

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JASON PRIESTER	:	DETERMINATION
	:	DTA NO. 829855
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes Under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2016.	:	
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Petitioner, Jason Priester, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the New York City Administrative Code for the year 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), filed a motion on August 5, 2020, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the Division of Taxation's motion. The 90-day period for issuance of this determination commenced on September 4, 2020. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the petition should be dismissed because it was signed by someone other than petitioner who does not meet the requirements of Tax Law § 2014 (1).

II. 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. On August 5, 2020, the Division of Taxation (Division) brought a motion for dismissal of the petition, or in the alternative, for summary determination in its favor. The Division seeks dismissal of the petition contending the petition is not in proper form as it was neither signed by petitioner, Jason Priester, nor by an individual authorized to represent individuals before the Division of Tax Appeals. In the alternative, the Division's motion for summary determination deals with the timeliness of petitioner's protest of a notice of deficiency, dated July 2, 2019, and bearing assessment identification number L-049795535 (notice). The notice is addressed to petitioner at an address in Amityville, New York.

2. On January 15, 2020, petitioner faxed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On January 31, 2020, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on July 2, 2019 but the request was not received until January 15, 2020, or in excess of 90 days, the request is late filed.”

4. A petition was filed with the Division of Tax Appeals in protest of the conciliation order on February 19, 2020. The petition is signed by James A. Pinto. In section III of the petition, petitioner indicated that Mr. Pinto was an enrolled agent licensed to practice before the Internal Revenue Service (IRS). Attached to the petition is an IRS form 2848, power of attorney and declaration of representative signed by petitioner authorizing Mr. Pinto's representation of

petitioner in matters pertaining to income tax for the years 2016, 2017 and 2018. The envelope containing the petition bears petitioner's return address.

5. On April 13, 2020, the Division contacted the Division of Tax Appeals to inform it that, upon inquiry by the Division, the IRS confirmed that Mr. Pinto is not an enrolled agent enrolled to practice before that agency. Subsequently, the Division of Tax Appeals spoke with petitioner, who informed the Division of Tax Appeals that he believed Mr. Pinto was an enrolled agent and would provide his qualifications. Petitioner was asked to sign the petition and informed that Mr. Pinto would be removed as representative until such time as Mr. Pinto's qualifications were provided. Petitioner never signed the petition nor were Mr. Pinto's qualifications further established. Consequently, all correspondence and communications concerning this matter have only been directed to petitioner.

6. To show proof of proper mailing of the notice, the Division submitted the following with its motion papers: (i) an affidavit, sworn to July 14, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for – DTF-962-F-E –Not of Def Follow Up, – DTF-963-F-E –Not of Det Follow up" (CMR) postmarked July 2, 2019; (iii) an affidavit, sworn to on July 16, 2020, of Susan Saccocio, a manager in the Division's mail room; (iv) a copy of the notice mailed to petitioner with the associated mailing cover sheet; and (v) a copy of petitioner's e-filed 2018 New York State resident income tax return, form IT-201, filed on March 10, 2019, which was the last return filed with the Division before the notice was issued. The address on the return lists the same Amityville, New York, address as listed on the notice.

7. The affidavit of Deena Picard, who has been in her current position since February 2006, and Acting Director since May 2017, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 pages of the CMR in the present case to the actual mailing date of "7/2/19." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (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.

8. 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."

9. The CMR in the present matter consists of 8 pages and lists 102 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard 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 July 2, 2019, to each page of the CMR, wrote the number "102" on page 8 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 8.

10. Page 7 of the CMR indicates that a notice with certified control number 7104 1002 9735 4973 4707 and reference number L 049795335 was mailed to petitioner at the Amityville, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit "B," bears this certified control number and petitioner's name and address as noted.

11. The affidavit of Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures. Ms. Saccocio has been in this position since 2017 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. A staff member receives 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 of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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. Each page of the CMR in exhibit “A” of the Picard affidavit contains a USPS postmark of July 2, 2019. On page 8, the postal service clerk wrote 108 to indicate 108 pieces of mail were received by the USPS. There is a set of initials or a signature on page 8.

12. According to the Picard and Saccocio affidavits, a copy of the notice was mailed to petitioner on July 2, 2019, as claimed.

CONCLUSIONS OF LAW

A. First addressing that part of the Division’s motion that seeks dismissal of the petition on the ground the petition was not signed by petitioner or an individual authorized to represent taxpayers before the Division of Tax Appeals, 20 NYCRR 3000.3 (b) describes the requirements to the form of a petition. Pursuant to 20 NYCRR 3000.3 (b) (1), a petition shall contain “the signature of the petitioner or the petitioner’s representative.” Section 2014 (1) of the Tax Law limits a taxpayer's choice of representatives in a proceeding in the Division of Tax Appeals as follows:

“Appearances in proceedings conducted by an administrative law judge or before the tax appeals tribunal may be by the petitioner or the petitioner's spouse, by an attorney admitted to practice in the courts of record of this state, by a certified public accountant licensed in this state, by an enrolled agent enrolled to practice before the internal revenue service or by a public accountant licensed in this state. The tribunal may allow any attorney, certified public accountant, or licensed public accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a petitioner in proceedings before the tribunal for a particular matter. In addition, the tax appeals tribunal may promulgate rules and regulations to permit a corporation to be represented by one of its officers or employees” (*see also* 20 NYCRR 3000.2 [a] [2])

B. In the instant case, the petition was not signed by petitioner. Rather, it was signed by Mr. Pinto, petitioner’s tax preparer pursuant to a valid form 2848. Although Mr. Pinto is not

authorized to represent petitioner in proceedings before administrative law judges in the Division of Tax Appeals, he was nonetheless petitioner's representative at the time the petition was filed. To dismiss the petition in this instance as not in proper form would mean that every otherwise timely filed petition signed by someone other than petitioner and who does not meet the requirements of Tax Law § 2014 (1) would be subject to dismissal. Such cannot be the case. The purpose of Tax Law § 2014 would not be effectuated as the legislative intent "promotes and encourages a high level of professional competence in tax proceedings and thereby protects taxpayers in the quasi-judicial setting of the Division of Tax Appeals and Tax Appeals Tribunal" (*Matter of New York State Society of Enrolled Agents v New York State Division of Tax Appeals*, 161 AD2d 1, 8 [2d Dept 1990]). To dismiss the petition as not being in proper form under these circumstances fails to protect petitioners from unqualified representatives. The appropriate remedy in such a case is to advise petitioner and the representative that the chosen representative is not qualified to represent petitioners in proceedings before the Division of Tax Appeals and proceed accordingly (*see Matter of Coliseum Palace*, Tax Appeals Tribunal, November 17, 1988 [the Tax Appeals Tribunal held that where an unqualified representative appears on behalf of a taxpayer at a hearing, and where this fact is raised on exception, the prudent and proper course is to remand the matter for a new hearing]). The failure of petitioner or a representative who meets the qualifications of Tax Law § 2014 to sign the petition does not render the petition void (*see Matter of Jenkins Covington, N.Y., Inc.*, Tax Appeals Tribunal, November 21, 1991, *confirmed Matter of Jenkins Covington, N.Y., Inc. v Tax Appeals Tribunal*, 195 AD2d 625 [3d Dept 1993], *lv denied* 82 NY2d 664 [1994] [where the Tax Appeals Tribunal and the Appellate Division refused to invalidate a final determination and remand the matter for a new hearing where the petitioner had been represented by an unqualified

representative throughout the proceedings]). Accordingly, the Division of Taxation's motion seeking dismissal of the petition as not in proper form is denied.

C. Alternatively, the Division seeks summary determination in its favor pursuant to 20 NYCRR 3000.9 (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]). 20 NYCRR 3000.9 (c) 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, Inc. 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]). "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 did not respond to the Division's motion. Accordingly, he 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 Std. Metals*, 99 AD2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]).

D. 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 of deficiency 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 merits of the protest (*see* Tax Law § 681 [b]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where 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 mail of the subject statutory notice to petitioner’s last known address (*see* Tax Law § 681 [a]; *see also 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 the 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*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).”

F. The Division has offered sufficient proof to establish the mailing of the statutory notice to petitioner’s last known address on July 2, 2019. 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). Further, the address on the mailing cover sheet and on the CMR conform with the address listed on petitioner's New York State income tax return for the year 2018, which satisfies the "last known address" requirement in Tax Law § 681 (a).

G. It is concluded that the notice was properly mailed to petitioner on July 2, 2019, and 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 that date (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Petitioner's request was filed on January 15, 2020. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the January 31, 2020 order issued by BCMS. Petitioner has offered no claim or evidence to meet his burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired.

H. Accordingly, based upon the foregoing, the Division of Taxation's motion to dismiss the petition is denied; the Division of Taxation's motion for summary determination is granted; the petition of Jason Priester is denied; and the January 31, 2020 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York
December 3, 2020

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE