

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
LIZET RUBINOS : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 827395¹
Personal Income Tax under Article 22 of the Tax Law :
for the Year 2012. :

Petitioner, Lizet Rubinos, filed an exception to the determination of the Administrative Law Judge issued on April 7, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioner did not file a brief in support of her 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 issuance of this decision began on October 5, 2016, the date that petitioner's reply brief was due.

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

¹ Petitioner filed a petition protesting notices of deficiency numbers L-039364568, L-039364587 and L-040808641, for the years 2010, 2011 and 2012, respectively. Petitioner's protest for notices of deficiency numbers L-039364568 and L-039364587 has been assigned a different Division of Tax Appeals number and will not be addressed herein. This decision addresses petitioner's protest of notice number L-040808641 only.

Conciliation and Mediation Services following the issuance of a notice of deficiency for the year 2012.

FINDINGS OF FACT

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

1. The Division of Taxation (Division) brought a motion to dismiss or, in the alternative, for summary determination, dated December 12, 2015. The subject of the Division's motion is the timeliness of petitioner's protest of a notice of deficiency dated April 22, 2014, bearing assessment identification number L-040808641. The notice is addressed to petitioner, Lizet Rubinos, at "5988 57th RD APT 2, MASPETH, NY 11378-2704."

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the April 22, 2014 notice. The request was mailed to BCMS on December 11, 2014 and received by BCMS on December 15, 2014.

3. On December 26, 2014, BCMS issued a conciliation order dismissing request to petitioner. The order determined that petitioner's protest of the subject notice 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 June 24, 2013 and April 22, 2014, but the request was not mailed until December 15, 2014, or in excess of 90 days, the request is late filed."²

² The conciliation order referenced notice numbers L-039364586, L-039364587 and L-040808641. The reference to a June 24, 2013 issuance date apparently refers to the other protested notice numbers, which, as previously noted, have been assigned a different Division of Tax Appeals number and will not be addressed herein.

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on March 24, 2015.

5. To show proof of proper mailing of the April 22, 2014 notice, the Division provided the following with its motion papers: i) an affidavit, dated November 13, 2015, 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 22, 2014; (iii) an affidavit, dated November 17, 2015, of Bruce Peltier, a mail and supply supervisor in the Division's mail room; (iv) a copy of the April 22, 2014 notice with the associated mailing cover sheet; (v) an affidavit, dated December 22, 2015, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (vi) Postal Service form 3811-A (request for delivery information/return receipt after mailing) and the USPS responses to such request dated December 17, 2015; and (vii) petitioner's electronically filed form IT-201, resident income tax return for the year 2012, filed April 9, 2013, which lists petitioner's address as "59-88 57th ROAD APT 2, MASPETH, NY 11378." The IT-201 was the last return filed with the Division by petitioner before the notice was issued.

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 "4/22/14." 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 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 38 pages and lists 416 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 38, which contains 9 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 22, 2014 to each page of the CMR, circled the number "416" on page 38 next to the heading "Total Pieces and Amounts" and initialed or signed page 38. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 416.

9. Page 17 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0231 6020 and reference number L-040808641, was mailed to petitioner at the Maspeth, 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 or signed page 38 and affixed a postmark dated April 22, 2014 to each page of the CMR.

11. The mail room 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 "416" on the last page next to the heading "Total Pieces and Amounts." The affixation of the postmarks and the

Postal Service employee's initials and circled number indicate that a total of 416 articles of mail listed on the CMR were delivered to the USPS on April 22, 2014.

12. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the subject notice. Specifically, using PS form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 0231 6020, addressed to "Rubinos - Lizet M" at the Maspeth, New York, address listed on the notice.³ The USPS response to the request indicates that the article bearing certified control number 7104 1002 9730 0231 6020 and addressed to petitioner was delivered to an address in Maspeth, New York, on April 24, 2014. Attached to the Corina affidavit as exhibit "A" is the Division's "request for delivery information" for article number 7104 1002 9730 0231 6020. Exhibit "B" attached to the Corina affidavit is the USPS response to the Division's request. The response for article number 7104 1002 9730 0231 6020 indicates delivery of the same article on April 24, 2014 to an address in Maspeth, New York, and bears a copy of petitioner's signature as recipient and recipient's address of "5988 57RD."

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 granting such a motion.

³ It is noted that the Corina affidavit incorrectly states that "For the taxpayers in question, Myrtle Ave. Family Deli Corp., I prepared one Request for Delivery Information/Return Receipt After Mailing (PS form 3811-A)." The attached PS form 3811-A specifically indicates that the request for delivery information was for petitioner and not "Myrtle Ave. Family Deli Corp." Additionally, the caption of the Corina affidavit indicates petitioner's name as the taxpayer for the matter at issue, and paragraph six of the affidavit indicates that the signature of the recipient appears as "Lizet Rubinos." The documentary evidence indicates that the Division's request for delivery information was for the notice at issue sent to petitioner and did not pertain to Myrtle Ave. Family Deli Corp. The reference to Myrtle Ave. Family Deli Corp. is determined to be a typographical and inconsequential error.

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 found that the Division had established its standard mailing procedure through affidavits submitted by Ms. Nagengast and Mr. Peltier. The Administrative Law Judge also found that such affidavits, along with the properly completed CMR, established that such procedure was followed in this instance. Additionally, the Administrative Law Judge found that the Division had proven that petitioner had received the notice on April 24, 2014. Therefore, the Administrative Law Judge determined that, even if the notice was improperly addressed, petitioner's request for conciliation conference was filed more than 90 days from petitioner's receipt of the notice and thus untimely. Accordingly, the Administrative Law Judge granted the Division's motion and denied the petition herein.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner acknowledges that her request for conciliation conference was filed late, but requests an opportunity to provide information to substantiate her position with respect to her income tax liability for the year at issue. Petitioner also asserts that she relied upon her accountant to timely file the request for conciliation conference.

The Division relies upon the determination of the Administrative Law Judge and the papers submitted with its motion.

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 the 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).

As relevant here, there is a 90-day statutory time limit for filing a request for conciliation conference following the issuance of a notice of deficiency of personal income tax (Tax Law

§§ 681 [b]; 170 [3-a] [a]). Accordingly, pursuant to Tax Law § 681 (b), the notice of deficiency in this case would be binding upon petitioner unless she filed a timely request for conciliation conference with BCMS.

As the Administrative Law Judge correctly noted, it is well established that where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

We agree with the Administrative Law Judge that the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency.

We also find that the CMR has been properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). Specifically, this document lists certified control numbers and

reference numbers with corresponding names and addresses and bears USPS postmarks dated April 22, 2014 on each page. As noted, the name, address, reference and the certified control number for petitioner appears on page 17 of the CMR. On the last page of the CMR, a postal employee wrote his or her initials or signature and also circled the number “416” to indicate receipt by the post office of all 416 pieces of mail listed thereon in accordance with the Division’s standard mailing procedure. We thus conclude that the Division has presented sufficient documentary proof to establish that the subject notice of deficiency was mailed as addressed to petitioner on April 22, 2014.

Additionally, as the Administrative Law Judge noted, even if the notice was incorrectly addressed, the affidavit of Ms. Corina and the USPS response to form 3811-A shows that petitioner actually received the notice on April 24, 2014 (*see* finding of fact 12). Petitioner’s request was thus filed untimely even when measured from the date of receipt of the notice (*see Matter of Hyatt Equities*, Tax Appeals Tribunal, May 22, 2008 [notice was improperly addressed and the 90-day period for filing a protest was tolled until such time petitioner actually received the notice]). Furthermore, petitioner cannot alleviate her responsibility to timely file the request for conciliation conference by asserting that she relied upon her accountant to do so (*see Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992).

A request for conciliation conference must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, January 6, 1989). As petitioner’s request for conciliation conference was not mailed until December 11, 2014, which was beyond the 90-day statutory period, the Division of Tax Appeals has no jurisdiction to entertain the petition in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lizet Rubinos is denied;
2. The determination of the Administrative Law Judge is sustained; and
3. The petition of Lizet Rubinos is dismissed, with prejudice.

DATED: Albany, New York
April 3, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner