

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOANNE FELICIANO : DETERMINATION
 : DTA NO. 827649
for Redetermination of Deficiencies or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2008. :

Petitioner, Joanne Feliciano, 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 2008.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition, dated June 27, 2016, on the basis that the Division of Tax Appeals does not have jurisdiction to hear the matter. The notice advised that each party was afforded a period of 30 days, within which to file written responses to the notice. This time was extended upon request by the Division of Taxation until September 12, 2016. Petitioner, appearing pro se, filed her responses to the notice on or about July 17, 2016 and September 7, 2016. The Division of Taxation, by Amanda Hiller, Esq. (Linda Jordan, Esq., of counsel), submitted its response in support of dismissal by its due date of September 12, 2016, which date commenced the 90-day period for issuance of this determination (20 NYCRR 3000.5[d]; 3009.9[a][4]). After due consideration of the documents and arguments submitted by the parties, along with the pleadings and proceedings had herein, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition in response to two notices of deficiency issued by the Division of Taxation.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued Notice of Deficiency, number L-040652088-2, dated May 23, 2014, to petitioner, Joanne Feliciano, asserting additional personal income tax due in the sum of \$3,939.00, plus penalty and interest, for the year 2008. The notice bore the address of “PO Box 1285, New York, NY 10163-1285.”

2. The Division issued Notice of Deficiency, number L-041789035-1, dated October 7, 2014, to petitioner, asserting additional personal income tax due in the sum of \$4,393.00, plus penalty and interest, for the year 2009. The notice bore a West 91st Street, New York, New York, address.

3. Petitioner filed a petition with the Division of Tax Appeals on May 23, 2016, protesting the notices of deficiency (numbers L-040652088-2 and L-041789035-1). The petition maintained that petitioner resided and filed taxes in New Jersey during 2008 and 2009. She further explained the existence and use of a post office box in New York as her mailing address from 2000 until 2012.

4. On June 27, 2016, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The notice stated, in pertinent part, as follows:

“You are hereby notified of our intent to dismiss the petition in the above referenced matter.

The protest of a notice of deficiency issued under Article 22 of the Tax Law must be filed within ninety (90) days following the issuance of the notice (*see* Tax Law § 689[b]).

Here, the Notices of Deficiency, Assessment Nos. L-040652088-2 and L-041789035-1, appear to have been issued on May 23, 2014 and October 7, 2014, respectively. However, the petition was not filed with the Division of Tax Appeals until May 23, 2016, or seven hundred thirty-one (731) and five hundred and ninety-four (594), respectively, days later. As such, the Division of Tax Appeals is without jurisdiction to consider the merits of the petition.

Pursuant to 20 NYCRR 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, a party shall have thirty (30) days from the date of this Notice to submit written comments on the proposed dismissal.”

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of the following Division employees: (i) Linda Jordan, Esq., an attorney in the Division’s Office of Counsel, dated June 27, 2016; (ii) Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Management Analysis and Project Services Bureau (MAPS) of the Division who, in her position since 2005, is familiar with the past and present office procedures as they relate to generating statutory notices, dated August 15, 2016; (iii) Bruce Peltier, a supervisor in the Division’s mail room since March 1999, dated August 16, 2016; and (iv) Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel since 2005, who is responsible for the preparation of United States Postal form 3811-A, a form used by the mailer to request return receipts after the mailing of documents, dated August 16, 2016.

In addition, the Division submitted various pertinent documents including the following: (i) a copy of the petition filed with the Division of Tax Appeals on May 23, 2016; (ii) a response to petitioner’s correspondence from the Division called “Explanation and Instructions” dated October 13, 2015; (iii) a copy of the Notice of Deficiency dated May 23, 2014, with a mailing cover sheet; (iv) a copy of the Notice of Deficiency dated October 7, 2014, with a mailing cover

sheet; (v) a copy of the “CERTIFIED RECORD FOR PRESORT MAIL” (CMR) containing a list of the statutory notices mailed by the Division on May 23, 2014; (vi) a copy of pages 1,467, and 1,572 from the CMR containing a list of the statutory notices mailed by the Division on October 7, 2014; (vii) a Request for Delivery Information/Return Receipt After Mailing (PS Form 3811-A) concerning an article mailed to petitioner on October 7, 2014, and the response by Ms. Corina from the United States Postal Service (USPS) confirming such delivery on October 9, 2014, to a West 91st Street, New York, New York, address; (viii) a copy of petitioner’s personal income tax returns for tax years 2010 and 2011, dated December 5, 2011 and July 25, 2014, respectively; (ix) a Request for Conciliation Conference dated May 19, 2015, referencing tax years 2008 and 2009, and notice number E-028099956-W011-4; (x) a response to petitioner’s Request for Conciliation Conference dated June 5, 2015; (xi) a Notice of Proposed Driver’s License Suspension Referral dated May 28, 2015, issued to petitioner at the West 91st Street, New York, New York, address; and (xii) a Conciliation Order issued regarding the Notice of Proposed Driver’s License Suspension Referral, dated February 26, 2016, indicating that a conference had been conducted on October 22, 2015.¹

6. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner sent the Division a letter dated July 17, 2016, indicating that for the years assessed by the Division, petitioner was residing in New Jersey and filed taxes in New Jersey. In addition, petitioner

¹ The documents submitted by the Division in Finding of Fact 5, (ix) through (xii), appear to relate to a separate matter concerning a Notice of Proposed Driver’s License Suspension Referral issued to petitioner in 2015. The submission of the Request for Conciliation Conference dated May 15, 2015 (ix), was treated as related to that matter by the Division and not the years in issue in this case, though the Request referenced tax years 2008 and 2009. A separate DTA file has been created for the Notice of Proposed Driver’s License Suspension Referral. Accordingly, such documents will not be further referenced herein.

explained that she had continually maintained a post office box as her mailing address from 2000 until 2012, regardless of her actual residence. Lastly, she requested a hearing.

In petitioner's second response dated September 7, 2016, she reiterated the above facts and further added that the notice in issue (*see* Finding of Fact 1) was mailed to her post office box in May 2014, two years after she closed it, and again requested a hearing.

7. The affidavit of Mary Ellen Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from the Case and Resource Tracking System (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. CARTS also generates any enclosures referenced within the body of each notice. Each batch of statutory notices is accompanied by a CMR, listing each statutory notice being mailed, with a certified control number assigned to each, and specified under the heading entitled, "CERTIFIED NO." 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."

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 each CMR in the present case to reflect the actual mailing dates of each of the two CMRs pertinent to this matter: "5/23/14" and "10/7/14."

8. According to the Nagengast affidavit relating to the CMR dated May 23, 2014, the CMR consisted of 18 cut sheet pages, 17 of which bore 11 entries each, that were banded together when the documents were delivered into possession of the USPS and remained so when

returned to her office unless it was 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 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 also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, circled the number 187 on page 18 and initialed the same page.

Page four of the CMR indicates that one statutory notice with certified control number 7104 1002 9730 0238 3374 and assessment ID number L-040652088 was mailed to petitioner at the same post office box number in New York, New York, as appears on the Notice of Deficiency dated May 23, 2014. The mailing cover sheet that accompanied the Notice of Deficiency also bears the same certified control number and address as those that appear on the corresponding CMR.

Ms. Nagengast attested that the Notice of Deficiency presented into evidence, No. L-040652088, and its mailing cover sheet, bearing certified control number 7104 1002 9730 0238 3374, issued to petitioner, is a true and accurate copy of the notice issued to petitioner on May 23, 2014, and that the assessment identification number and the certified control number that appear on the CMR for May 23, 2014, are the same as those located on the Notice of Deficiency and mailing cover sheet issued to petitioner at her post office box New York, New York address on that date.

9. According to the Nagengast affidavit relating to the CMR dated October 7, 2014, the CMR consisted of 1,572 cut sheet pages, 1,571 of which bore 11 entries and the last page listing 3 entries, that were banded together when the documents were delivered into possession of the

USPS and remain so when returned to her office unless it is requested that the pages be disconnected. According to Ms. Nagengast, the page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page. However, included in the record are only copies of pages 1,467 and 1,572 of the CMR prepared by the Division for the statutory notices mailed on October 7, 2014. 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 also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, wrote the number 17,284 on page 1,572 and initialed the same page.

Page 467 of the CMR indicates that a statutory notice with certified control number 7104 1002 9730 0289 5228 and assessment ID number L-041789035 was mailed to petitioner at the same West 91st Street, New York, New York, address as that listed on the Notice of Deficiency dated October 7, 2014.

Ms. Nagengast attested that the Notice of Deficiency presented into evidence, No. L-041789035, and its mailing cover sheet, bearing certified control number 7104 1002 9730 0289 5228, issued to petitioner, is a true and accurate copy of the notice issued to petitioner on October 7, 2014, and that the assessment identification number and the certified control number that appear on the CMR for October 7, 2014, are the same as those located on the Notice of Deficiency and mailing cover sheet issued to petitioner at her West 91st Street, New York, New York address on that date.

10. The affidavit of Bruce Peltier, a mail room supervisor, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." A staff member operates a machine that puts each notice and the

associated documents into a windowed envelope so the addresses and certified numbers from the Mailing Cover Sheet show through the windows. That staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail 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 signature or initials on the CMR, indicating receipt by the post office. The mail room 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.

11. According to the Peltier affidavit relating to the CMR dated May 23, 2014, the USPS employee initialed page 18 of the CMR, affixed a postmark dated May 23, 2014 to each page of the CMR, and circled the number of pieces of certified mail received, indicating that a total of 187 pieces of mail listed were delivered to the USPS. Based upon his review, Mr. Peltier attested to the fact that petitioner's name and address as set forth on the statutory notice would have been displayed in the window of the envelope. According to the Peltier affidavit, the procedures described in his affidavit are the regular procedures followed by the mail room staff in the ordinary course of business when handling items to be sent by certified mail and that such procedures were followed in mailing the pieces of certified mail described herein on May 23, 2014, as claimed.

12. According to the Peltier affidavit relating to the CMR dated October 7, 2014, the USPS employee initialed page 1,572 of the CMR, affixed a postmark to each page of the CMR

and wrote the number “17,284,” indicating that a total of 17,284 pieces of mail listed on the CMR were delivered to the USPS on that date. Based upon his review, Mr. Peltier attested to the fact that petitioner’s name and address as set forth on the statutory notice would have been displayed in the window of the envelope. According to the Peltier affidavit, the procedures described in his affidavit are the regular procedures followed by the mail room staff in the ordinary course of business when handling items to be sent by certified mail and that such procedures were followed in mailing the pieces of certified mail described herein on October 7, 2014, as claimed.

13. The affidavit of Heidi Corina describes the Division’s request to the USPS for delivery information on the Notice of Deficiency dated October 7, 2014. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number “71041002973002895228,” and this request is attached to the Corina affidavit. The USPS response to this request, also attached to the Corina affidavit, indicates that the article bearing this certified control number and addressed to petitioner’s West 91st Street, New York, New York, address was delivered on October 9, 2014.

14. As previously described, also attached to the affidavit supporting the motion was petitioner’s 2010 Form IT-201, New York Resident Income Tax Return dated December 5, 2011, which lists the same post office box address for petitioner as that listed on the Notice of Deficiency dated May 23, 2014. According to the Division’s records, this income tax return was the last return filed with the Division by petitioner before the Notice of Deficiency dated May 23, 2014, was issued.

In addition, also attached to the affidavit supporting the motion was petitioner’s 2011 Form IT-201, New York Resident Income Tax Return dated July 25, 2014, which lists the same

West 91st Street, New York, New York, address for petitioner as that listed on the Notice of Deficiency dated October 7, 2014. According to the Division's records, this income tax return was the last return filed with the Division by petitioner before the Notice of Deficiency dated October 7, 2014, was issued.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition or request for conciliation conference following the issuance of a Notice of Deficiency (Tax Law §§ 681[b]; 689[b]). In this matter, pursuant to Tax Law Tax Law § 681(b), the underlying assessments would be binding upon petitioner unless she filed a timely petition with the Division of Tax Appeals, and the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this case, it appeared upon receipt of the petition by the Division of Tax Appeals that it was filed late and a Notice of Intent to Dismiss Petition was issued pursuant to 20 NYCRR 3000.9(a)(4). This determination addresses the issuance of the Notice of Intent to Dismiss Petition, and responses thereto.

B. Section 3000.9(a)(4) of the Rules of Practice and Procedure allows the supervising administrative law judge on his or her own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction. Similarly, section 3000.9(a)(1) of the Rules of Practice and Procedure allows a party to bring a motion to dismiss a petition for lack of jurisdiction (20 NYCRR 3000.9[a][1][ii], [vii]). Under the Rules, such a motion brought by a party may be treated as a motion for summary determination (20 NYCRR 3000.9[a][2][I]). Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under section 3000.9(a)(4) would have the same impact as a determination issued following a motion to

dismiss brought under section 3000.9(a)(1)(ii) and (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss.

C. As provided in section 3000.9(b)(1) of the Rules, 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.” 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 [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, 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, 382 [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 [1992] *citing Zuckerman*). In order to decide whether such an issue exists, a discussion of the relevant substantive law is appropriate.

D. In most cases, where, as here, the timeliness of a taxpayer’s petition is in question, 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]). The initial inquiry focuses on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*Matter of Katz*). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced, and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*). 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, and the fact that the Division followed such procedures with respect to the mailing of the notice dated May 23, 2014. The Division mailed the May 23, 2014 notice to petitioner at her post office box number, the last address provided to the Division by petitioner before the issuance of the notice as indicated on her 2010 Form IT-201, New York Resident Income Tax Return, filed on or about December 5, 2011. Accordingly, the Division has met its burden of establishing proper mailing, by certified mail, of the Notice of Deficiency dated May 23, 2014, to petitioner's last known address.

Concerning the notice dated October 7, 2014, however, the Division does not rely upon the date of issuance of the statutory notice, but rather the date of receipt of the notice by the taxpayer. Under such circumstances, 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]). Here, the record shows that petitioner received actual notice of the subject Notice of Deficiency on October 9, 2014. Specifically, the Nagengast and Peltier affidavits establish the Division's standard mailing procedure, including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheets, as well as the CMR, and the inclusion of such mailing cover sheets along with the notices in the windowed envelopes for mailing. A review of the mailing cover sheet related to the notice mailed to petitioner confirms that the control number listed thereon is consistent with the control number listed on the CMRs and the USPS response to the Division's request for delivery information. The documentation provided to the Division by the USPS shows that the article of mail bearing such certified control number was delivered to petitioner's address on October 9, 2014. Petitioner thus received actual notice of the subject Notice of Deficiency on that date. Accordingly, the Division has shown that it mailed each of the subject notices of deficiency to petitioner at her last known address consistent with Tax Law § 681(a).

F. In light of the conclusions reached above, the Division of Taxation has established that it properly mailed the Notice of Deficiency to petitioner on May 23, 2014, that petitioner received the October 7, 2014 Notice of Deficiency on October 9, 2014, and the petition, filed on May 23, 2016, was not timely. Therefore, the Division of Tax Appeals does not have jurisdiction to hear this the substantive merits of this matter (*Matter of Sak Smoke Shop*).

G. It should be noted that petitioner is not entirely without recourse since she can still obtain a hearing on the merits of her case by paying the assessments, filing claims for refund within two years from the time of payment (Tax Law § 687[a]) and, if the claims are denied,

filing a petition contesting such denial of refund within two years of the denial in accordance with Tax Law § 689(c).

H. The Notice of Intent to Dismiss Petition of the Division of Tax Appeals is sustained, and the petition of Joanne Feliciano is hereby dismissed.

DATED: Albany, New York
November 17, 2016

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE