

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARK FEUER AND REGINA SOROK : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 827041
of New York State Personal Income Tax under Article :
22 of the Tax Law for the Year 2009. :

Petitioners, Mark Feuer and Regina Sorok,¹ 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 2009.

On December 22, 2015, the Division of Taxation, by Amanda Hiller, Esq., (Christopher O'Brien, 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 Christopher O'Brien, Esq., dated December 21, 2015, and annexed exhibits. Petitioners, appearing by John Savignano, CPA, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination began on January 21, 2016, the due date for petitioners' response. After due consideration of the affidavits and documents presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

¹ Petitioner Regina Sorok's name also appears as Regina Feuer on documents in the record.

ISSUE

Whether petitioners filed a timely request for a conciliation conference 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 petitioners' protest of a Notice of Deficiency dated October 8, 2013 and addressed to petitioners, Mark Feuer and Regina Feuer, "2918 Allon St, Oceanside, NY 11572-4733." The Notice of Deficiency, notice number L-040012059-1, asserted additional New York State personal income tax due for the year 2009 in the amount of \$23,580.12, plus interest, for a balance due of \$30,616.58. The mailing cover sheet of the Notice of Deficiency contains the certified control number 7104 1002 9730 0070 4515.

2. Petitioners protested the Notice of Deficiency by filing with the Division's Bureau of Conciliation and Mediation Services (BCMS) requests for conciliation conference.² Each Request was signed and dated by Karen Jou, CPA, as petitioner's representative, on May 20, 2015. The envelope in which the requests for conciliation conference were mailed bears a metered stamp dated May 20, 2015. BCMS received the requests for conciliation conference on May 26, 2015. Both requests for conciliation conference list petitioners' address as 29-18 Allon Street, Ocean Side, New York 11572.

3. On June 12, 2015, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioners. Bearing CMS No. 266698 and referencing notice number L-040012059, the Order determined that petitioners' protest was untimely and stated, in part:

² One Request for Conciliation Conference (Request) was submitted for petitioner Mark Feuer, and the other Request was submitted for petitioner Regina Sorok. Each Request also protested three other statutory notices not at issue in this proceeding.

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on October 8, 2013, but the request was not received until May 26, 2015, or in excess of 90 days, the request is late filed.”

4. On June 23, 2015, the Division of Tax Appeals received a petition seeking redetermination of the deficiency issued in this matter. The envelope in which the petition was sent bears a metered stamp dated June 18, 2015. There is no dispute that the petition was filed within 90 days after the June 12, 2015 issuance of the Order, and constitutes a timely challenge thereto. In their petition, petitioners assert that they want to “receive the original correspondence and proof of mailing” because they were never made aware of the Division’s assessment of additional tax due for the year 2009 until recently. On the petition, petitioners’ address is listed as “29-18 Allon Street, Oceanside, NY 11572.”

5. In support of the motion and to prove proper and timely mailing of the Notice of Deficiency under protest, the Division submitted the following: (i) the affidavit of Christopher O’Brien, Esq., the Division’s representative, dated December 21, 2015; (ii) the affidavit, dated November 13, 2015, of Mary Ellen Nagengast, a Tax Auditor Administrator I and Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) dated October 8, 2013; (iv) the affidavit, dated November 17, 2015, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; (v) the affidavit, dated December 17, 2015, of Heidi Corina, Legal Assistant 2 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 response to such request dated August 3, 2015; (vii) copies of petitioners’ requests for conciliation conference and the

Conciliation Order Dismissing Request in response thereto; and (viii) a copy of petitioners' joint New York State resident income tax return (form IT-201) for the year 2009, filed on May 23, 2013, which was the last filing from petitioners prior to the issuance of the Notice of Deficiency.

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 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 "10/8/13." 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.

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 "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."

8. Ms. Nagengast attested to the truth and accuracy of the copy of the 27-page CMR, which contains a list of 289 statutory notices issued by the Division on October 8, 2013. The CMR lists 290 computer-printed 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 11, which contains 10 such entries (1 of the original such certified control numbers and the assessment number, name and address corresponding thereto, has been crossed out), and page 27, which contains 4 such 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.

9. Page 19 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0070 4515 and reference number L-040012059, was issued to "Feuer-Mark," at the 2918 Allon Street, Oceanside, New York, address listed thereon.³ The corresponding mailing cover sheet, attached to the Nagengast affidavit as "Exhibit B," bears this certified control number and petitioners' names, "Feuer-Mark" and "Feuer-Regina," and the address as noted above.

10. 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

³ The certified mail record lists only the name Mark Feuer because it is standard procedure for the certified mail record to set forth the name of the primary taxpayer associated with the statutory notice. Thus, when as here, a husband and wife file a joint personal income tax return wherein the husband's social security number is listed in the place designated for the primary taxpayer, only the husband's name will appear on the certified mail record.

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 and fee amounts 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.

11. 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, the postal employee did apply a USPS postmark to every page of the CMR, except page 10. The date on the postmark is illegible on ten pages of the CMR including page 19, the page on which information concerning the subject Notice of Deficiency, assigned certified control number 7104 1002 9730 0070 4515 and reference number L-040012059, and Mark Feuer’s name and address appear. However, the postmark dated October 8, 2013 of the Colonie Center branch of the USPS is legible on the last page of the CMR. The USPS employee also initialed or signed all 27 pages of the CMR. On the last page of the CMR, the preprinted number “290” appearing next to the heading “TOTAL PIECES AND AMOUNTS” has a diagonal line through it, and the handwritten number “289” appears next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE.” This change was made to reflect that one piece of mail identified but crossed out on page 11 (*see* Finding of Fact 8) had been “pulled” from the particular run. A piece of mail may be pulled for any number of reasons including, but not limited to, a discrepancy in a name or address. Any piece of mail so

pulled is segregated from the remaining group of statutory notices for correction and issuance at another time. 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 handwritten number "289" on the last page of the CMR next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE."

12. Mr. Peltier's affidavit states that the CMR is the Division's record of receipt, by the USPS for pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

13. Based upon his review of the affidavit of Mary Ellen Nagengast, the exhibits attached thereto and the CMR, Mr. Peltier avers that on October 8, 2013, an employee of the Mail Processing Center delivered an item of certified mail addressed to "FEUER-MARK and FEUER-REGINA 2918 ALLON ST., OCEANSIDE, NY 11572-4733 to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail." He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on October 8, 2013 to be kept as part of the records of the Department. Mr. Peltier asserts that the procedures described in his affidavit were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to Mark Feuer and Regina Feuer on October 8, 2013.

14. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After

Mailing in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0070 4515 on October 8, 2013 from the Albany, New York, branch of the USPS to “Feuer-Mark” and “Feuer-Regina” at 2918 Allon Street, Oceanside, NY 11572-4733. In response, the USPS confirmed delivery of this certified mail item at the noted address, specifically petitioners’ 2918 Allon Street, Oceanside, New York, address, on October 10, 2013 at 1:51 P.M.

15. Petitioners’ 2009 New York State resident income tax return filed on May 23, 2013, reported petitioners’ address as 2918 Allon Street, Oceanside, New York 11572. This was the last return filed by petitioners prior to the issuance of the subject notice of deficiency. This address corresponds with the address on the CMR and on the notice of deficiency that was issued to petitioners.

CONCLUSIONS OF LAW

A. The Division has filed alternative motions, seeking dismissal under 20 NYCRR 3000.9(a), or summary determination under 20 NYCRR 3000.9(b). As the Division of Tax Appeals has subject matter jurisdiction on the issue of the timely filing of a request for a conciliation conference in the instant matter, the Division’s motion will be treated as one for summary determination (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013).

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. 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 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 [2d 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 [2d 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, 449 [1st Dept 1992] citing *Zuckerman*).

D. Petitioners did not respond to the Division’s motion. Therefore, petitioners are deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544 [1975]; *Whelan v. GTE Sylvania*).

However, in determining a motion for summary determination, the evidence must be viewed in a

manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*; *see also Weiss v. Garfield*, 21 AD2d 156 [1964]).

E. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law §§ 681[b]; 689[b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner’s last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and date of mailing of the subject notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the

particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

G. 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).

H. While each page of the 27-page CMR lists certified control numbers with corresponding notice numbers, names and addresses, it does not contain legible postmarks on each page, indicating the mailing date of October 8, 2013, despite the fact that both the Nagengast and Peltier affidavits assert that a postmark was affixed to each page. However, the last page of the CMR bears a USPS postmark dated October 8, 2013. In addition, a postal service employee circled the handwritten number “289” next to the “TOTAL PIECES RECEIVED AT POST OFFICE” heading and initialed the last page, thereby indicating that all 289 pieces listed on the CMR were received at the post office. The notice addressed to Mark Feuer and Regina Feuer was among the 289 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 Raskusin*, Tax Appeals Tribunal, July 26, 2001). Moreover, despite whatever infirmities may or may not exist in the CMR, the Division has confirmed petitioners’ actual receipt of the Notice of Deficiency on October 10, 2013 (*see* Finding of Fact 14).

I. The Division established that the Notice of Deficiency was mailed to petitioners’ last known address, being the same address as reported on petitioners’ 2009 resident income tax return, which was the last return filed with the Division before the subject Notice of Deficiency

was issued (Tax Law § 681[a]; *see* Finding of Fact 15). It is concluded that the subject Notice of Deficiency was properly mailed 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 October 8, 2013 (Tax Law §§ 170[3-a][a]; 681[b]).

J. The documents show that the Notice of Deficiency was mailed on October 8, 2013, but petitioners' requests for conciliation conference were not mailed until May 20, 2015, a date well beyond the 90-day period for protesting the Notice of Deficiency. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation. (*See Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late].)

K. Finally, it is observed that petitioners are not entirely without recourse. That is, petitioners 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, petitioners 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).

L. The Division of Taxation's motion for summary determination is hereby granted, the June 12, 2015 Conciliation Order Dismissing Request is sustained and the petition of Mark Feuer and Regina Sorok is denied.

DATED: Albany, New York
April 7, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE