

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DAVID AND CAROLYN P. HANSARD : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 826399
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 2009. :

Petitioners, David and Carolyn P. Hansard, filed a petition for revision of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2009.

On February 4, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Kent J. Gebert, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(I) and 3000.9(b). Accompanying the motion was the affidavit of Kent J. Gebert, Esq., dated February 4, 2015, and annexed exhibits. Petitioners, appearing by Hodgson Russ LLP (Ariele R. Doolittle, Esq., of counsel), submitted a letter dated May 19, 2015 in opposition to the motion. After due consideration of the documents submitted, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely request for conciliation conference following the issuance of a notice of deficiency.

FINDINGS OF FACT

1. Through this motion, the Division of Taxation (Division) asserts that petitioners did

not timely protest a Notice of Deficiency, dated December 5, 2013, bearing assessment identification number L-040503810. The notice was addressed to petitioners David M. Hansard and Carolyn P. Hansard at 3443 Trenary Ln., Colorado Springs, Colorado, 80918-3043. An additional copy of the notice was addressed to petitioners at 2733 Kinney Oaks Ct., Austin, Texas 78704-4977.

2. Included with the Division's motion is a copy of petitioners' Request for Conciliation Conference, filed with the Division's Bureau of Conciliation and Mediation Services (BCMS), dated March 8, 2014, and stamped as received by BCMS on March 21, 2014.

3. On April 4, 2014, BCMS issued a Conciliation Order Dismissing Request to petitioners. The order determined that petitioners' 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 December 5, 2013, but the request was not mailed until March 19, 2014, or in excess of 90 days, the request is late filed.”

4. Petitioners filed a petition with the Division of Tax Appeals that was stamped as received on July 3, 2014. The petition was mailed via the United States Postal Service 2-day “Priority Mail” on June 30, 2014.

5. To show proof of proper mailing of the subject notice, the Division provided, among other items, the following with its motion papers: (I) an affidavit, dated January 28, 2015, of Mary Ellen Nagengast, the Director of the Division's Management Analysis and Project Services Bureau (MAPS) since October 2005; (ii) a 98-page “Certified Record for Presort Mail - Assessments Receivable” (CMR), each page of which is legibly postmarked December 5, 2013; (iii) an affidavit, dated January 28, 2015, of Bruce Peltier, a supervisor in the Division's mail

room since March 1999; (iv) an affidavit, dated January 28, 2015, of Heidi Corina, Legal Assistant in the Office of Counsel of the New York State Department of Taxation and Finance, with exhibits; (v) copies of the subject notices with the associated mailing cover sheets; and (vi) a copy of documentation and correspondence pertaining to petitioners' address.

6. The affidavit of Mary Ellen Nagengast sets forth the Division's general practice and procedure for processing statutory notices. In her affidavit, Ms. Nagengast avers that in her role as Director of MAPS, she has assumed responsibility for the receipt and storage of CMRs, and has reviewed and become familiar with past and present procedures as they relate to the Division's issuance of statutory notices. In particular, Ms. Nagengast is familiar with the Division's Case and Resource Tracking System (CARTS) and its procedures for generating statutory notices prior to mailing.

7. CARTS generates the computer-generated CMR and the corresponding notices. The notices 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 page of the CMR in the present case to the actual mailing date of "12/5/13." In addition, according to 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 ordered otherwise. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

8. 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 P.O. Address."

9. According to Ms. Nagengast, the CMR in the present matter consists of 98 pages. Ms. Nagengast notes that the entire CMR is attached to her affidavit as Exhibit A, and that portions have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She states that the USPS representative affixed a postmark to each page of the CMR, circled "1,069" on page 98, and initialed or signed the same page. She adds that the total number of statutory notices mailed pursuant to the CMR was 1,069.

10. Page 96 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0103 5212 and assessment ID number L-040503810 was mailed to Carolyn P. Hansard at 2733 Kinney Oaks Ct., Austin, Texas 78704-4977 and a second identical Notice of Deficiency with certified control number 7104 1002 9730 0103 5229 was mailed to David M. Hansard, 3443 Trenary Ln., Colorado Springs, Colorado 80918-4043. The corresponding mailing cover sheets, also attached to Ms. Nagengast's affidavit, bear the certified control numbers and petitioners' names and addresses as noted.

11. The affidavit of Bruce Peltier, a mail room supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. 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 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 listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the 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 signature on the CMR, indicating receipt by the post office. Here, as noted, each page of the CMR contains such postmarks. The Center further requests that the USPS employee either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR. The USPS employee complied with this request by circling "1069" on the last page of the CMR.

12. According to the Peltier affidavit, copies of the subject notices of deficiency were mailed to petitioners on December 5, 2013, as claimed and, according to both the affidavits of Ms. Nagengast and Mr. Peltier, the procedures described and followed with respect to the mailing of the subject notice were the normal and regular procedures of the Division on December 5, 2013.

13. Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Form 3811-A or she asks the Division's mail room staff to make to make such a request on behalf of the Office of Counsel. Form 3811-A is sent to the USPS for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery, when delivery can be confirmed.

14. Attached to Ms. Corina's affidavit are two copies of the Form 3811-A, which requested information regarding the delivery of an article to each petitioner. Specifically, one form requested information regarding a piece of mail that was mailed on December 5, 2013 bearing certified control number 7104 1002 9730 0103 5212 and addressed to petitioners at 3443 Trenary Ln., Colorado Springs, Co., 80918-3043. This is the same number as the certified number on the CMR corresponding with the mailing of a Notice of Deficiency to petitioners on December 5, 2013. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request. The letter, on USPS letterhead dated January 28, 2015 stated in part: "The delivery record shows that this item was delivered on December 10, 2013 at 1:23 pm in COLORADO SPRINGS, CO 80918." The letter also contains a scanned image of the signature of the recipient, a printed name of Yvonne Hansard and the address of the recipient is listed as "3443 Trenary."¹

15. The second form requested information regarding a piece of mail bearing certified control number 7104 1002 9730 0103 5229 and addressed to petitioners at 2733 Kinney Oaks Ct., Austin, TX 78704-4977.² This is the same number as the certified number on the CMR corresponding with the mailing of a Notice of Deficiency to petitioners on December 5, 2013. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request. The letter, on USPS letterhead dated January 28, 2015, stated in part: "The delivery record shows that this item was delivered on December 26, 2013 at 12:20 pm in AUSTIN, TX 78704." The letter also contained a scanned image of the signature of the recipient, a printed

¹ The postal service's response refers to certified control number 71041002973001035229.

² The mailing date was omitted from the request for information.

name of Carolyn Hansard and the address of the recipient is listed as “2733 Kinney Oaks Court 78704.”³

16. In order to show that a notice was mailed to David Hansard’s last known address, the Division offered a screen shot from the Division’s e-MPIRE data base showing an address of 3443 Trenary Lane, Colorado Springs, Colorado 80918-3043. This address was updated through the United States Postal Service National Change of Address database effective March 30, 2013. The Division also presented a copy of a letter from David Hansard that was stamped received by the Division on December 9, 2013. The return address listed on the letter is 3443 Trenary Lane, Colorado Springs, Colorado 80918. The same address appears on a copy of the notice, the request for a conciliation conference and the petition. The Division also offered a screen shot from Carolyn Hansard’s e-MPIRE database that shows an address of 2733 Kinney Oaks Ct., Austin, TX 78704-4977. This address was updated through the United states Postal Service National Change of Address database effective June 23, 2014. The same address appears on the second notice issued to petitioners.

SUMMARY OF PETITIONERS’ POSITION

17. In response to the motion, petitioners submitted a letter that argues that there are questions of fact that preclude granting summary determination. First, petitioners note that the Corina affidavit states that the responses to requests for delivery information from the U.S. Postal Service show:

“ . . . that certified number ‘710410029730101035212’ was delivered on ‘December 26, 2013’ at 12:20 pm in AUSTIN, TX 78704.”

³ The postal service’s response refers to certified control number 71041002973001035212.

“. . . that certified number ‘710410029730101035229’ was delivered on ‘December 10, 2013’ at 1:23 pm in COLORADO SPRINGS, CO 80918.”

However, the responses to requests for delivery information attached to the Corina Affidavit refer to “71041002973001035212 ” and “71041002973001035229, ” respectively. (emphasis and underline added to highlight the discrepancy). Petitioners also note that the copy of the PS Form 3811-A attached to the Corina affidavit pertaining to the mailing to the Austin, Texas, address does not have any entry on the line for “Mailing Date (mm/dd/yy).” Lastly, petitioners submit that the Division has offered no explanation for the excessive delay in the delivery of the notice to the Austin, Texas, address. According to petitioners, the incomplete postal forms and other inconsistencies in the Corina affidavit are sufficient to conclude that the 90-day period should begin with the date of receipt rather than the date of the alleged mailing and this, in turn, would result in a timely filing of the Request for a Conciliation Conference. Petitioners posit that the motion for summary determination should be denied because there are questions of fact as to the timeliness of petitioners’ request.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). As the petition in this matter was filed within 90 days of the conciliation order, the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioners’ request for a conciliation conference. This order shall address the instant motion as such.

B. 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” (20 NYCRR 3000.9[b][1]).

C. There is a 90-day statutory time limit for filing either a petition for hearing or a request for conciliation conference following the issuance of a Notice of Deficiency (Tax Law §§ 681[b]; 689[b]). In most cases, where, as here, the timeliness of such a protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioners’ last known addresses (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 681[a]). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show 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).

D. In the present matter, the Division also offered evidence regarding the receipt of the notice by the taxpayers. When the Division relies upon receipt of the notice, the 90-day period for filing a petition or a request for a conciliation conference commences with the date of actual notice (*see Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]).

E. The Division has offered proof sufficient to establish the mailing of the statutory notices to petitioners’ last known addresses on December 5, 2013. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits

submitted by the Division adequately describe the Division's general mailing procedure, as well as the relevant CMR, and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, petitioners' addresses on the subject notices, corresponding mail cover sheets, and CMR all conform with the address on the United States Postal Service National Change of Address database. For petitioner David Hansard, the address used also matches the address listed on the request and the petition. The addresses used satisfy the "last known address" requirement. It is thus concluded that the Division properly mailed the notices on December 5, 2013 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]). It is noted that petitioners have not raised an issue with respect to the addresses used by the Division.

F. Petitioners' arguments regarding discrepancies in the mailing documents are without merit. Petitioners have called attention to differences in the certified control numbers between the Corina affidavit and documents from the Postal Service. However, there is no showing that the apparent errors have any bearing upon the mailing of the notices. Petitioners have also correctly noted that, for the notice sent to Austin, Texas, the mailing date was omitted from the Request for Delivery Information. However, petitioners have not shown that this omission alters the conclusion that the document was mailed as indicated by the CMR. Moreover, since the date of mailing is the focus of the inquiry, the delay in the delivery of the Notice to Austin, Texas is of no consequence.

G. Petitioners' Request for Conciliation Conference was mailed on March 19, 2014. This date falls after the 90-day period of limitations for the filing of such a request.

Consequently, the request was untimely (*see* Tax Law §§ 170[3-a][b]; 681[b]) and the same was properly dismissed by the April 4, 2014 Order issued by BCMS.

H. The Division's motion for summary determination is granted and the petition of David and Carolyn P. Hansard is denied.

DATED: Albany, New York
August 13, 2015

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE