

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LIN YU	:	DETERMINATION DTA NO. 830062
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 2016.	:	

Petitioner, Lin Yu, 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 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion, filed on May 6, 2021, 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 by Myron Yang and Co., LLC (Myron Yang, CPA), did not respond to the motion by June 7, 2021, which date commenced the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

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 Division of Taxation (Division) brought a motion dated May 6, 2021, for dismissal of the petition, or in the alternative, for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of a notice of deficiency, dated March 20, 2020, and bearing assessment identification number L-051098120 (notice). The notice is addressed to petitioner, Lin Yu, at an address in Roslyn, New York. A copy of this notice was mailed to petitioner's representative, Myron Yang, at Myron Yang & Co., LLC, 38-08 Union St, Unit 2A, Flushing, New York 11354.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On August 21, 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 March 20, 2020, but the request was not received until August 6, 2020, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on September 24, 2020.

5. In support of the motion and to show proof of proper mailing of the notice, the Division provided, along with an affirmation of Michelle M. Helm, Esq., sworn to on May 6, 2021, the following with its motion papers: (i) an affidavit, dated March 15, 2021, 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 March 20, 2020; (iii) an affidavit, dated March 18, 2021, of Susan Saccocio, a manager in the Division’s mailroom; (iv) copies of the notice mailed to petitioner and his representative with the associated mailing cover sheets; (v) a power of attorney form, dated February 21, 2020, authorizing Mr. Yang to represent petitioner for the tax year 2016, that listed Mr. Yang’s Flushing, New York, address; (vi) a copy of petitioner’s request for conciliation conference that reflects petitioner’s Roslyn, New York, address; and (vii) a copy of petitioner’s New York resident income tax return, form IT-201, for the tax year 2018, dated April 15, 2019, that reflects petitioner’s Roslyn, New York, address. Petitioner’s 2018 form IT-201 was the last return filed before issuance of the notice.

6. The affidavit of Deena Picard, who has been in her current position 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 “3/20/20.” 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.

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 26 pages and lists 310 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 March 20, 2020, to each page of the CMR, wrote the number "310" on page 26 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 26.

9. Page 11 of the CMR indicates that a notice with certified control number 7104 1002 9735 5443 9499 and reference number L-051098120 was mailed to petitioner's representative at the Flushing, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and the representative's name and address as noted. Page 13 of the CMR indicates that a notice with certified control number 7104 1002 9735 5443 9673 and reference number L-051098120 was mailed to petitioner at the Roslyn, New York, address listed on the notice. The corresponding

mailing cover sheet, also attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Susan Saccocio, a manager in the Division’s mailroom, describes the mailroom’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 mailroom with regard to statutory notices. The mailroom 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. The mailroom 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. Each page of the CMR in exhibit “A” contained in the Picard affidavit has a USPS postmark date of March 20, 2020. On page 26, corresponding to “Total Pieces and Amounts,” is the preprinted number 310 and next to “Total Pieces Received At Post Office” is the handwritten entry “310.” There is a set of initials or a signature on page 26.

11. According to the Picard and Saccocio affidavits, copies of the notice were mailed to petitioner and his representative on March 20, 2020, as claimed.

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). Since the petition was timely filed, the Division of Tax Appeals has subject matter jurisdiction over the issue of the timely filing of a request for a conciliation conference. Therefore, 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 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. 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 (*see* 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 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).

D. Where the timeliness of a petition or a request for a 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 (*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 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, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

E. The Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., March 20, 2020, to petitioner’s last known address and to his representative’s last known address. 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 for each recipient and on the CMR conforms with the address listed on petitioner’s New York State income tax return for the year 2018 and the power of attorney form, respectively, which satisfied the “last known address” requirement in Tax Law § 681 (a).

F. It is concluded that the notice was properly mailed to both petitioner and his representative on March 20, 2020 and the statutory 90-day time period to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Petitioner’s request for conciliation conference was not filed until August 6, 2020. This date falls after the 90-day period of

limitations for the filing of such a request and was properly dismissed by the August 21, 2020 conciliation order issued by BCMS.

G. The Division of Taxation's motion for summary determination is granted, the petition of Lin Yu is denied, and the conciliation order dismissing request, dated August 21, 2020, is sustained.

DATED: Albany, New York
September 2, 2021

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE