

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PANAGIOTA BETTY TUFARIELLO	:	DECISION
	:	DTA NO. 823613
for Redetermination of Deficiencies or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Periods Ended December 31, 1999,	:	
October 31, 1999, September 30, 1999, March 31, 2000,	:	
September 30, 2000 and March 31, 2001.	:	

Petitioner, Panagiota Betty Tufariello, filed an exception to the order of the Administrative Law Judge issued on October 7, 2010. Petitioner appeared by Saranto P. Calamas, CPA. The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

- I. Whether the Division of Taxation properly issued the Notices of Deficiency herein.
- II. Whether petitioner filed a timely petition following the issuance of the Notices of Deficiency in issue.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Panagiota Betty Tufariello, filed a petition for a conciliation conference on January 8, 2010 in the Bureau of Conciliation and Mediation Services (BCMS) in protest of Notices of Deficiency numbered L-022220217, L-022220218, L-022220219, L-022220220 and L-022220221. All of the Notices were dated April 17, 2003.

BCMS issued to petitioner a conciliation order (CMS No. 236997), dated February 5, 2010. The order denied the request for a conference because it was filed in excess of 90 days from the issuance of the Notices of Deficiency.

On April 29, 2010, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the conciliation order bearing CMS number 236997.

On June 25, 2010, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the Notices of Deficiency appear to have been issued on April 17, 2003, but that the petition was not filed until April 29, 2010, or more than six years later.

In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the following: affidavits of Division employees, John E. Matthews, Esq., an attorney in the Office of Counsel; James Steven VanDerZee, the Head Mail and Supply Supervisor in the Division's Registry Unit; and Patricia Finn Sears, Tax Processing Specialist 2 and Supervisor of the Case and Resource Tracking System (CARTS) Control Unit. In addition, the Division submitted various pertinent documents including copies of the petition filed with the Division of Tax Appeals on April 29, 2010; copies of the Notices of Deficiency, dated April 17, 2003; a copy of the certified mail record (CMR) containing a list of the statutory notices mailed by the Division on April 17, 2003; petitioner's request for conciliation conference; the conciliation order; a transcript of petitioner's New York personal income tax

returns for the years 2001 and 2002; and a Division computer record indicating that petitioner's bankruptcy case was closed as of December 18, 2003.

In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner submitted her own affirmation, dated July 26, 2010, which asserted that she never received the Notices of Deficiency in issue, that there was an automatic stay of all proceedings pursuant to 11 USCS § 362 and that once the stay was lifted when the bankruptcy case was closed on December 18, 2003, the Division failed to reissue the Notices, and therefore they were never properly served on her. Attached to the affirmation was a docket entry indicating that petitioner had filed a bankruptcy petition on March 21, 2003 and a copy of the order of the Bankruptcy Court, dated December 18, 2003, discharging debtor and closing the case.

The affidavit of Patricia Finn Sears, sworn to July 20, 2010, sets forth the Division's general practice and procedure for processing statutory notices, as follows. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, pages 7 and 8 of the 10-page CMR contain information on the Notices in issue and list an initial date of April 7, 2003. Following general practices, this date was manually changed to the actual mailing date of "4/17," April 17, 2003, and appears on page 1 of the CMR. Taxpayer addresses, certified control numbers, and reference numbers assigned to each notice may be found under their respective columns on the CMR. The reference number and control number appear on the corresponding notice and accompanying cover sheet, respectively, while the address appears on both. Pages 7 and 8 of the CMR establish that notices with the control numbers 7104 1002 9739 0169 8241, 7104 1002 9739 0169 8258, 7104 1002 9739 0169 8265, 7104 1002 9739 0169 8272 and 7104 1002 9739 0169 8289 and

respective reference numbers L-022220217, L-022220218, L-022220219, L-022220220 and L-022220221 were sent to petitioner at 8 Fountain Ave, Selden, NY 11784-1906. A United States postmark on each of the 10 pages of the CMR, including those containing the name of petitioner, pages 7 and 8, confirms that the Notices of Deficiency in issue were sent to petitioner on April 17, 2003.

Ms. Sears specifically states that the procedures described and followed in this case were the normal and regular procedures in effect as of April 17, 2003.

The affidavit of James Steven VanDerZee, sworn to July 20, 2010, describes the Mail Processing Center's general operations and procedures, as follows. The Center receives the notices and places them in an "Outgoing Certified Mail" area. A mailing cover sheet precedes each notice. A staff member retrieves the notices and operates a machine that puts each notice into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and then performs a random review of up to 30 pieces of certified mail 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 U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature or initials on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirmed that a USPS employee marked said pages of the CMR with the USPS postmark and placed his initials on the last page, page 10, and wrote and circled the number 100, indicating the number of pieces of certified mail received. Pages 7 and 8 contained the mailings addressed to petitioner at 8 Fountain Ave,

Selden, NY 11784-1906, which were assigned certified numbers of 7104 1002 9739 0169 8241, 7104 1002 9739 0169 8258, 7104 1002 9739 0169 8265, 7104 1002 9739 0169 8272 and 7104 1002 9739 0169 8289 and respective reference numbers L-022220217, L-022220218, L-022220219, L-022220220 and L-022220221. On the final page, page 10, corresponding to “Total Pieces and Amounts,” is the number 100, and a short distance below this number are the handwritten initials of the USPS employee and the handwritten and circled number “100,” confirming that all notices were received by the USPS. The USPS postmark is from “Colonie Center” and bears the date April 17, 2003, confirming that the notices were mailed on that date.

The transcripts of petitioner’s 2001 and 2002 personal income tax returns indicate that petitioner’s address was 8 Fountain Ave, Selden, NY 11784-1906, thus constituting her last known address prior to the issuance of the Notices of Deficiency herein. The 2001 return was filed on October 15, 2002 and the 2002 return was filed on August 15, 2003.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that Tax Law § 681(a) authorizes the Division to issue a Notice of Deficiency for additional income tax due under Article 22. Further, the Administrative Law Judge pointed out that a taxpayer may file a request for a conciliation conference with BCMS or, alternatively a petition with the Division of Tax Appeals seeking revision of such deficiency within 90 days of the mailing of the Notice of Deficiency. The Administrative Law Judge observed that the Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit. The Administrative Law Judge determined that it appeared, upon receipt of the petition by the Division of Tax Appeals, that it was filed late, and a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

The Administrative Law Judge found that inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under section 3000.9(a)(4) of the Rules of Practice and Procedure would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss. Accordingly, the Administrative Law Judge determined that the matter would be treated as a motion for summary determination.

The Administrative Law Judge noted that the Rules of Practice and Procedure provide that a motion for summary determination may be granted if it has been sufficiently established that no material and triable issue of fact is presented. The Administrative Law Judge pointed out that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. The Administrative Law Judge cited relevant case law concerning the level of proof required to obtain summary judgment.

The Administrative Law Judge noted that where the timeliness of a petition is at issue, the initial inquiry must focus on the mailing of the notice. The Administrative Law Judge observed that the burden of demonstrating proper mailing rests with the Division. Where a notice is found to have been properly mailed, the Administrative Law Judge noted that a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail. The Administrative Law Judge cited case law that noted that the Division may meet its burden of showing proper mailing by producing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing of the notice at issue. Accordingly, the Administrative Law Judge found that the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerZee.

The Administrative Law Judge also determined that petitioner did not dispute that the Notices were mailed to her last known address (Tax Law § 691[b]). Rather petitioner argued that she did not receive the Notices. The Administrative Law Judge found that petitioner did not offer any proof that she filed a change of address notice with the Division. Accordingly, the Administrative Law Judge concluded that the Division provided sufficient documentary proof to establish that the Notices of Deficiency, dated April 17, 2003 were mailed by certified mail to petitioner at her last known address.

The Administrative Law Judge rejected petitioner's argument that the fact that she filed bankruptcy on March 21, 2003, precluded the Division from issuing a Notice of Deficiency against her after that date and before the bankruptcy matter was closed on December 18, 2003. The Administrative Law Judge pointed out that the prohibited bankruptcy period began on March 21, 2003, when the bankruptcy was filed and ended with the closing of the case on December 17, 2003. The Administrative Law Judge further determined that since the automatic stay ended on December 17, 2003, the tolling period within which petitioner was required to have filed ended and the 90-day period in which to file a petition for a conciliation conference or a hearing with the Division of Tax Appeals began.

Thus, the Administrative Law Judge concluded that the Division properly mailed the Notices of Deficiency to petitioner on April 17, 2003 and the petition for a conciliation conference, filed on January 8, 2010 was not timely filed and the Division of Tax Appeals lacks jurisdiction to entertain the petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Notices of Deficiency should be nullified and cancelled due to the failure to provide any warnings or notice that: a) the Notices were being

issued under the exception of Bankruptcy Code § 362(b)(9); b) the Notices were properly issued notwithstanding the bankruptcy stay; and c) the 90-day statute of limitations to file the petition would be tolled only until the discharge of bankruptcy. Petitioner also argues that the omission to provide such warnings or notice is a violation of petitioner's constitutional right to Due Process. Petitioner asserts that the 90-day statute of limitations is barred by the doctrine of unclean hands and concludes that the Division's demand for monies and fees is barred by the doctrine of estoppel.

The Division argues that the Administrative Law Judge correctly decided the relevant issues and that the order should be affirmed.

OPINION

We find that the Administrative Law Judge properly applied the same standard of review to the Notice of Intent to Dismiss as that applied to a motion for summary determination.

Section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that 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]).

That section further provides that a motion for summary judgment is subject to the same provisions as a motion pursuant to CPLR § 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgement as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985], *citing Zuckerman v. City of New York*, 49 NY

2d 557 [1980]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*see Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276 [1978]).

Tax Law § 681(a) authorizes the Division to issue a notice of deficiency to a person liable for the collection or payment of the tax if a return required under Article 22 was not filed. The timely filing of a request for a BCMS conference or a petition for a hearing before the Division of Tax Appeals concerning such a notice of deficiency is a jurisdictional prerequisite for review of that notice (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*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 proffered (*see Matter of MacLean v. Procaccino*, 53 AD2d 965 [1976]). When the timeliness of a petition is at issue, the Division must establish proper mailing of the notice of deficiency to petitioner (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Petitioner has the right to rebut this presumption (*see Matter of Ruggerite v. State Tax Commn.*, 64 NY2d 688 [1984]). The Division is entitled to the presumption of receipt unless petitioner can rebut the presumption by showing that he did not receive the notice (*see Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314 [1986]; *Matter of Esther Parking Corp.*, Tax Appeals Tribunal, December 18, 1997; *Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). We find that the mere denial of receipt is insufficient to rebut this presumption (*see Matter of T.J. Gulf v. New York State Tax Commn.*, *supra*).

We find that the Division has met its burden to establish proper mailing of the Notices of Deficiency to petitioner on April 17, 2003, by submitting affidavits describing its general mailing

record, which showed that the procedure was followed in this case (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Further, petitioner did not present any evidence apart from the denial of receipt, which is not sufficient evidence to rebut the presumption.

We next address petitioner's argument that the Notices should be cancelled due to the Division's failure to provide any warnings or notice that the Notices were being issued under the exception of the Bankruptcy Code. Section 362(a) of the Bankruptcy Code (11 USC § 362) provides that in the case of voluntary, joint and involuntary bankruptcy proceedings, the filing of a bankruptcy petition creates an automatic stay upon, among other things:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title

Section 362(b) of the Bankruptcy Code states in relevant part, that:

The filing of a petition . . . does not operate as a stay . . .

(9) under subsection (a), of

(A) an audit by a governmental unit to determine tax liability;

* * *

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (11 USC § 362[b][9][A] and [D]).

We agree with the Administrative Law Judge that the Bankruptcy Code does not stay an audit by a governmental unit to determine tax liability or the issuance of a notice. As such, the Division's issuance of the Notices on April 17, 2003 was valid and proper. Additionally, we agree with the Administrative Law Judge that the prohibited bankruptcy period began on March

21, 2003 (the date on which the bankruptcy commenced) and ended on December 17, 2003 (the date on which the bankruptcy closed). Therefore, the tolling ended on December 17, 2003, and the 90-day period within which to file a petition for a conciliation conference or a hearing with Division of Tax Appeals began. Further, there is nothing in the bankruptcy code that requires the Division to notify petitioner that the Notices were being issued under the exception of the Bankruptcy Code.

Petitioner's petition was not filed until January 8, 2010, or more than six years late. Therefore, we affirm the order of the Administrative Law Judge that the Division has established that it properly mailed the Notices on April 17, 2003. Further, as petitioner failed to file her petition protesting the Notices of Deficiency within 90 days following the closing of the bankruptcy, such petition was untimely filed and properly dismissed.

We have reviewed and considered the remainder of petitioner's arguments and find them equally without merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Panagiota Betty Tufariello is denied:
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Panagiota Betty Tufariello is dismissed.

DATED: Troy, New York
July 7, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner