

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SHEREE A. DAGOSTINO : DETERMINATION
 : DTA NO. 827522
 :
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 2012. :
 :
_____ :

Petitioner, Sheree A. Dagostino, 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 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), brought a motion on June 20, 2016, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Peter B. Ostwald, Esq., dated June 20, 2016, and annexed exhibits. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this order began on July 21, 2016, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

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 dated July 28, 2015, bearing assessment identification number L-043097252-5 and addressed to petitioner, Sheree A. Dagostino, at a Liverpool, New York, address.

2. Petitioner filed a petition with the Division of Tax Appeals on March 7, 2016, in protest of a Conciliation Order Dismissing Request, CMS No. 268983, dated January 22, 2016. The Conciliation Order explained the basis for the dismissal as follows:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices(s) was issued on July 28, 2015, but the request was not received until January 4, 2016, or in excess of 90 days, the request is late filed.”

3. Petitioner filed a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of a notice numbered L-043097252-5, dated November 16, 2015.¹ The Request bore a date of December 10, 2015, however, it was received by BCMS on January 4, 2016.²

4. In support of its motion, the Division included the following documents: (i) the affidavit of Peter B. Ostwald, Esq., dated June 20, 2016; (ii) a copy of the petition filed with the

¹ This was the date on the Notice and Demand for Payment of Tax Due for assessment number L-043097252-5, issued to petitioner at the same Liverpool, New York, address as the Notice of Deficiency.

² This date was extracted from the conciliation order issued in this matter. The Division's affidavit indicates the Request for Conciliation Conference was received on January 7, 2016.

Division of Tax Appeals on March 7, 2016, with attachments, including the Request for Conciliation Conference dated December 10, 2015, and a Conciliation Order Dismissing Request dated January 22, 2016; (iii) a copy of the Division's answer; (iv) the affidavit of Heidi Corina, a legal assistant in the Division's office of counsel since April 2000, who is involved in making requests to the United States Postal Service (USPS) for delivery information; (v) a Postal Service form 3811-A (Request for Delivery Information/Return Receipt after Mailing) and the USPS response to the request dated May 23, 2016; (vi) the affidavit of Mary Ellen Nagengast, the Director of the Division's Management Analysis and Project Services Bureau since October 2005, who is responsible for the receipt and storage of certified mail records; (vii) pages numbered 1, 454, and 486 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR) each either date-stamped or postmarked July 28, 2015; (viii) an affidavit, dated June 17, 2016, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center since March 1999; (ix) a copy of the Notice of Deficiency dated July 28, 2015, with the associated mailing cover sheet bearing certified control number 7104 1002 9730 0519 7428; (x) a copy of the Notice and Demand for Payment of Tax Due dated November 16, 2015, attached to which was a Consolidated Statement of Tax Liabilities listing income tax liabilities for the tax periods ending December 31, 2006 and December 31, 2012; and (xi) petitioner's 2014 Form IT-370, New York State Application for Automatic Six-Month Extension of Time to File for Individuals, filed with the Division on April 14, 2015, which lists the same Liverpool, New York, address for petitioner as that listed on the subject notice.

5. 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, i.e., 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 pages of the CMR in the present case to reflect the actual mailing date of "7/28/15." Page 454 of the CMR, however, was not changed to reflect the July 28, 2015 mailing date.

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. The pages of the CMR stay banded together unless ordered otherwise. The page numbers of the CMR, starting with "PAGE 1," are noted in the upper right corner of each page.

6. All notices are assigned a certified control number. The certified control number for each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Division's return address on the front, and taxpayer assistance information on the back. The certified control numbers are 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."

7. According to the Nagengast affidavit, the CMR in the present matter consists of 486 pages and the statutory notices mailed with the CMR in this case total 5,335. Ms. Nagengast notes that the portion 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. She states that the USPS representative affixed his or her initials or signature and a U.S. postmark to each page of the CMR, wrote and circled "5335" on page 486, and initialed or signed that page of the CMR.

8. Page 454 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0519 7428 and assessment ID number L-043097252 was mailed to petitioner at the Liverpool, New York, address listed on the subject notice. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit “B,” bears the same certified control number as the CMR, along with petitioner’s name and address as noted.

9. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division’s Mail Processing Center (Center) since March 1999, 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 mail processing clerk checks the first and last pieces of certified mail listed on the certified mail record against the information on the CMR, and performs a random review of 30 or fewer pieces of certified mail against the information 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. 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.

Pages 1, 454 and 486 of the CMR bear a USPS postmark of July 28, 2015. On page 486, corresponding to “Total Pieces and Amounts,” is the preprinted number 5,335, and next to “Total Pieces Received At Post Office” is the handwritten circled entry “5335” along with initials.

10. According to the Nagengast and Peltier affidavits, the affixation of the postmarks and

the Postal Service employee's initials indicate that all 5,335 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on July 28, 2015. The affidavits further support that a copy of the subject notice was mailed to petitioner on July 28, 2015, as claimed.

11. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the subject Notice of Deficiency. Specifically, using PS Form 3811-A, and attached to the Corina affidavit as Exhibit "A," the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 0519 7428. The USPS response to this request, attached to the Corina affidavit as Exhibit "B," indicates that the article bearing certified control number 7104 1002 9730 0519 7428 and addressed to petitioner was delivered as addressed on July 30, 2015, to petitioner's Liverpool, New York, address. The response shows a scanned signature image of the recipient as "Sheree Dagostino."

12. As previously described, also attached to the affidavit supporting the motion was petitioner's 2014 Form IT-370, New York State Application for Automatic Six-Month Extension of Time to File for Individuals, filed with the Division on April 14, 2015, which lists the same Liverpool, New York, address for petitioner as that listed on the subject notice. According to the Division's records, this was the last application filed with the Division by petitioner before the Notice of Deficiency was issued.

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 2), 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.

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]).

Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules § 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 [1980]). Inasmuch 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 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [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 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*).

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 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 Ostwald, Nagengast, and Peltier affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden; Whelan v. GTE Sylvania*).

C. Tax Law § 681(a) provides the authority for the Division to issue a notice of deficiency of income tax to a taxpayer. This deficiency will become irrevocably fixed unless the taxpayer files a petition with the Division of Tax Appeals within 90 days from the issuance of the notice (Tax Law §§ 681[b]; 689[b]). Prior to petitioning the Division of Tax Appeals for a hearing, a taxpayer may request a conciliation conference at the Division's Bureau of Conciliation and Mediation Services within 90 days of the issuance of the notice (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 4000.5[c]). If after the Conciliation Order is issued, a taxpayer remains unsatisfied, there is an additional 90 days from the issuance of such order within which to file a petition with the Division of Tax Appeals (Tax Law § 170[3-a][e]). Failure to timely file a petition or request a conciliation conference challenging the notice of deficiency bars the Division of Tax Appeals from acquiring jurisdiction over the substantive merits of the matter (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. In a case where 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; 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, January 6, 1989).

E. Here, the Nagengast and Peltier affidavits establish the Division's standard mailing procedures. As to whether such procedures were followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the address indicated thereon and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In the present matter, however, such a properly completed CMR is missing from the record. Exhibit "A" of the Nagengast affidavit contains three pages of what purports to be a longer multi-page computer-generated CMR. Unlike in the procedure described in the Nagengast affidavit, the three pages in exhibit "A," are not physically connected, and the usual indicators of such connection are absent. The certified mail numbers do not run consecutively on each page, nor from page to page, and the pages are not consecutively numbered. Moreover, the date on the top of pages 1 and 486 (the last page), have been changed to July 28, 2015, but the date remains unchanged on page 454 (the page bearing the information regarding the item mailed to petitioner). Pages 1 and 486, therefore, bear a different date of preparation than page 454. As a result, the partial CMR submitted as exhibit "A" of the Nagengast affidavit does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

F. Such a flaw may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in this matter. Specifically, the USPS delivery information accompanying the Corina affidavit shows that a copy of the notice at issue, addressed to

petitioner, which was also listed on the CMR, was delivered as addressed on July 30, 2015, to the same Liverpool, New York, address listed on the Notice of Deficiency and petitioner's last application filed with the Division prior to its issuance. The signature provided by the USPS indicates that the recipient accepted delivery at petitioner's address, and petitioner has offered no argument or evidence that she did not sign the document as the recipient. 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 of Deficiency was delivered to petitioner's last known address, as claimed, on July 30, 2015 (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012; *Matter of Winner's Garage*, Tax Appeals Tribunal, May 20, 2010).

G. Based on the above conclusions, the 90-day period for filing a petition or request for conciliation conference with regard to the notices in issue is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), which in this case is the date of delivery, i.e. July 30, 2015. Here, the period within which to challenge the notice commenced to run on that date 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 [1986], *rev'd* 118 AD2d 894 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Petitioner's Request for Conciliation Conference was filed on or about January 4, 2016,³ and since it falls outside the 90-day period of limitations for the filing of such a request, her request

³ Although the Request for Conciliation Conference was dated December 10, 2015, petitioner offered no explanation for the gap from that date and the date it was received by the Division. However, even using December 10, 2015 as the filing date, the Request was still well beyond the 90-day period.

was not timely filed (*see* Tax Law § 170[3-a][b]; § 689[b]). Accordingly, the Division of Tax Appeals does not have jurisdiction to consider the merits of petitioner's protest.

H. The Division of Taxation's motion for summary determination is granted, and the petition of Sheree A. Dagostino is hereby denied.

DATED: Albany, New York
October 6, 2016

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE