

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LIZET RUBINOS	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 827395
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2012.	:	

Petitioner, Lizet Rubinos, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2012.¹

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), brought a motion dated December 30, 2015, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i), and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not file a response to the Division's motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

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, L-039364587 has been assigned a different Division of Tax Appeals number and will not be addressed herein. This determination 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

1. The subject of the motion of the Division of Taxation (Division) 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

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

² The conciliation order referenced notice numbers L-039364586, L-039364587, and L-040808641.

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 Processing Center (Center); (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 Center's general operations and procedures. The Center 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 page 38 and affixed a postmark dated April 22, 2014 to each page of the CMR.

11. The Center 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.”

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). As the petition in this matter was filed within 90 days of the conciliation order (*see* Finding of Fact 4), 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 petitioner’s request for conciliation conference. This order shall address the instant motion as such.

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.” Based on the documentary evidence, I find 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.

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” (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, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [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 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, 382 [2d Dept 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, 449 [1st Dept 1992] *citing Zuckerman*).

D. Petitioner did not respond to the Division’s motion. Accordingly, she is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest

the facts alleged in the Corina, Nagengast and Peltier affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v. Baiden*, at 544; *Whelan v. GTE Sylvania*).

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 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 BCMS “if the time to petition for such a 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 request for conciliation conference or petition 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).

G. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices to petitioner's last known address on August 30, 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).

H. As noted, the notice must be sent to petitioner's last known address. The phrase "last known address," for purposes of the Division's issuance of statutory notices carrying with them the right to a hearing, has been defined and consistently interpreted to mean the address given in the last return filed by the taxpayer or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable (*see Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012; *see also Matter of Nelloquet Restaurant, Inc.*, Tax Appeals Tribunal, March 14, 1996). Here, petitioner's last known address, as indicated on petitioner's 2012 IT-201, was 59-88 57th Road, Apt. 2, Maspeth, New York. The address that appears on the notice is 5988 57th Road, Apt. 2, Maspeth, New York, thus missing the hyphen in the street address as it appears on petitioner's last filed return. It is first noted that petitioner does not contend that the notice was improperly addressed and does not dispute receipt of the notice. Additionally, the evidence in the record shows that petitioner received the subject notice two days after it was mailed. Specifically, the USPS response to form 3811-A shows that petitioner signed for the notice, acknowledging receipt, on April 24, 2014. Moreover, on the receipt acknowledgment, petitioner listed her address as 5988 57RD.

Assuming, arguendo, that the notice was improperly addressed and the missing hyphen constitutes consequential error, the 90-day period for filing a petition or request for conciliation conference is tolled until such time as petitioner actually received the notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [1992], *lv denied* 79 NY2d 759 [1992]). The Corina affidavit and the accompanying USPS delivery information clearly and convincingly show that a copy of the subject notice, addressed to petitioner, which was also listed on the CMR, was delivered to petitioner at her Maspeth, New York, address on April 24, 2014. The signature provided by the USPS indicates that petitioner signed for the document as recipient, and petitioner has offered no evidence to the contrary. Thus, the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information, and the USPS response that the notice at issue was received by petitioner on April 24, 2014 (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012; *Matter of Winner's Garage, Inc.*, Tax Appeals Tribunal, June 10, 2010, *confirmed* 89 AD3d 1166 [2011], *lv denied* 18 NY3d 807 [2012]). As such, assuming the notice was improperly addressed in the first instance, the period within which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., April 24, 2014, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [1986], *revg* 118 AD2d 894, 499 NYS2d 457 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Petitioner's request for conciliation conference was not filed until December 11, 2014. This date falls after the 90-day period of limitations for the filing of

such a request. Petitioner's request was therefore untimely filed (*see* Tax Law §§ 681[b]; 689[b]; 170[3-a][b]) and the same was properly dismissed by the Order issued by BCMS.

I. The Division's motion for summary determination is hereby granted, the December 26, 2014 Order dismissing petitioner's Request is sustained and the petition is denied.

DATED: Albany, New York
April 7, 2016

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE