

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JANELLE WILLIAMS : DETERMINATION
 : DTA NO. 826775
for Redetermination of a Deficiency or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2013. :

Petitioner, Janelle Williams, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2013.

On October 20, 2015, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9 (a) (1) and (b). Petitioner, appearing pro se, filed no response to the Division of Taxation's motion by her due date on November 19, 2015, which date commenced the 90-day period for the issuance of this determination. After due consideration of the affidavits, documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

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

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Deficiency, bearing assessment ID number L-041168935, and dated July 10, 2014. The notice is addressed to petitioner, Janelle Williams, at an E. 94th Street address in Brooklyn, New York. The notice asserts additional personal income tax due in the amount of \$1,573.00, plus interest, for tax year 2013.

2. Petitioner filed a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) requesting a refund in the amount of \$3,090.00 and protesting a "notice of disallowance or refund denial" dated June 16, 2014, for tax year 2013. The address borne by the Request was the E. 94th Street, Brooklyn, New York, address. The Request is dated September 12, 2014, but date-stamped as received by BCMS on October 17, 2014. Included with the Request and other documents is a copy of the envelope presumably used to mail the Request, bearing a postmark from the United States Post Office (USPS) of October 14, 2014, and is also date-stamped as received by BCMS on October 17, 2014.

3. BCMS issued a Conciliation Order Dismissing Request (CMS No. 263804) to petitioner dated November 7, 2014, with a cover letter bearing petitioner's name and the same E. 94th Street, Brooklyn, New York, address. 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 was issued on July 10, 2014, but the request was not mailed until October 14, 2014, or 96 days, the request is late filed."

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on February 6, 2015, bearing the E. 94th Street, Brooklyn, New York, address.¹

5. To show proof of proper mailing of the July 10, 2014 Notice of Deficiency, the Division, along with the October 19, 2015 affidavit of Christopher O'Brien, Esq., provided the following with its motion papers: (i) an affidavit, dated July 28, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Management Analysis and Project Services Bureau (MAPS) of the Division (since October 2005), who is familiar with the Case and Resource Tracking System (CARTS) and past and present procedures for generating statutory notices; (ii) an affidavit, dated July 29, 2015, of Bruce Peltier, a mail room supervisor in the Division's Mail Processing Center (since March 1999); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 10, 2014; (iv) a copy of petitioner's Notice of Deficiency, dated July 10, 2014, bearing a cover letter with certified control number 7104 1002 9730 0251 6307, and petitioner's E. 94th Street, Brooklyn, New York, address; (v) the petition filed with the Division of Tax Appeals bearing a postmark of February 6, 2015, and date-stamped as received by the Division of Tax Appeals on February 9, 2015; and (vi) a representative copy of petitioner's e-filed resident income tax return for tax year 2013, identifying a paid income tax preparer, a preparation date of January 30, 2014, but no filing date.

6. The Division's affidavit indicates that petitioner's 2013 tax return was filed, and although it does not specify a filing date, the Division states that it is "the last return filed before the Notice was issued." The return bears the E. 94th Street, Brooklyn, New York, address.

¹ The fact that the petition in this matter was filed on February 6, 2015, challenging the Conciliation Order issued on November 7, 2014 (91 days after its issuance) and appearing to be late, was not addressed by the parties.

7. The affidavit of Mary Ellen Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and 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."

Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing, allowing for a manual review of the notices prior to mailing. Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to reflect the actual mailing date of "7/10/14."

8. According to the Nagengast affidavit, the CMR in the present matter consists of 29 pages and lists 313 certified control numbers along with the corresponding assessment numbers, names and addresses. In addition, Ms. Nagengast stated that all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page. Ms. Nagengast notes that the portion of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved

in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, circled “313” on page 29 and initialed the same page.

9. Page 10 of the CMR indicates that a statutory notice with certified control number 7104 1002 9730 0251 6307 and assessment ID number L-041168935 was mailed to petitioner at the E. 94th Street, Brooklyn, New York, address listed on the subject notice.²

10. 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. Once a staff member 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. Mr. Peltier attests that all pages of the CMR contain postmarks, including the page containing petitioner’s mailing. The Center further requests that the USPS employees 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. Here, the USPS employee circled the number “313” on page 29 of the CMR and handwrote what are likely initials over the postmark of July 10, 2014, as well.

11. According to the Nagengast and Peltier affidavits, the subject Notice of Deficiency was mailed to petitioner on July 10, 2014, as claimed, to her E. 94th Street, Brooklyn, New York, address.

² Although 2 pages of the CMR have incomplete postmarks, page 10, bearing petitioner’s name and address, has a clear postmark and appears in sequential order based upon the certified control numbers and the page numbers of the CMR.

CONCLUSIONS OF LAW

A. As noted, 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).

B. 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]).”

C. Section 3000.9 (c) of the Rules 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 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557 [1980]). 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, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 573 [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 [1960]). “To defeat a motion for summary judgment, 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 [1992] *citing Zuckerman*).

Petitioner failed to file a response to the instant motion; therefore she is deemed to have 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 Corp.*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts set forth in the O'Brien, Nagengast, and Peltier affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden; Whelan v. GTE Sylvania*).

D. Where, as here, the timeliness of a petitioner's 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 petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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).

E. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., July 10, 2014, to petitioner's last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Also supporting the fact that such procedures were followed herein, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the listed address and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The facts concerning the CMR indicate that the proper mailing procedures were followed in this case.

In addition, the address on the Notice of Deficiency conforms with the address listed on petitioner's e-filed resident income tax return, filed for tax year 2013, the last return filed prior to the issuance of the notice, satisfying the "last known address" requirement of Tax Law § 681(a).

Accordingly, it is concluded that the Division has presented sufficient documentary proof to establish that the subject Notice of Deficiency was mailed as addressed to petitioner on the date claimed and, thus, 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 July 10, 2014 (Tax Law § 170 [3-a] [a]; § 681 [b]).

F. The documents show that the notice was mailed on July 10, 2014, but petitioner's request for conciliation conference was not mailed until October 14, 2014, which is 6 days beyond the 90-day period. Consequently, the Division of Tax Appeals must grant summary determination in favor of the Division of Taxation (*see Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003).

G. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 687 [a]). If the claim for refund is disallowed, petitioner may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 689 [c]; § 170 [3-a] [a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

H. The Division of Taxation's motion for summary determination is granted, and the petition of Janelle Williams is denied.

DATED: Albany, New York
February 11, 2016

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE