

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DEAN CAROTENUTO	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 826393
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2009.	:	

Petitioner, Dean Carotenuto, filed an exception to the determination of the Administrative Law Judge issued on April 9, 2015. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Tobias A. Lake, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on September 17, 2015, the due date for petitioner's reply brief.

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

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of deficiency.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 1, 3, and 5 to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact appear below.

1. The Division of Taxation (Division) brought a motion dated January 5, 2015, seeking an order dismissing the petition, or in the alternative, summary determination in its favor. The subject of the Division's motion was the timeliness of petitioner's protest of a notice of deficiency dated April 13, 2011 and bearing assessment identification number L-035633806.

The notice was addressed to petitioner at an address in New Rochelle, New York.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the April 13, 2011 notice of deficiency. The request was mailed to BCMS on June 17, 2014 and received by BCMS on June 19, 2014.

3. On July 3, 2014, BCMS issued a conciliation order dismissing request to petitioner. The order determined that petitioner's protest of the subject notice of deficiency was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on April 13, 2011, but the request was not mailed until June 19, 2014, or in excess of 90 days, the request is late filed.”¹

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on July 14, 2014.

5. To show proof of proper mailing of the April 13, 2011 notice of deficiency,

¹ As finding of fact 2 indicates, the request was actually mailed on June 17, 2014. Under the circumstances, this is an inconsequential error.

the Division provided the following with its motion papers: i) an affidavit, dated December 23, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 13, 2011; (iii) an affidavit, dated December 29, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center); (iv) a copy of the April 13, 2011 notice of deficiency with the associated mailing cover sheet; and (v) petitioner's resident income tax return for the year 2009, which lists the same address for petitioner as that listed on the subject notice. The 2009 return was the last return filed with the Division by petitioner before the notice was issued.

Petitioner did not file a response to the Division's motion.

6. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and 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 and last page of the CMR in the present case to the actual mailing date of "4/13/11." In addition, as described by Ms. Nagengast, 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 the Division. The pages of the CMR stay banded together unless

otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

7. 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."

8. The CMR in the present matter consists of 23 pages and lists 252 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 23, which contains 10 entries. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated April 13, 2011 to each page of the CMR, circled the preprinted number "252" on page 23 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 23. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 252.

9. Page 5 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0551 1491 and reference number L-035633806 was mailed to petitioner at the New Rochelle, New York, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Nagengast 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 mail room's general operations and procedures. The mail room 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. Here, as noted, the USPS employee initialed page 23 and affixed a postmark dated April 13, 2011 to each page of the CMR. 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. Here, the USPS employee complied with this request by circling the number "252" on the last page next to the heading "Total Pieces Received at Post Office."

11. According to the Peltier affidavit, a copy of the subject notice was mailed to petitioner on April 13, 2011, as claimed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first noted that the Division's motion to dismiss or, in the alternative, for summary determination, was properly treated as a motion for summary

determination. The Administrative Law Judge then reviewed the standards for the granting of such a motion.

Next, the Administrative Law Judge reviewed statutory and case law relevant to the timeliness of protests of statutory notices. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the notice by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division met the foregoing standards and established that the subject notice of deficiency was properly mailed to petitioner on April 13, 2011. Specifically, the Administrative Law Judge found that the Division had established its standard mailing procedure through affidavits submitted by Ms. Nagengast and Mr. Peltier. The Administrative Law Judge also concluded such affidavits, along with the properly completed CMR, established that such procedure was followed in this instance. Accordingly, the Administrative Law Judge granted the Division's motion and denied the petition herein.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends, for the first time in this matter, that he did not receive the April 13, 2011 notice of deficiency. Specifically, he asserts that the houses on his street were renumbered soon after he filed his 2009 New York income tax return and that, therefore, he did not reside at the street number indicated on the notice at the time it was mailed.

Also for the first time in this matter, petitioner offers an excuse for his failure to respond to the Division's motion. He contends that his former representative believed that such a response

was unnecessary because the representative had purportedly received a letter from BCMS indicating that a conference would be scheduled to discuss this matter.

Petitioner also makes assertions regarding the substantive merits of his petition.

The Division contends that the Administrative Law Judge properly determined that it offered sufficient proof to establish proper mailing of the subject notice of deficiency on April 13, 2011 and, accordingly, properly determined that petitioner's request for conciliation conference was late-filed.

With respect to petitioner's claim on exception that he did not receive the notice at issue, the Division asserts that, even if true, the record shows that the notice was mailed to petitioner's last known address and that the Tax Law does not require actual receipt of a properly mailed notice of deficiency.

The Division also contends that petitioner's excuse for his lack of a response to the motion is unreasonable.

OPINION

We first note that the Administrative Law Judge properly treated the Division's motion as a summary determination motion. As the Administrative Law Judge noted, this is because the Division of Tax Appeals has jurisdiction over the timely filed petition herein.

Pursuant to our Rules of Practice and Procedure, a motion for summary determination is properly 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]).

As we previously noted in *Matter of United Water New York* (Tax Appeals Tribunal, April 1, 2004):

“Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is ‘arguable’ (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v. Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v. Johnson*, 147 AD2d 312 [1989]).”

Petitioner did not respond to the Division’s motion for summary determination and thus has presented no evidence to contest the facts as alleged in the affidavits submitted therewith. Accordingly, such facts may be deemed admitted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *see also Matter of Chin*, Tax Appeals Tribunal, December 3, 2015).

At this point, we note that petitioner’s proffered excuse for his failure to respond to the Division’s motion is plainly unreasonable (*see Matter of Manny*, Tax Appeals Tribunal, August 7, 1997 [a calendar call notice from the Division of Tax Appeals regarding the scheduling of a hearing did not excuse a failure to respond to a motion for summary determination]). We note further that the Division’s notice of motion clearly states that petitioner had 30 days to respond thereto in accordance with our Rules (*see* 20 NYCRR 3000.5 [b]).

Tax Law § 681 (a) authorizes the Division to issue notices of deficiency. This section also requires that the Division mail such notices by certified or registered mail to a taxpayer at his or her last known address. With certain exceptions not relevant herein, there is a 90-day statutory time limit for filing a request for conciliation conference following the issuance of a notice of deficiency (Tax Law §§ 170 [3-a] [a]; 689 [b]; 20 NYCRR 4000.5 [c] [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition where the request for conciliation

conference is filed beyond the 90-day time limit (*see e.g., Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

If the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of such notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet its burden "by establishing the use of a standard mailing procedure for conciliation orders [or notices] by a person with knowledge of such procedures, and by introducing the evidence that this procedure was used in connection with the mailing of the order [or notice] in this case" (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

We agree with the Administrative Law Judge's conclusion that the proof submitted herein is sufficient to establish the mailing of the subject notice of deficiency to petitioner's last known address on April 13, 2011. Specifically, the affidavits submitted by the Division in connection with this motion establish the Division's standard mailing procedure and such affidavits, along with the properly completed CMR, establish that such procedure was followed in connection with the mailing of the subject notice (*see Matter of Chin; see also Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011). Additionally, we note that the address on the mailing cover sheet and CMR conforms with the address listed on petitioner's 2009 resident income tax return. This satisfies the last known address requirement (*see* Tax Law § 691 [b]). The Division thus properly mailed the notice at issue to petitioner on April 13, 2011 and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a]

[a]; 681 [b]; 689 [b]). Petitioner's request for conciliation conference, filed on June 17, 2014, was therefore untimely and properly dismissed by BCMS.

With respect to petitioner's assertion, made for the first time on exception, that his street number was changed and thus he did not receive the notice, it is well established that where, as here, a notice of deficiency of income tax has been properly mailed, Tax Law § 681 (a) does not require actual receipt by the taxpayer (*see Matter of Clayton*, Tax Appeals Tribunal, January 28, 2016; *Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001; *Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). In other words, non-receipt does not toll the 90-day protest period. The Tax Law thus places the onus on the taxpayer to inform the Division of a change in address (*see* Tax Law § 691 [b]). Here, there is no evidence, or even an allegation, that petitioner informed the Division of a change in his address prior to the issuance of the subject notice of deficiency. Accordingly, even if petitioner's street number did change as claimed, the Division properly mailed the notice to the address on petitioner's 2009 return, the last return filed by him at that time, and the 90-day limitations period commenced on the date on such mailing.²

As to petitioner's contentions regarding the substantive merits of his protest, as noted previously, the Division of Tax Appeals has no authority to consider the merits of an untimely petition (*see Matter of Modica*).

Finally, we observe that petitioner is not entirely without recourse, as he may seek a post-payment remedy. That is, petitioner may pay the disputed tax and then file a claim for refund (Tax Law § 687 [a]). If his refund claim is denied, petitioner may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such

² We note that there is no evidence in the record to support petitioner's claim that his street number was changed.

disallowance (*see* Tax Law §§ 170 [3-a] [a]; 689 [c]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dean Carotenuto is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Dean Carotenuto is denied.

DATED: Albany, New York
March 17, 2016

/s/ Roberta Moseley Nero

Roberta Moseley Nero
President

/s/ Charles H. Nesbitt

Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.

James H. Tully, Jr.
Commissioner