

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARCOS DE LOS SANTOS	:	DETERMINATION
for Redetermination of Deficiencies or for Refund of	:	DTA NO. 826024
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 2009, 2010 and 2011.	:	

Petitioner, Marcos De Los Santos, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2009, 2010 and 2011.

On March 7, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On August 14, 2014, Administrative Law Judge Winifred M. Maloney issued an Order withdrawing the Notice of Intent with respect to the notices of deficiency at issue in the petition.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Leo Gabovich), brought a motion on January 30, 2015 seeking an order of dismissal or, in the alternative, summary determination in its favor pursuant to sections 3000.5, 3000.9(a)(1)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Leo Gabovich, dated January 29, 2015, and annexed exhibits. Petitioner, appearing pro se, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination began on March 2, 2015, the due date for

petitioner's response.¹ After due consideration of the affidavits and documents presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of notices of deficiency.

FINDINGS OF FACT

1. On December 28, 2013, petitioner, Marcos De Los Santos, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review notices of deficiency (numbers L-038866429-4, L-038866430-4 and L-038866433-1), which were attached to the petition. The instant motion challenges the timely filing of the petition in response to those notices.

2. The subject notices of deficiency, each dated February 21, 2013, are addressed to petitioner at a Longfellow Avenue, Bronx, New York, address.

3. On March 7, 2014, Daniel J. Ranalli, the Supervising Administrative Law Judge of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the subject petition was filed in protest of notices of deficiency issued to petitioner on February 21, 2013 and that the petition was not filed until December 28, 2013. After further proceedings and consideration by the undersigned, the Notice was withdrawn by an Order, dated August 14, 2014, and the Division of Taxation (Division) was directed to file an answer to the petition within 75 days. Said answer was filed on November 5, 2014. This motion for summary determination was filed on January 30, 2015.

¹ Since March 1, 2015 fell on a Sunday, petitioner had until Monday, March 2, 2015 to file a response to the Division of Taxation's motion for summary determination (*see* General Construction Law § 20).

4. In support of the motion and to prove proper and timely mailing of the notices of deficiency under protest, the Division submitted the following: (i) an affidavit, dated January 28, 2015, of Mary Ellen Nagengast, a Tax Auditor Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable (CMR) dated February 21, 2013; (iii) an affidavit, dated January 28, 2015, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; and (iv) a copy of a transcript of petitioner's New York State personal income tax return (form IT-201) for the year 2012 electronically filed on April 17, 2012, which was the last filing from petitioner prior to the issuance of the notices of deficiency.

5. 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 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 page of the CMR in the present case to the actual mailing date of "2/21/13." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. 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.

6. 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 "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 P.O. Address."

7. The CMR relevant to the notices of deficiency under protest consists of 64 pages and lists 700 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 64, which contains 7 entries. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. A USPS employee affixed a postmark dated February 21, 2013 of the Colonie Center branch of the USPS to each page of the 64-page CMR, circled the preprinted number "700" on page 64 next to the heading "TOTAL PIECES AND AMOUNTS" and wrote and circled his or her initials directly under the circled number "700."

8. Page 19 of the CMR indicates that three notices of deficiency with certified control numbers 7104 1002 9730 1498 4255, 7104 1002 9730 1498 4262 and 7104 1002 9730 1498 4279 and assessment numbers L-038866429, L-038866430 and L-038866433, respectively, were mailed to "DELOSSANTOSMATOS-MARCOS, MARCOS DE LOS SANTOS" at the same Longfellow Avenue, Bronx, New York, address listed on the subject notices of deficiency. Each of these notices has a corresponding mailing cover sheet that bears the same certified control number and petitioner's name and address as noted above.

9. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently Principal Mail and Supply Supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. 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. That staff member then weighs, seals and places 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 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 affixed a postmark dated February 21, 2013 to each page of the CMR and circled his or her initials on page 64. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, the USPS employee complied with this request by circling the number "700" on the last page next to the heading "TOTAL PIECES AND AMOUNTS." The affixation of the postmarks, the postal service employee's circled initials, and the circling of the number 700 indicating that all such pieces were received, confirm that the notices of deficiency dated February 21, 2013 were received by the USPS on that date.

10. Petitioner's 2011 Resident Income Tax Return, electronically filed on April 17, 2012, reported petitioner's name as Marcos De Los Santos Matos, his address as Longfellow Avenue,

Bronx, New York 10460, and his occupation as tax preparer. The paid preparer of this return was listed as petitioner, Marcos De Los Santos, whose address was listed as a Longfellow Avenue, Bronx, New York, address. This was the last return filed by petitioner prior to issuance of the subject notices. This address corresponds with the address on the CMR and on the notices that were sent to petitioner.

CONCLUSIONS OF LAW

A. 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]).

B. Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “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 of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary determination 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 a material issue of fact is “arguable” (*Glick & Dolleck v. Tri-pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2nd Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381 [2nd Dept 1960]). “To defeat a motion for summary determination, the opponent must . . . produce

‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 448-449 [1st Dept 1992] citing *Zuckerman*).

C. In the instant matter, petitioner did not respond to the Division’s motion and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc., v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227 [1984], *appeal dismissed* 62 NY2d 942 [1984]). In addition, petitioner has submitted no evidence to contest the facts alleged in the Nagengast and Peltier affidavits; consequently, those facts may be deemed admitted. Accordingly, summary determination may be granted in this matter, and the Division’s motion will be granted for the reasons set forth below.

D. There is a 90-day statutory time limit for filing a petition following the issuance of a Notice of Deficiency (Tax Law §§ 681[b]; 689[b]). Where, as here, the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing to petitioner’s last known address (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 681[a]). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). There must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. In this case, 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, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

F. The 64-page CMR provides sufficient documentary proof that the notices of deficiency dated February 21, 2013 were mailed by certified mail to petitioner at his last known address on February 21, 2013. Specifically, each page of this 64-page CMR listed certified control numbers with corresponding notice numbers, names and addresses and bore a USPS postmark dated February 21, 2013. A postal service employee circled the number “700” next to the heading “TOTAL PIECES AND AMOUNTS” and circled his or her handwritten initials directly under the circled number, thereby indicating that all 700 pieces listed on the CMR were received at the post office. The notices addressed to petitioner were among the 700 pieces so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Additionally, the Division established that the notices were mailed to petitioner’s last known address, being the same address as reported on petitioner’s 2011 resident income tax return, which was the last return filed with the Division before the subject notices were issued (Tax Law § 681[a]).

G. A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the notices were properly mailed when they were delivered into the custody of the USPS on February 21, 2013, and it is this date that commenced the 90-day period within which a protest had to have been filed.

Petitioner's protest was not filed until December 28, 2013, or 310 days later. The petition was thus untimely filed (Tax Law §§ 681[b]; 689[b]). Consequently, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest and must grant summary determination in favor of the Division of Taxation (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The Division of Taxation's motion for summary determination is granted, and the petition of Marcos De Los Santos is hereby denied.

DATED: Albany, New York
May 28, 2015

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE