

NEW YORK CITY TAX APPEALS TRIBUNAL

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In the Matter of	:	DECISION
	:	
CT 157-162 LLC., et al.	:	TAT (E) 21-5 (RP)
	:	TAT (E) 21-6 (RP)
	:	
Petitioners	:	
	:	
-----X		

Petitioners CT 157-162 LLC and WH Uptown LLC (Petitioners) filed an exception to a Determination of the Acting Chief Administrative Law Judge (ACALJ), dated August 9, 2022 (ACALJ Determination), that granted the motion of the Commissioner of Finance of the City of New York (Respondent) for summary determination (Respondent's Motion), dismissed the Petitions filed by Petitioners, and sustained Notices of Determination issued by the New York City Department of Finance (Notices) asserting New York City Real Property Transfer Taxes (RPTT) with respect to a transfer of real property.¹

Petitioners were represented by Ellen S. Brody, Esq., Roberts & Holland, LLP. Respondent was represented by Stephanie M. Fitos, Esq., Senior Counsel, New York City Law Department. The parties submitted affidavits and accompanying exhibits in connection with Respondent's Motion.²

¹ Except as otherwise noted, the ALJ's Findings of Fact, although paraphrased and amplified herein, generally are adopted for purposes of this Decision. Certain Findings of Fact not necessary to this Decision have not been restated and can be found in the ALJ Determination.

² Additionally, certain allegations in the Petitions, not supported by affidavits and accompanying exhibits, were considered by the ACALJ for the limited purpose of Respondent's Motion, which was originally a motion to dismiss that was treated by the ACALJ, on consent of the parties, as a Motion for Summary Determination. As these

Petitioners jointly filed a RPTT Return, dated January 17, 2017, with respect to a January 11, 2017, transfer of a 100% LLC interest in 75 Fort Washington LLC which owned property located on 75 Fort Washington Avenue, New York, New York (the Transfer). The RPTT Return listed the address for both the Grantor, WH Uptown LLC, and the Grantee, CT 157-162 LLC, as 85 Delancey Street, New York, New York 10002.

The New York City Department of Finance (Department) issued Notices of Determination (Notices) dated June 10, 2019, to Petitioners at 85 Delancey Street, New York, New York 10002 asserting RPTT deficiencies with respect to the Transfer.

Petitioners each received a Financial Statement of Account (Statement or Statements) dated October 1, 2019, showing a “balance due” of RPTT liability with respect to the Transfer. The Statements were addressed to the Petitioners at P.O. Box 155, Lawrence, New York, 11559-0155.

On October 24, 2019, Petitioners’ representative wrote to the Department’s address shown on the Statements and questioned the RPTT liability, claiming that the Statements were the only notice Petitioners had received from the Department and that Petitioners did not understand why there was an additional assessment owing.

On November 20, 2019, the Department’s representative responded by telephone and requested a copy of the Recording and Endorsement Cover Page showing the amount of RPTT paid in connection with the Transfer. Petitioners’ representative sent the cover

factual allegations do not appear to be disputed, and for the purpose of having a complete record to decide the issue before us, we consider these allegations for the limited purpose of reviewing the Determination.

page by email on November 20, 2019. On December 26, 2019, a Department representative stated that the audit determination would stand and that the Petitioners could request a conciliation conference or file a petition with the Tribunal. He also stated that the audit department claimed to have mailed requests for information and several notices, including the Notices, to the Petitioners.

On December 26, 2019, a Department representative forwarded copies of the Notices to Petitioners' representative. The Notices are dated June 10, 2019, and were mailed to 85 Delancey Street, New York, New York, 10002, a different address from the address to which the Statements were sent.

On January 8, 2020, Petitioners each requested a conciliation conference with the Department's Conciliation Bureau. On January 9, 2020, the requests for a conciliation conference were denied as untimely. Petitioners' representative contacted the Conciliation Bureau stating that the Notices had not been properly mailed.

Petitioners state that there were other offices, besides Petitioners', at the 85 Delancey Street address, the address Petitioners had provided on the RPTT return they jointly filed in connection with the Transfer, including a "We Work type of facility called the Yard".

On February 21, 2021, a representative of the Conciliation Bureau sent Petitioners' representative proof of mailing the Notices on June 11, 2019, addressed to Petitioners at 85 Delancey Street, New York, NY 10002.³

The above facts are not in dispute. Petitioners, however, claim that several offices are located at the 85 Delancey Street address, and that United States Postal Service (USPS) tracking history shows that a delivery to the 85 Delancey Street address was unsuccessful, and that the recipient of the mail at that address rejected it. Petitioners allege that the mail delivery described in the USPS tracking history was the Notices sent to Petitioners. Petitioners further claim, based on the tracking history, that the rejected mail delivery at 85 Delancey Street was allegedly "Delivered to Agent" at zip code 10038. Petitioners allege they had no office within this zip code but that the Department was located within this zip code "so we assume that the Notice was returned to sender and never delivered to Taxpayer at the address shown on the Notice of Determination at zip code 10002." Petitioners infer from the tracking information that the Department was then on notice that the Notices were not delivered to Petitioners.

Petitioners allege that they did not receive the Notices.

Petitioners allege that they filed "at least two" New York City Unincorporated Business Tax Returns, subsequent to the filing of their RPTT returns and before the

³ Due to the onset of COVID the Conciliation Bureau representative was unable to gain access to his office to obtain the Department's proof of mailing, explaining the long delay in sending that information to Petitioners.

issuance of the Notices, using the Lawrence address, the address of Petitioners' accountants' office. This is the address to which the Department mailed the Statements.

Respondent's Motion relies on the Affirmation of Christopher J. Long, Respondent's attorney,⁴ and the Affidavit and Supplemental Affidavit of Noel Woodburn, Assistant Director of the Review and Quality Control Group (RQC) at the Department.

The Affirmation of Christopher J. Long states that the RPTT return filed in connection with the Transfer (a copy of which is attached to the Affirmation) listed 85 Delancey Street as Petitioners' address. His Affirmation further states that the Department has a procedure for returned mail (see, *infra*, Woodburn Affidavit, ¶ 16); that there is no indication the Notices were returned to the Department; and that the Petitions were filed with the Tribunal more than 90 days after the Notices were mailed to Petitioners and were, therefore, untimely. New York City Administrative Code (Admin. Code) §11-2107.

The Affidavit of Noel Woodburn (Woodburn Affidavit) describes "the routine office practice and procedure followed by the RQC when mailing any notice of determination". It states that completed audits are forwarded to the RQC for review and mailing of the applicable notice. Once the review is completed, the physical and electronic case files are transferred to the RQC supervisor with the notice of determination dated and ready for mailing. After the supervisor's review, the notice of

⁴ Assistant Corporation Counsel, New York City Law Department, who represented Respondent on the motion.

determination is placed in a designated cabinet for notices ready for mailing. The Assistant Director of the RQC gives the notice of determination to a Clerical Support Staff member for mailing on a day before the date indicated on the notice of determination. The Clerical Support Staff member prepares a “Daily Transmittal List” listing all mailings for that day and makes copies of the notices for the Department’s files.

The Woodburn Affidavit states that, in addition to the Daily Transmittal List, the Clerical Support Staff member prepares a USPS Form 3800 (Receipt for Certified Mail) for each notice of determination to be mailed. On the Form 3800, the Clerical Support Staff member enters the staff member’s name and the source of the form, i.e., 375 Pearl Street 29th Floor – RQC. Once the USPS Form 3800 is prepared, the Clerical Support Staff member examines it carefully to ensure that the name and address of the taxpayer is present, legible, and identical in all places. The Clerical Support Staff member places each notice, a power of attorney, a Request for Conciliation Conference with a Notice of Taxpayer Rights and Petition for Hearing in a windowed envelope ensuring that the name and address is legible and visible. The envelope is sealed, and the USPS Form 3800 is affixed in the appropriate location on the front of the envelope. The envelopes to be mailed, together with the Daily Transmittal List, are placed in the outgoing mailbox on the twentieth floor of 375 Pearl Street, New York, New York 10038.

The Woodburn Affidavit further states that once a day, all envelopes prepared for mailing, including certified mail envelopes prepared by the Clerical Support Staff of the

RQC, are picked up from the RQC's outgoing mailbox on the 29th floor of 375 Pearl 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 Daily Transmittal List contains a notation at the lower left which states "Clerks [sic] initials" without any initials.

The Supplemental Affidavit of Noel Woodburn (Supplemental Affidavit) explains that the Daily Transmittal Sheet "is an internal DOF [Department] document that is not provided to the USPS for stamping." The reference to "Clerk's initials" on the Daily Transmittal Sheet is not for the purpose of having a USPS employee initial the sheet, as the Daily Transmittal Sheet is an internal document. "During the time when the NOD [Notice] was issued in this matter, it was not the DOF's practice to have a DOF clerk initial the transmittal sheet." On this subject, the Supplemental Affidavit, thus, concludes:

"DOF no longer follows the mailing procedures that were in place in March 1992 referenced in the *Matter of [Samuel] Heyman*⁵ case . . . Rather a DOF staff member brings only the certified mail receipt (Form USPS 3800) to the USPS to be postmarked. Similarly, DOF does not utilize the same mailing procedures used by the State referenced in the *Matter of Khayer Kayumi*⁶ case . . ."

⁵ TAT (E) 93-1577 (RP) (City Tax Appeals Tribunal, 2001)

⁶ DTA No. 825953 (NYS Tax Appeals Tribunal, 2019)

The Woodburn Affidavit states that the mail is brought to the mail room on the 26th floor of 375 Pearl Street, New York, NY, and picked up by a mail courier who transports it to 66 John Street, New York, NY for further processing and mailing. The Supplemental Affidavit states that, customarily, on the day after the mailing, the mail room returns the USPS Form 3800 (Receipt for Certified Mail) to the RQC. After the Receipt has been returned, it is placed in the file folder dedicated to the filing of these USPS forms.

Copies of the certified mail receipts (USPS Forms 3800) to Petitioners at the address listed on the RPTT return, date-stamped June 11, 2019, were submitted. The receipt for each mailing states the name of the Clerical Support Staff member (“J Walia”) and the source “375 Pearl Street 29th Floor – RQC.” The Woodburn Affidavit states that these receipts indicate that the envelopes were taken to the USPS Post Office at 66 John Street where a USPS clerk acknowledged receipt of each envelope by stamping it with a postmark of June 11, 2019. The Supplemental Affidavit attached copies of USPS Form 3800 with legible postmarks and a Zip Code of 10038, which is the Zip Code for the Post Office at 66 John Street. The Supplemental Affidavit also states that the receipts were returned to the RQC and filed in the folder in accordance with standard procedures.

The Woodburn Affidavit further states that, after the mail has been picked up from the outgoing mailbox on the twenty-ninth floor of 375 Pearl Street, a copy of the Daily Transmittal List is made available to the RQC supervisor who updates the electronic case

to the appropriate case status and responsible owner in the Business Tax System and the file is sent to Audit Operations Clerical Support Staff for filing.

The Woodburn Affidavit, ¶16, concludes that if the USPS returns an envelope because it was not delivered, the Employee Services personnel located on the 26th floor of 375 Pearl Street receives the envelope and places it in the incoming mailbox on the 29th floor of 375 Pearl Street. The Clerical Support Staff personnel responsible for distributing the mail hand-delivers the returned envelope to the Assistant Director of the RQC. There is no indication that the envelopes at issue in this case were returned to the Assistant Director of the RQC.

Copies of the USPS Forms 3800, the Notices, and a redacted copy of the Daily Transmittal List are attached to the Woodburn Affidavit.⁷ Both the certified mail receipt and the Daily Transmittal List include in the address for WH Uptown LLC “c/o CREFA Corp.” The USPS Forms 3800 otherwise replicate the addresses provided on the RPTT return.

Finally, the Supplemental Affidavit addresses whether the procedure set out in Statement of Audit Procedure (SAP) PP-2008-06 applies to the mailing of the Notices. The Supplemental Affidavit concludes that it does not. SAP PP-2008-06 refers to a service called Address Change Service (ACS) for batch-generated mailings prepared using the Department’s FAIRTax computer system. The Department, however, no

⁷ Copies of the USPS 3800’s (certified mail receipts) attached to the Woodburn Affidavit do not bear legible USPS postmarks. The Supplemental Affidavit provides copies of the receipts that bear legible USPS postmarks.

longer does “Batch-generated mailings” and no longer uses the FAIRTAX computer system. Therefore, the Supplemental Affidavit concludes that SAP PP-2008-06 does not apply here.⁸

In opposition to Respondent’s Motion, Petitioners submitted the Affirmation of Ellen S. Brody (Brody Affirmation), which purports to attach USPS tracking documentation received from Petitioner’s managing member,⁹ which is no longer available through the USPS tracking system and cannot be corroborated.

The ACALJ treated Respondents motion to dismiss the Petitions as a motion for summary determination and stated, at a status conference on Respondent’s motion, that “the parties consented to treat this motion as one for summary determination.”¹⁰ In deciding the motion on the timeliness of the Petitions, the ACALJ placed the burden on the City to prove that the Notices were mailed to the address given in the last [RPTT] return filed by Petitioners, as required by Admin. Code § 11-2116(a). The ACALJ explained the relevant case law as holding that “[a] notice is deemed mailed when it is delivered to the custody of the USPS for mailing; actual receipt is not required.”¹¹ Furthermore, the ACALJ defined Respondent’s burden to establish the Notices were mailed by offering proof (1) of a standard procedure used in the issuance of the notices

⁸ Moreover, the procedure set out in the above SAP is based on the “last known address” mailing standard applicable under other taxing statutes – such as the UBT. That mailing standard, however, does not apply under the RPTT - which looks to “the address given in the last return filed [under the RPTT].” See, *infra*.

⁹ The managing member of Petitioner CT 157-162 LLC.

¹⁰ ACALJ Determination, at 12.

¹¹ *Id.*, at 15.

by one who has personal knowledge of the procedure and (2) that the standard procedure was followed in this case.

The ACALJ found that the Department's procedure for mailing the Notices had changed from the previous mailing cases considered by the Tribunal. In those previous cases, the Department's procedure was to mail several statutory notices at a time in a batch, recording each of them on a mail manifold, USPS Form 3877. In *Matter of Samuel Heyman, supra*, the Tribunal held that the failure of USPS employees to initial the mail manifold indicating the total number of pieces mailed rendered the mailing defective.

The ACALJ found that, under the standard procedure for mailing presently in effect, the Department mails each notice individually, and relies on a USPS Form 3800, the certified mail receipt for a single article of mail. On that receipt, the USPS postmark is sufficient to prove the single article was mailed and there is no longer a need for the initials of USPS employees as to the number articles mailed.¹²

Based on the Woodburn Affidavit and the Supplemental Affidavit, the ACALJ found that the Department had a standard mailing procedure in effect and followed that procedure in connection with properly mailing the Notices to Petitioners at the address shown on the last RPPT return Petitioners jointly filed. The ACALJ also found that “[t]here is no indication that the envelopes at issue in these [sic] case were returned to the Assistant Director of the RQC.”¹³ The ACALJ rejected the tracking information provided

¹² ACALJ Determination, at 16.

¹³ *Id.*, at 8.

on the Brody Affidavit, holding it did not rebut the presumption of receipt. On the basis of these findings, the ACALJ concluded that Respondent met its burden of proof on the motion for summary determination of proper mailing of the Notices and granted Respondent's Motion, dismissed the Petitions as untimely, and sustained the Notices.

On appeal to the Tribunal, Petitioners argue that Admin. Code § 11-2116(a), which states that "[t]he mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed" creates a statutory presumption that can be rebutted. Petitioners do not, however, argue here for the introduction of evidence bearing on the issue of nonreceipt or improper mailing, but for a legal interpretation of Admin. Code § 11-2116(a) and its counterpart in 19 RCNY § 23-18 that the proper statutory mailing address is not restricted to the address shown on the last-filed RPTT return, but can also include tax returns later-filed under other chapters of the law besides the RPTT – such as the Unincorporated Business Tax (UBT).

We agree with the ACALJ's Determination.

Pursuant to Tribunal Rules of Practice and Procedure (Tribunal Rules) 20 RCNY §1-05 (b)(2) (ii), the administrative law judge may treat a motion to dismiss as a motion for summary determination "on notice to the parties". Notice was given, and the parties consented to treat the motion as one for summary determination pursuant to Tribunal Rules §1-05 (d).¹⁴

¹⁴ During Oral Argument of this matter, Petitioners' counsel contended that, had this matter proceeded to a hearing, Petitioner could have elicited testimony that the mail was returned to rebut the presumption of receipt.

Tribunal Rules §1-05 (d)(1) provide that a motion for summary determination:

“shall 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. The motion shall be denied if any party shows sufficient basis to require a hearing of any issue of fact.”

Tribunal Rules §1-05 (d)(1) is based on CPLR 3212(b). “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues from the case.” *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). See also, *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

The timely filing and service of a petition is a jurisdictional prerequisite to the Tribunal’s review of a taxpayer’s petition. City Charter § 170(a); Matter of 1456-69-71 Bushwick Ave. LLC, TAT (E) 14-14 (RP) (2016). The petition must be filed and served within 90 days after the notice is issued. *Id.* City Charter § 170(a); Admin. Code § 11-2107. “The tribunal shall not extend the time limitations for commencing a proceeding for any petitioner failing to comply with such time limitations.” City Charter § 170(a).

The Notices were each postmarked and mailed on June 11, 2019, to the 85 Delancey Street address reported on the joint RPTT return filed by Petitioners in connection with the Transfer pursuant to Admin. Code §11-2105(a). The Petitions were

Petitioners, however, had consented to treating the motion to dismiss as one for summary determination. More importantly, any rebuttal testimony that Petitioner could have elicited at a hearing could have been submitted in affidavit form with Petitioners’ opposing papers.

filed on April 20, 2021, nearly two years after the mailing of the Notices to Petitioners at the address shown on their RPTT return, and far outside the ninety-day statutory period within which the Petitions were required to be filed.¹⁵

A notice of determination asserting RPTT, pursuant to chapter 21 of title 11 of the Admin. Code, must be sent to the taxpayer's mailing address specified in Admin. Code § 11-2116(a):

“Any notice authorized or required under the provisions of this chapter may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given *in the last return filed by him or her pursuant to the provisions of this chapter* in any application made by him or her, or in any deed or instrument which is the subject of the notice, or, if no return has been filed or application made or address stated in the deed or instrument, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this chapter by the giving of notice shall commence to run from the date of mailing of such notice.” (Emphasis added.)

In the present case, Respondent was required to mail the notices to the addresses for each of the Petitioners shown on the RPTT return jointly filed by them in connection with the Transfer, both of which reported their address as 85 Delancey Street, New York, NY 10002.¹⁶

¹⁵ Note that on January 8, 2020, Petitioners had requested a Conciliation Conference, which was denied on January 9, 2020, as untimely. A timely request for a Conciliation Conference (within 90 days of June 11, 2019, i.e., by September 9, 2019) would have suspended the running of the statutory ninety-day period pending the issuance of the Conciliation Decision. Admin. Code §11-124(b) and §11-2107.

¹⁶ As distinguished from some of the other NYC taxes under title 11 of the Admin. Code, the RPTT does not use the “last known address” standard as the required mailing address. Compare, Admin. Code § 11-521(a) (unincorporated business tax “UBT”); Admin. Code § 11-672(1) (general corporation tax “GCT”). But see Admin. Code § 11-717(a) (commercial rent and occupancy tax “CRT”).

Admin. Code § 11-2116(a) requires the Notice to be mailed “to such person at the address given in the last return filed by him or her pursuant to the provisions of this chapter” (Chapter 21 – the RPTT).¹⁷ 19 RCNY § 23-18 uses identical language except instead of the language “pursuant to the provisions of this chapter” it reads “pursuant to the law”. Petitioners nevertheless argue that the term “law,” as used in the rule, is broader than the statutory term from which the rule was derived and “recognizes that a taxpayer may have filed a later return with the Department under a different chapter of *the tax law*”.¹⁸ (Emphasis added.)

We reject Petitioner’s request to disregard the unambiguous language of Admin. Code § 11-2116(a) and 19 RCNY § 23-18. The phrase “this chapter” in Admin. Code § 11-2116(a), unambiguously refers to Chapter 21, the RPTT, and, therefore, looks to the address “in the last [RPTT] return filed by [Petitioners]” – the 85 Delancy Street address.¹⁹ Similarly, the reference to “law” in 19 RCNY § 23-18 cannot have a meaning that differs from the statute from which that rule was derived, and which serves as the exclusive source of its authority, Admin. Code § 11-2116(a).²⁰ Petitioners’ contention that “law” as used in 19 RCNY § 23-18 (entitled “Notices”) is broader than the statute,

¹⁷ It is undisputed that only one RPTT return was filed with respect to the Transfer, pursuant to Admin. Code § 11-2105.

¹⁸ Pet Br, at 7.

¹⁹ We agree with the ACALJ that the accidental addition of “c/o CREFA Corp.” to the Notice mailed to WH Uptown “is of no moment because the addressee and the address [shown on the Notice] are correct.” ACALJ Determination, at p 18. Petitioners do not argue that the Notices were not properly addressed, but that the Department’s use of c/o CREFA Corp. implies that “the auditor was aware that Petitioner was using the Lawrence address.” Petitioners’ brief, at p. 9. But as explained, *supra*, the Lawrence address was not the address required by Admin. Code § 11-2116(a) – the address given in the last RPTT return filed. Had the Notices been sent to the Lawrence address, they would not have comported with the statute and would not have been properly mailed.

²⁰ *Kursics v. Commissioner*, 49 NY2d 451, 459 (1980).

and that it references not only notices issued under the RPTT but also notices issued under other City taxes, such as the UBT, is an argument devoid of merit. Does Petitioner suggest that taxpayers should look to 19 RCNY§ 23-18 for their rights when they receive notices issued under the UBT or other City taxes?²¹ The only mailing address authorized under the RPTT, therefore, was the 85 Delancy Street address, the address to which Respondent mailed the Notices in accordance with its standard procedure.²²

Petitioners also argue that the Department failed to follow SAP PP 2008-06. That SAP, entitled “Last Known Address,” applies to tax statutes that use the “last known address” statutory standard when mailing statutory notices, under circumstances where the Department uses the USPS Address Change Service (ACS) for “batch-generated mailings.” Under those specified circumstances, where the SAP applies, the auditor is required to check the FAIRTAX system for any updates to the “last known address” before mailing the notice.

We reject this argument, as did the ACALJ. As explained above, the “last known address” mailing requirement does not apply under the RPTT, which requires the Notice to be mailed to “the address given on the last return . . . filed by [Petitioner] pursuant to the [RPTT]”. 19 RCNY § 23-18. It is undisputed that only one RPTT return was filed

²¹ The “notice” requirement under the UBT, for example, can be found in Admin. Code §11-521(a): “. . . A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his or her last known address in or out of the city. . .”

²² Moreover, Petitioners’ erroneous contention that the word “law” as used in Rule § 23-18 means the “tax law” fails to recognize that the term “tax law” is the title of the statutory regime under State law and does not refer to any chapter or body of law under the City Admin. Code. See, New York Consolidated Laws, Chapter 60, Article 1, Section 1 Short title. This Chapter shall be known as the “Tax Law.”

by Petitioners with respect to the Transfer. Therefore, SAP PP-2008-06, which requires the Notices to be mailed to the taxpayer's "last known address" does not apply here. As further explained in the Supplemental Affidavit, the SAP applied only in connection with an "Address Change Service" used for "batch-generated mailings" under the Department's FAIRTAX System. The Department, however, no longer uses the "Address Change Service" for batch-generated mailings (because it now mails single articles using the USPS Form 3800) and no longer uses the FAIRTAX System. On both grounds, therefore, the SAP is inapplicable to the mailing of the Notices.

Finally, Petitioners argue, in the Rider to their Exception, that the tracking information provided in the Brody Affirmation indicates that the mailed envelopes containing the Notices were returned to Respondent, disagreeing with the ACALJ's Finding of Fact that "[t]here is no indication that the envelopes at issue in this case were returned to the Assistant Director of the RQC." Although Petitioners preserve this issue in their Exception, and had argued it in the briefs below, Petitioners do not appear to pursue it in their briefs before us.²³ The issue, however, was raised, and we will address it.

In meeting its burden of proof that the Notices were timely mailed, Respondent was required to offer proof (1) of a standard procedure for mailing notices by one who has personal knowledge of the procedure and, (2) that the standard procedure was

²³ Other than a few words in the Preliminary Statement that Petitioners disagree with one of the Findings of Fact "as noted in the Exception," without specifying in their brief the factual finding with which Petitioners disagree, there is no further reference to that issue in Petitioners' brief.

followed in this case. See, *Matter of 2981 Third Avenue, Inc.*, TAT (E) 93-2092 (RP) (NYC Tax Appeals Tribunal, 1999), at p. 13. We are satisfied that Respondent has established that both requirements for proof of timely mailing of the Notices have been met here, through the Woodburn Affidavit and the Supplemental Affidavit. Actual receipt of the Notices is not required, however, and Respondent need only prove that the Notices were timely mailed. *Id.*²⁴ Respondent, moreover, is not required to offer proof that the Notices were not returned, to establish that the Notices were timely mailed. “[T]he showing of whether a notice has been returned is not an essential part of the proof required to show that a notice was properly mailed.” *2981 Third Avenue, Inc.*, at p. 15, citing, *Cataldo v. Commissioner*, 60 T.C. 522, 524 (1973), *aff’d*, 499 F.2d 550 (2d Cir. 1974). Although Respondent showed, based upon its standard procedure, that the Notices were not returned, it was not required to do so to meet its burden that the Notices were properly, timely, mailed.

Petitioner relies on purported USPS tracking information attached to the Brody Affirmation, the affirmation of Ms. Brody, an attorney, with no personal knowledge of the mailing nor of any nonreceipt of the mailing. Ms. Brody affirmed that she had received the tracking information from Israel Weinberger, also an attorney, with no personal knowledge of the mailing nor of any nonreceipt of the mailing. According to the

²⁴ Admin. Code § 11-2116(a) creates a presumption of receipt, where Respondent satisfies both requirements described above to establish a proper, timely mailing of the Notices. *2981 Third Avenue, supra*, at p. 13. The mere denial of receipt by Petitioners is not sufficient to rebut the presumption of receipt. *Matter of T.J. Gulf v. NYS Tax Comm.*, 124 AD2d 314, 315 (3d Dept 1986). Rather, Petitioners must demonstrate that the Department’s standard procedure for mailing notices was not followed or was performed “so carelessly that it would be unreasonable to assume that the notice was mailed.” *Id.* A burden that Petitioners have not met here. Petitioners, moreover, have submitted no credible evidence of nonreceipt. See, *infra*.

Brody Affirmation, however, the USPS tracking data “is no longer available through the USPS tracking system.” It, therefore, cannot be corroborated.

One problem with the Brody Affirmation is that we have no sworn statement in the record from Israel Weinberg, the individual who is purported to have retrieved the tracking information, authenticating it. An even greater problem is its relevance. There is nothing, in the form of testimony or authenticated document, to tie the tracking information in the Brody Affirmation to Respondent’s mailing of the Notices to Petitioners by Certified Mail. Even looking beyond Petitioner’s failure to authenticate the document attached to the Brody Affirmation and Petitioner’s failure to connect it with the specific Certified Mailings at issue in this case, the most the Affirmation could possibly establish is that the attempt to deliver the mail at the “Delivery Location” was denied access twice and was “refused” on the third attempt. We cannot know from this document whether it was the Petitioners, themselves, who repeatedly denied access to the Delivery Location and refused to accept delivery on the third attempt. We, therefore, reject the efficacy of the Brody Affirmation as proof of nonreceipt by Petitioners.

Petitioners, therefore, have failed to rebut the presumption of receipt of the Notices, pursuant to Admin. Code § 11-2116(a).²⁵

²⁵ Petitioners reliance on *Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634 (3d Dept 1983), *aff’d*, 64 NY2d 688 (1984), to rebut the presumption of receipt here is unavailing. In *Ruggerite*, the Third Department found that “there is uncontroverted proof that petitioner did not receive the notice of tax deficiency.” 97 AD2d, at 635. Here, Petitioners have failed to prove nonreceipt.

Accordingly, we deny Petitioner's Exception, affirm the ACALJ Determination, grant summary determination in favor of Respondent, and sustain the Notices.²⁶

Dated: October 6, 2023

New York, NY

_____/s/____

Frances J. Henn

President and Commissioner

_____/s/____

Robert J. Firestone

Commissioner

_____/s/____

Neil Schaier

Commissioner

²⁶ We have considered all the other arguments of the parties and find them unpersuasive.