stamped date "APR - 6 2015" but no legible postmarks. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, on the last page next to "TOTAL PIECES RECEIVED AT POST OFFICE" appears the circled handwritten number "1,158." In addition, handwritten initials or a signature appear under the stamped date of "APR - 6 2015" on the last page.

10. Mr. Peltier's affidavit states 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. Peltier's staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

11. According to both the Nagengast and Peltier affidavits, copies of the subject Notice of Deficiency was mailed to petitioner on April 6, 2015, as claimed.

12. Alexei and Kayoko Mostovoi's joint 2013 Resident Income Tax Return, filed on or about April 15, 2014, reported Mr. and Mrs. Mostovoi's address in Scarsdale, New York 10583. This was the last return filed by petitioner and his spouse prior to the issuance of the subject Notice of Deficiency.

13. In response to the Division's motion, petitioner submitted an affidavit, and documentation. In his affidavit, petitioner claims that he received the subject Notice of Deficiency "in June 2015 by regular US mail." Petitioner further claims that he was actively communicating with the Division's representatives at the time and specifically looked out for mailings from the Division. Because he is familiar with tax assessments and time limitations on contesting proposed tax adjustments, petitioner maintains that shortly after receipt of the Notice of Deficiency, he obtained advice about the appropriate course of action and filed the petition "within the time prescribed under New York Tax Law."

14. On April 14, 2016, petitioner filed a Motion to Impose Sanctions against the attorneys representing the Division in this matter.

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 (Tax Law §§ 681[b]; 689[b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services "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). This is because, absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner’s last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and date of mailing of the subject notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

C. In this case, the Division has introduced adequate proof of its standard mailing procedures through 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 (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

D. The Division failed to present sufficient proof, i.e., the CMR, to establish that the subject Notice of Deficiency was mailed as addressed to petitioner and his spouse on April 6, 2015. Specifically, this document did not contain a legible USPS postmark on each page, indicating the mailing date of April 6, 2015, despite the fact that both the Nagengast and Peltier affidavits assert that a postmark was affixed to each page.³ Rather, on all pages of the CMR, the date “APR - 6 2015” was stamped. It is noted that no legible USPS postmarks appeared on any page of the CMR, including the last page, page 106, which set forth and verified vital information: the total number of pieces being mailed on the date contained in the USPS postmark.

In sum, the CMR was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

E. Where proper mailing cannot be proved, demonstration of receipt of the notice by the taxpayer allows for the statutory period to be measured from the date of receipt (*Matter of Bryant Tool & Supply*, Tax Appeals Tribunal, July 30, 1992; *Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992). In petitioner’s affidavit submitted in response to the Division’s motion, petitioner acknowledges receipt of the Notice of Deficiency “in June 2015.” Using June 1, 2015, a date most beneficial to the Division, as the date of receipt of the notice, the 90-day statutory period ends on August 31, 2015.⁴ The subject petition was mailed by FedEx Express

³ USPS Domestic Mail Manual § 503[5.1.1] provides that each individual firm sheet (form 3877) is postmarked (round-dated) at the time of mailing; and the forms are then returned to the mailer and become the mailer’s receipt, i.e., certificate of mailing. A “local” postmark shows the full name of the Post Office, a two-letter state abbreviation, ZIP CODE,TM and date of mailing (*see* USPS Handbook PO-408[1-1.3]).

⁴ The 90th day would be August 30, 2015, a Sunday; however, the statutory period would expire on August 31, 2015 pursuant to General Construction Law § 25-a.

Overnight Standard shipping on August 26, 2015 (*see* 26 USC § 7502 [a][1]; Tax Law § 691[a][2][A]). Therefore, the petition was timely filed within 90 days after the actual date of receipt of the Notice of Deficiency, and petitioner is entitled to a hearing on the merits underlying such notice.

F. With respect to petitioner's Motion to Impose Sanctions (*see* Finding of Fact 14), this is not the proper forum for such motion, as the Rules of Practice and Procedure of the Tax Appeals Tribunal contain no provision for the same.

G. The Division of Taxation's motion to dismiss the petition or for summary determination is denied, and the matter will be scheduled for hearing in due course. Petitioner's Motion to Impose Sanctions is denied.

DATED: Albany, New York
July 7, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE