

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN P. DEMAIO : ORDER
 : DTA NO. 825913
for Redetermination of Deficiencies or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
for the Years 1997 through 2000, 2003, 2007 through :
2008, and 2010 through 2012. :
:

Petitioner, John P. DeMaio, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1997 through 2000, 2003, 2007 through 2008, and 2010 through 2012.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, dated February 21, 2014, on the grounds that (i) the petition did not appear to have been filed in a timely manner and (ii) the Division of Tax Appeals lacks subject matter jurisdiction because the petition was not filed in protest of a statutory notice. An extension of time to respond to the Notice of Intent to Dismiss Petition by May 21, 2014 was granted to both parties. On April 25, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), submitted an affidavit and documents in support of dismissal. Petitioner, appearing pro se, filed a response on May 21, 2014, which commenced the 90-day period to issue this order. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Tax Appeals has subject matter jurisdiction over the petition filed in this matter.

FINDINGS OF FACT

1. On October 5, 2013, petitioner, John P. DeMaio, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the following notices of deficiency and notices and demands, which were attached to the petition:

Notice Number	Notice Type	Date Issued	Petitioner's Address Listed on Notice
L-039572485	Notice and Demand	June 25, 2013	75 Maiden Ln #203 New York, NY 10038-4810
L-038435221	Notice of Deficiency	October 3, 2012	75 Maiden Ln #203 New York, NY 10038-4810
L-034130849	Notice and Demand	June 17, 2010	75 Maiden Ln 203 New York, NY 10038-4810
L-030574366	Notice and Demand	August 14, 2008	75 Maiden Ln 203 New York, NY 10038-4810
L-029573330	Notice of Deficiency	February 25, 2008	225 Broadway 1401 New York, NY 10007-3001
L-020134778	Notice and Demand	October 12, 2001	225 Broadway 1401 New York, NY 10007-3001
L-018298873	Notice and Demand	July 27, 2000	225 Broadway 1401 New York, NY 10007-3001

L-016939537	Notice and Demand	September 20, 1999	225 Broadway 1401 New York, NY 10007-3001
L-015663803	Notice and Demand	November 2, 1998	888 7 Ave 1809 New York, NY 10019-5841
L-039806861	Notice and Demand	July 30, 2013	75 Maiden Ln #205 New York, NY 10038-4810
L-040365544	Notice and Demand	November 14, 2013	75 Maiden Ln #205 New York, NY 10038-4810

2. On February 21, 2014, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, which stated, in pertinent part:

Pursuant to § 2006.4 of the Tax Law, a petitioner's liability will become final and irrevocable unless a petition is filed within ninety (90) days from when the statutory notice was issued. In addition, pursuant to § 173-a(3)(c) [sic] of the Tax Law, the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition that is filed in protest of a Notice and Demand for Payment of Tax Due.

In this case, the Notices of Deficiency (Assessment Nos. L-038435221 and L-029573330) were issued to petitioner on October 3, 2012 and February 25, 2008, respectively. However, the petition was not filed until October 5, 2013, or three hundred and sixty seven (367) days later for Assessment No. L-038435321 and two thousand and forty nine (2,049) days later for Assessment No. L-029573330.

In addition, the petitioner filed the petition in protest of several Notices and Demands for Payment of Tax Due. The Division of Tax Appeals lacks jurisdiction to consider the merits of the petition under Tax Law § 173-a(3)(c) [sic]. Therefore, no hearing rights exist to protest the Notice and Demands.¹

¹ The Notice of Intent to Dismiss Petition appears to contain a typographical error in citing Tax Law § 173-a(3)(c) with regard to the notices and demands at issue. Tax Law § 173-a(3)(c) pertains to sales and compensating use tax. The correct section for purposes of personal income tax notices and demands is Tax Law § 173-a(2).

3. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Notice of Deficiency dated October 3, 2012, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated April 10, 2014, of Daniel A. Maney, a manager in the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) pages numbered 1, 302, and 2,439 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR), each legibly postmarked October 3, 2012; (iii) an affidavit, dated April 11, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; and (iv) a copy of petitioner's 2007 form IT-201 resident income tax return, filed on March 21, 2008, which reports the same New York, New York, address for petitioner as that listed on the October 3, 2012 Notice of Deficiency.

4. To prove mailing of the Notice of Deficiency dated February 25, 2008, the Division submitted the following: (i) an affidavit, dated April 10, 2014, of Daniel A. Maney, a manager in the Division's Refunds, Deposits, Overpayments and Control Units, which includes the CARTS Control Unit; (ii) pages numbered 1, 66, and 1,214 from a CMR, each legibly postmarked February 25, 2008; (iii) an affidavit, dated April 11, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; and (iv) a copy of petitioner's form IT-201 income tax transcript for the year 1998, filed on August 18, 1999, which reported the same New York, New York, address for petitioner as that listed on the February 25, 2008 Notice of Deficiency.

The Notice of Deficiency Dated October 3, 2012

5. The affidavit of Daniel A. Maney, who has been in his current position since January 2010, sets forth the Division's general practice and procedure for processing statutory notices.

Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices.

The notices 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 to the actual mailing date. In the present case, on the CMR presented by the Division as proof of mailing of the notice dated October 3, 2012, the date was manually changed on pages 1 and 2,439 to the actual date of mailing of "10/3/12." In addition, according to Mr. Maney, 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 his office. The pages of the CMR stay banded together unless otherwise ordered by Mr. Maney. According to Mr. Maney, 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 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. According to the Maney affidavit, the CMR postmarked October 3, 2012 consists of 2,439 pages. Mr. Maney notes that the portion of the CMR that is attached to his affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each

page of the CMR and initialed or signed page 2,439. Mr. Maney adds that the total number of statutory notices mailed pursuant to the CMR was 26,822.

8. Attached to the Maney affidavit, as exhibit "A," is a copy of pages 1, 302, and 2,439 of the CMR issued by the Division on October 3, 2012. Pages 1 and 2,439 have a handwritten entry referring to October 3, 2012 on the top; however, page 302 does not have a similar entry.

9. Page 302 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 1325 1693 and reference number L-038435221 was mailed to petitioner at "75 Maiden Ln #203, New York, NY 10038-4810." The corresponding mailing cover sheet, attached to the Maney affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the Center's general operations and procedures. The Center 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. 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.

11. Each of the three pages of the CMR in exhibit "A" of the Maney affidavit contains a USPS postmark of October 3, 2012. On page 2,439, corresponding to "Total Pieces and Amounts," is the preprinted number 26,824. This number is crossed out and next to "Total Pieces Received At Post Office" is the handwritten entry "26,822" along with initials or a signature. According to Mr. Peltier, the affixation of the postmarks and the Postal Service employee's initials indicate that a total of 26,822 articles of mail listed on the CMR, including the article addressed to petitioner, were delivered to the USPS on October 3, 2012.

12. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on October 3, 2012, as claimed.

The Notice of Deficiency Dated February 25, 2008

13. The affidavit of Mr. Maney, submitted in support of the Division's mailing of the notice dated February 25, 2008, sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices 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 to the actual mailing date. In the present case, on the CMR presented by the Division as proof of mailing of the notice dated February 25, 2008, the date was manually changed on page one to the actual date of mailing of "2/25/08." In addition, according to Mr. Maney, 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 his office. The pages of

the CMR stay banded together unless otherwise ordered by Mr. Maney. According to Mr. Maney, the page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

14. 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."

15. According to the Maney affidavit, the CMR postmarked February 25, 2008 consists of 1,214 pages. Mr. Maney notes that the portion of the CMR that is attached to his affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each page of the CMR and initialed or signed page 1,214. Mr. Maney adds that the total number of statutory notices mailed pursuant to the CMR was 13,346.

16. Attached to the Maney affidavit, as exhibit "A," is a copy of pages 1, 66, and 1,214 of the CMR issued by the Division on February 25, 2008. Page 1 has a handwritten entry referring to February 25, 2008 on the top; however, pages 66 and 1,214 do not have a similar entry.

17. Page 66 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0599 4416 and reference number L-029573330 was mailed to petitioner at "225 Broadway 1401, New York, NY 10007-3001." The corresponding mailing cover sheet,

attached to the Maney affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

18. The affidavit of Bruce Peltier describes the Center's general operations and procedures. The Center 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. 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.

19. Each of the three pages of the CMR in exhibit "A" of the Maney affidavit contains a USPS postmark of February 25, 2008. On page 1,214, corresponding to "Total Pieces and Amounts," is the preprinted number 13,346. Below this number and next to "Total Pieces Received At Post Office" is the handwritten entry "13,346" along with initials or a signature. According to Mr. Peltier, the affixation of the postmarks and the Postal Service employee's initials indicate that a total of 13,346 articles of mail listed on the CMR, including the article addressed to petitioner, were delivered to the USPS on February 25, 2008.

20. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on February 25, 2008, as claimed.

The Notices and Demands

21. In response to the issuance of the Notice of Intent to Dismiss Petition with regard to the notices and demands issued to petitioner, the Division submitted copies of notices and demands numbers L-040365544, L-039806861, L-039572485, L-034130849, and L-030574366, dated November 14, 2013, July 30, 2013, June 25, 2013, June 17, 2010, and August 14, 2008, respectively.

SUMMARY OF PETITIONER'S POSITION

22. Petitioner argues, in part, that the jurisdictional notices were not properly mailed to the correct address.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction whose powers are confined to those expressly conferred in its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326 [1991]). Therefore, in the absence of legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

B. In this matter, the petition, in part, challenges notices and demands numbers L-040365544, L-039806861, L-039572485, L-034130849, and L-030574366, dated November 14, 2013, July 30, 2013, June 25, 2013, June 17, 2010, and August 14, 2008, respectively. Upon review, it is concluded that this proceeding must be dismissed with respect to these notices and demands because the Division of Tax Appeals lacks jurisdiction to review the documents. The

Tax Appeals Tribunal is authorized to “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006[4]). In this instance, the right to a hearing is specifically denied. Tax Law § 173-a(2) provides that a notice and demand “shall not be construed as a notice which gives a person the right to a hearing.”

Accordingly, the Division of Tax Appeals is without authority to proceed (*see Matter of Chait*, Tax Appeals Tribunal, April 22, 2010) with respect to notices and demands numbered L-040365544, L-039806861, L-039572485, L-034130849, and L-030574366.

C. The provision of Tax Law § 173-a(2), which provides that a notice and demand shall not be construed as a notice which gives a person the right to a hearing was enacted by Chapter 60 of the Laws of 2004 and applies to notices issued on or after December 1, 2004 (L2004, ch 60, pt F, § 8). For the notices and demands issued prior to the effective date of Tax Law § 173-a(2), *Matter of Meyers v. Tax Appeals Tribunal* (201 AD2d 185 [1994], *lv denied* 84 NY2d 810 [1994]) is controlling. In *Meyers*, the Court held that because the right to a prepayment hearing challenging a notice and demand is not specifically provided for, modified or denied by any other provision of the Tax Law, petitioners have the right to such a hearing pursuant to Tax Law § 2006(4) (*Matter of Meyers v. Tax Appeals Tribunal*, 201 AD2d at 188). As such, petitioner has a right to a hearing for the notices and demands issued prior to the effective date of Tax Law § 173-a(2), specifically, notices and demands numbers L-020134778 (dated October 12, 2001), L-018298873 (dated July 27, 2000), L-016939537 (dated September 20, 1999), and L-015663803 (dated November 2, 1998).

Moreover, the Division has presented no evidence with respect to the mailing of these notices and demands and as such has not met its burden to show that the petition was untimely

filed. Based on the foregoing, the Notice of Intent to Dismiss is rescinded with respect to the notices and demands numbers L-020134778, L-018298873, L-016939537, and L-015663803, and the Division of Taxation shall have 75 days from the date of this order to file its answer in this matter with regard to these notices.

D. Addressing next the notices of deficiency at issue, 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).

E. 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).

F. 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).

G. Here, the Maney and Peltier affidavits establish the Division's current standard mailing procedure. In this case, however, the Division has not fulfilled the requirement to introduce adequate proof that its standard mailing procedure was followed in issuance of the subject notices. Specifically, a properly completed CMR is missing from the record (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Exhibit "A" of the two Maney affidavits contain three pages of what purports to be longer multi-page computer-generated CMRs. Unlike the procedure described in the Maney affidavits, the three pages in each exhibit "A," are not physically connected, and the pages are not consecutively numbered. Moreover, for purposes of the CMR postmarked October 3, 2012, the date on the top of pages 1 and 2,459 has been changed to October 3, 2012, but remains unchanged on page 302. Pages 1 and 2,459, therefore, bear a different date than page 302. Similarly, on the CMR postmarked February 25, 2008, the date on the top of page 1 has been changed to February 25, 2008, but remains unchanged on pages 66 and 1,214. Page 1 therefore bears a different date than pages 66 and 1,214. As a result, the partial CMRs submitted as exhibits "A" of the Maney affidavits do not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

H. While these flaws may be overcome by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008), such as delivery information from the USPS showing that the subject notices were delivered to petitioner at the last known address, the Division has not introduced such evidence into the record. As such, the Division has not met its burden of proving proper mailing of the notices of deficiency at issue.

I. The petition of John P. DeMaio is dismissed to the extent indicated in Conclusion of Law B, the Notice of Intent to Dismiss is rescinded to the extent indicated in Conclusions of Law C, G and H, and the Division of Taxation shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
July 10, 2014

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE