

ISSUE

Whether the Petition should be dismissed as untimely because it was filed more than ninety days after the Notice of Determination was mailed.

FINDINGS OF FACT

1. The Commissioner issued Petitioner a Notice of Determination on January 19, 2012, asserting a Real Property Transfer Tax (RPTT) deficiency relative to the transfer on February 3, 2010, of real property known as 311 Taylor Street, Staten Island, New York (Block 222, Lot 25). The deficiency was in the amount of \$2,810.00 plus interest (calculated to February 17, 2012) in the amount of \$465.60 plus a penalty in the amount of \$56.20, for a total of \$3,331.80.

2. Petitioner filed a Petition dated April 17, 2012, which was received by the Tribunal on April 23, 2012. Respondent moved to dismiss the Petition as untimely filed.

3. Respondent submitted the affidavit of Noel A. Woodburn sworn to on January 8, 2013 (Affidavit). Mr. Woodburn attested that on the date of his Affidavit, he was employed as the Assistant Director of the Quality Analysis Group of the New York City Department of Finance (QAG), at 345 Adams Street, 7th Floor, Brooklyn, New York. Mr. Woodburn attested to the QAG's routine practices and procedures for preparing and mailing Notices of Determination. He stated that these routine practices and procedures consisted of the steps described in Paragraph 4 below.

4. Mr. Woodburn attested that cases that are not agreed to by the taxpayer are issued a statutory Notice of Determination.

Once the case reviewer completes the review, the physical and electronic case is transferred to the Assistant Director of the QAG with the Notice of Determination dated and ready for mailing. The Assistant Director of the QAG gives the Notice of Determination along with a signed copy of the Audit Case Summary Report to a clerical support staff (Clerical Support Staff) member for mailing on the date indicated on the Notice of Determination. The Clerical Support Staff member prepares a Daily Transmittal listing all the mailings for that day and makes copies of the notices for the Department's files. In addition to the preparation of the Daily Transmittal list, the Clerical Support Staff member prepares a United States Postal Service (USPS) Form 3800, Receipt for Certified Mail (Form 3800 Receipt) for each Notice of Determination to be mailed. On the Form 3800 Receipt, the Clerical Support Staff member indicates the name of the Clerical Support Staff supervisor and the source of the form, *i.e.*, QAG. Once Form 3800 Receipt is prepared, the Clerical Support Staff member examines it carefully to ensure that the name and address of the taxpayer are present, legible and identical on all pieces. The Clerical Support Staff member places each completed piece of mail in a window envelope ensuring that the name and address is legible and visible. The envelope is sealed and the USPS Form 3800 Receipt is affixed in the appropriate location on the front of the envelope. The envelopes along with the Daily Transmittal list are placed into the QAG's outgoing mail box reserved for this purpose on the seventh floor of 345 Adams Street, Brooklyn, New York. Once each day, certified mail envelopes, prepared by the Clerical Support Staff of the QAG are picked up from the QAG's outgoing mail box on the seventh floor of 345 Adams Street. The Employee Services personnel responsible for picking up the mail signs the Daily Transmittal list after ensuring that all the related pieces are included. The mail is brought to the mail room on the sixth floor at the Brooklyn

Municipal Building on Joralemon Street, Brooklyn, New York for further processing. Within two days of preparation, pick-up and mailing, the mail room returns the Form 3800 Receipt to the QAG and it is then placed in the file folder dedicated to the filing of these USPS forms.

Attached to Mr. Woodburn's Affidavit as an Exhibit are copies of the front of three Form 3800 Receipts for Notices of Determination, two of which are addressed to "Hurley, Stephen O," and one of which is addressed to "Hurley, Joan." Mr. Woodburn explains in his Affidavit, that Mr. Hurley was sent two Notices of Determination because he was both a grantor and a grantee in the transaction that gave rise to the issuance of the Notices of Determination.

Mr. Woodburn attested that the three Form 3800 Receipts for Certified Mail that were addressed to Petitioner and to Hurley, Joan, state the name of the Clerical Support Staff supervisor, "R. Davis," and the source, "345 Adams St. QAG 7th Fl." indicate that each of the three envelopes was taken to the United States Post Office located at the Brooklyn Municipal Building on Joralemon Street, where a USPS clerk acknowledged receipt of each envelope by stamping the Form 3800 Receipt with a post mark of January 19, 2012. These Form 3800 Receipts were returned to the QAG and filed in the folder in accordance with standard QAG procedures. After the mail has been picked up from the QAG's outgoing mail box on the seventh floor of 345 Adams Street, a copy of the Daily Transmittal list is given to the Assistant Director of the QAG. RPTT mailings that are returned from the USPS are generally reviewed for accuracy of the address and placed in the case folder or a folder maintained by the Assistant Director of the QAG. In this particular case a return mailing was not located in the case folder or otherwise.

5. The two separate Form 3800 Receipts addressed to Petitioner bear the address: Hurley, Stephen O, 311 Taylor Street, Staten Island, NY 10310. Pre-printed article number 7011 2970 0003 0862 1944 appears on the left side of one Form 3800 Receipt. Pre-printed article number 7011 2970 0003 0862 1937 appears on the left side of the second Form 3800 Receipt. Both Form 3800 Receipts bear a round USPS stamp bearing the date "January 19, 2012" and the words "Municipal Station."¹ Above the portion of each of the Form 3800 Receipts addressed to Petitioner, appear the words "R. DAVIS, 345 ADAMS ST QAG 7th Fl."

A third Form 3800 Receipt bears the address: Hurley, Joan, 8240 Natures Drive - Monroe County, Tobyhanna, PA 18466. Pre-printed article number 7011 2970 0003 0862 1951 appears on the left side of this Form 3800 Receipt. The Form 3800 Receipt for Hurley, Joan bears a round USPS stamp bearing the date "January 19, 2012" and the words "Municipal Station."² Above the portion of the Form 3800 Receipt having the name "Hurley, Joan," appears the words "R. DAVIS, 345 ADAMS ST QAG 7th Fl."

6. Mr. Woodburn attested that based upon his review of the documents the foregoing procedures were followed in this matter.

7. A FedEx envelope containing the Petition was received by

¹ The round USPS stamp on one of the Form 3800 Receipts addressed to Petitioner bears, as part of the post-mark, the number "11201" The number "11201" may correspond to the postal code of the United States Post Office located at the Brooklyn Municipal Building. The round USPS stamp on the second Form 3800 Receipt addressed to Petitioner is partially illegible and bears, as part of the post-mark, the digits "201."

² The round USPS stamp appearing on the Form 3800 Receipt for Hurley, Joan is partially illegible and (apart from the date), does not bear any digits as part of the post-mark.

the Tribunal on April 23, 2012. The envelope has a FedEx tracking label with the number 7934 7649 6205 and bears the notation "[S]hip Date: 19 APR 12" and "[M]on- 23 APR Standard Overnight 10007 EWR." The envelope is addressed to "chief admin judge, tax appeals ALJ division, 1 Center St, Ste 25501, New York, NY 10007" [sic]. The FedEx envelope was stamped "Received NYC Tax Appeals Tribunal 2012 APR 23 P 3:27." The return address on the envelope is "Joseph Lassen, The Law Firm of Joseph Lassen P.C., 18 Hervey Street, Staten Island, NY 10309."

8. A copy of the FedEx envelope containing the Petition served on the Corporation Counsel was included in the motion papers. The envelope has a FedEx tracking label, with tracking number 7983 0701 9867 and the notation "[S]hip Date: 19 APR 12" and "Mon- 23 APR Standard Overnight 10007 EWR." The return address on that envelope is also that of Joseph Lassen, The Law Firm of Joseph Lassen P.C., 18 Hervey Street, Staten Island, NY 10309.

9. The Petition protests the substantive basis for the Notice of Determination issued to Petitioner. Attached to the Petition is a copy of the Notice of Determination.

CONCLUSIONS OF LAW

The timely filing and service of a petition is a jurisdictional prerequisite to Tribunal review of a taxpayer's petition protesting a Notice of Determination. (City Charter §170 [a]). A petition protesting a Notice of Determination asserting a RPTT deficiency is timely filed when it is filed with the Tribunal within ninety days of the latter of the mailing of (1) the protested notice of determination, or, where a conciliation conference was held, (2) within ninety days from the mailing of a

conciliation decision or from the date of the Commissioner's confirmation of the discontinuance of the conciliation proceeding. In this instance, since a conciliation conference was not held, the petition, in order to be timely filed with the Tribunal is required to be mailed within ninety days of the mailing of the protested notice of determination. (City Charter §170[a]; Administrative Code of the City of New York (Administrative Code) § 11-2107.)

The proper mailing of a Notice of Determination starts the running of the 90-day period for a taxpayer to file and serve a petition. (Administrative Code § 11-2107). The Notice of Determination issued to Petitioner is dated January 19, 2012. A timely Petition of this Notice of Determination therefore must have been filed within ninety days of January 19, 2012 or on or before April 18, 2012. (General Construction Law § 50).³

Respondent cites § 1-17 of the Rules of Practice and Procedure of the Tribunal which provides in pertinent part, that "[w]here delivery of a document is made by other than United States mail, such as by courier, as is the case in this matter, the date of delivery will be deemed to be the date of filing. . . ."

However, Administrative Code § 11-2116.f.1 treats the date of delivery by a designated private delivery service as the date recorded or marked by private delivery service in the manner described in 26 USCA § 7502. Private delivery services that have been approved by the Internal Revenue Service are considered to be designated for City purposes. (Administrative Code § 11-2116.f.2). Subject to certain limitations not relevant in this instance, the same provisions regarding delivery of a document by private

³ The month of February in the year 2012 consisted of 29 days.

delivery service apply for the purposes of delivery of documents to the Tribunal. (Administrative Code § 11-2116.f.1; City Department of Finance Memorandum 02-4). Memorandum 02-4 confirms that FedEx Standard Overnight service is approved by the Internal Revenue Service and is considered designated for City purposes.

Because the date appearing on the FedEx label was April 19, 2012, if it is established that the Notice of Determination was properly mailed on January 19, 2012, the Tribunal does not have subject matter jurisdiction over the Petition. (*Matter of Goldman & Goldman, P.C., TAT(E) 02-12(CR)* [City Tax Appeals Tribunal, March 24, 2005.])⁴

Where timeliness of a petition is at issue, Respondent has the burden of proving proper addressing and mailing of the document - in this case, the Notice of Determination - to start the running of the ninety-day period for filing and serving a Petition. (*Matter of Goldman & Goldman.*) See also, *Matter of Novar TV & Air Conditioning Sales & Service, Inc.*, [New York State Tax Appeals Tribunal, May 23, 1991]; *Matter of William and Gloria Katz*, [New York State Tax Appeals Tribunal November 14, 1991.]

The Notice of Determination was properly addressed to Petitioner on January 19, 2012. *Massie v. Commissioner of Internal Revenue*, TC Memo 1995-173 [United States Tax Court, April 17, 1995]. The USPS Form 3800 Receipts establish that the Notice of Determination was properly addressed to Petitioner at 311 Taylor Street, Staten Island, NY 10310, the address Petitioner provided on the Petition.

⁴ See, *Matter of Standard Notions, Inc.*, DTA 820612 (September 15, 2005). Division of Tax Appeals decisions, although not binding on the Tribunal, may be considered.

A Notice of Determination is deemed properly mailed when it is delivered to the custody of the USPS for mailing. (*Matter of Novar; Matter of Katz*). See also, *Matter of Allied Properties, LLC* TAT(H)04-42(RP) [City Administrative Law Judge Determination, January 18, 2006]. The Code does not require actual receipt by a taxpayer. A properly addressed Notice of Determination which is properly mailed is valid regardless of whether it is actually received. (*Matter of Kenning v State Tax Commission*, 72 Misc 2d 929 [Sup Ct, Albany County, 1971], *aff'd* 43 AD2d 815 [3rd Dept 1973], *appeal dismissed*, 34 NY2d 653 [1974]).

To establish when Respondent mailed the Notice of Determination, Respondent must: "(1) offer proof of a standard procedure used for the issuance of [the petitionable document] by one who has knowledge of the relevant procedure; and (2) offer proof that the standard procedure was followed in the case at issue." (*Matter of 2981 Third Avenue, Inc.*, TAT(E) 93-2092 [City Tax Appeals Tribunal, June 14, 1999]).

The Affidavit of Mr. Woodburn explains the Department's standard practices and procedures for preparing and mailing statutory and non-statutory documents including the Notice of Determination. Mr. Woodburn attested that based upon his review of the documents, the procedures described in the Affidavit were followed in this matter.

A properly completed Form 3800 Receipt represents direct documentary evidence of the date and the fact of mailing. (*Matter of Goldman & Goldman* (USPS Form 3877); *Matter of Air Flex Custom Furniture, Inc.*, DTA No. 807485, [New York State Tax Appeals Tribunal, November 25, 1992] (USPS Form 3877); *Matter of Allied Properties* (Form 3800)). The Form 3800 Receipt included in the

file of the QAG is properly completed, stating Mr. Hurley's address. The form bears a USPS postal stamp dated January 19, 2012 and the words "Municipal Station" which confirm that the item was mailed on that date. The Affidavit of Mr. Woodburn combined with copies of properly completed Form 3800 Receipts constitute direct evidence that the Department's procedures were followed in this case. (*Matter of Goldman & Goldman.*)

Petitioner did not submit any papers in opposition to the instant motion to dismiss the Petition.

Respondent has established that the Notice of Determination was properly addressed and mailed on January 19, 2012. Therefore the Petition transmitted by FedEx on April 19, 2012 more than 90 days after the Notice of Determination, is untimely.

ACCORDINGLY, IT IS CONCLUDED THAT as the Petition transmitted by FedEx on April 19, 2012 was untimely filed, the Tribunal lacks jurisdiction to hear the Petition and the motion to dismiss the Petition is granted in accordance with Section 1-05(b)(1)(vii) of the Rules of Practice and procedure of the Tribunal.

It is so ordered.

DATED: June 11, 2013
New York, New York

Jean Gallancy-Wininger
Administrative Law Judge