

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
ROBERT HERSKOWITZ
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 Administrative
Code of the City of New York for the Years 2009 through
2014.

DETERMINATION
DTA NO. 830064

Petitioner, Robert Herskowitz, 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 Administrative Code of the City of New York for the years 2009 through 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel) filed a motion dated February 9, 2021, 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), (vii), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Shanholt Glassman Klein Kramer & Co. (Jonathan Kramer, CPA), did not file a response by the extended deadline of April 12, 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, Winifred M. Maloney, 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 subject of the motion of the Division of Taxation (Division) is the timeliness of a request for conciliation conference (request) filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioner, Robert Herskowitz, in protest of a notice of deficiency, dated January 31, 2020, and bearing assessment ID number L-051196170 (notice). The notice is addressed to "HERSKOWITZ-ROBERT" at PO Box XXXXX3, Miami Beach, Florida. The mailing cover sheet of this notice contains certified control number 7104 1002 9730 0083 1525. The notice asserts additional tax due under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2011.

2. A copy of the notice was also sent to petitioner's representative, Jonathan H. Kramer, under a mailing cover sheet that bore certified control number 7104 1002 9730 0082 9331 and the following address:

"JONATHAN H. KRAMER
C/O SHANHOLT GLASSMAN KLEIN KRAMER & CO
575 LEXINGTON AVENUE
19TH FLR
NEW YORK, NY 10022."

3. Petitioner's request with BCMS in protest of the notice is signed by petitioner's representative, Mr. Kramer, and is dated May 20, 2020. The request was faxed to and received by BCMS on May 20, 2020. A review of petitioner's request indicates that it was filed in response to a notice, dated January 31, 2020, and "recv'd March 15, 2020." The request further indicates that a conciliation conference was requested for personal income tax for the years 2009

through 2014 because the Division's "disallowance of capital loss did not correctly consider taxpayer total loss."

4. On July 3, 2020, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order (CMS No. 000320411) 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 date of the statutory notice. Since the notice(s) was issued on January 31, 2020, but the request was not received until May 20, 2020, or in excess of 90 days, the request is late filed."

5. On September 25, 2020, a petition protesting the conciliation order was filed with the Division of Tax Appeals. The petition was dated and signed by petitioner's representative, Gary Stark,¹ on September 25, 2020, and was received by the Division of Tax Appeals on September 29, 2020. The envelope in which the petition was mailed bears a United States Postal Service (USPS) postage paid label dated September 25, 2020. The petitioner lists petitioner's Miami Beach, Florida, address. There is no dispute that the petition was filed within 90 days after the July 3, 2020 issuance of the conciliation order and constitutes a timely challenge thereto.

The petition alleges that while the notice was issued on January 31, 2020, petitioner's representative, Mr. Kramer, did not receive the notice until March of 2020. It further alleges that the Division's auditor "mailed the notice on January 31, 2020 but on March 2, 2020 the auditor received the notice back" from the USPS "marked 'Return to Sender, Unable to Forward'"; and "[o]n March 12, 2020 the notice was then remailed to taxpayer's representative, Jonathan Kramer, who received it soon after." Petitioner asserts that his request for conciliation conference was timely because "the notice of deficiency was received after March 12, 2020 and

¹ Mr. Stark is also employed by Shanholt Glassman Klein Kramer & Co. and is petitioner's second named authorized representative in this matter.

the request for the conference was made on May 20, 2020, which is within 90 days of receipt of the original deficiency.” Attachments to the petition, include, among other items, copies of two envelopes, the first of which is postmarked March 12, 2020 and is addressed to petitioner’s representative, Mr. Kramer, at the New York, New York, address with a return address for the Division’s auditor of Metro Tech Center, Brooklyn, New York. The second envelope is postmarked January 31, 2020 and marked “unclaimed” by the USPS with a return to sender label affixed over the mailing address. The USPS return to sender label contained, among other things, the following information:

“RETURN TO SENDER
UNCLAIMED
UNABLE TO FORWARD.”

6. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affidavit, dated February 9, 2021, of Mary Hurteau, Esq., the Division’s representative; (ii) an affidavit, dated January 22, 2021, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record For Presort Mail – Assessments Receivable” (CMR) postmarked January 31, 2020; (iv) an affidavit, dated January 28, 2021, of Susan Saccocio, a manager in the Division’s mail room; (v) copies of the notice mailed to petitioner and his representative with the associated mailing cover sheets; (vi) copies of the power of attorney forms, dated February 2, 2015 and January 9, 2020, respectively, authorizing Mr. Kramer to represent petitioner for tax years 2009 through 2013 and tax year 2014, respectively, that listed Mr. Kramer’s New York, New York, address;² (vii) a copy of petitioner’s request for conciliation conference; and (viii) a copy of petitioner’s New York State

² The power of attorney forms also authorized Gary Stark, CPA, c/o Shanholt Glassman Klein Kramer & Co., New York, New York, to represent petitioner for tax years 2009 through 2014.

resident income tax return (form IT-201) for the year 2014, dated February 21, 2017 and filed on February 27, 2017, which lists the same Miami Beach, Florida, address for petitioner as that listed on the notice, the request for conciliation conference, and the petition. The 2014 income tax return was the last return filed with the Division by petitioner before the notice was issued.

7. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon, and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20200241700." 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 "1/31." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the 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.

8. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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 22 pages and lists 236 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 22, which contains 5 entries. Ms. Picard notes that the copy of the CMR 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 employee affixed a postmark dated January 31, 2020 to each page of the CMR. On the last page of the CMR, the USPS employee handwrote "236" on the line next to the preprinted heading "Total Pieces Received at Post Office," and initialed or signed page 22.

10. Page 21 of the CMR indicates that a notice with certified control number 7104 1002 9730 0083 1525, and reference number L-051196170 was mailed to petitioner at the Miami Beach, Florida, 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. Page 2 of the CMR indicates that a notice with certified control number 7104 1002 9730 0082 9331, and reference number L-051196170 was mailed to petitioner's representative, Jonathan H. Kramer, at "575 LEXINGTON AVENUE, 19TH FLR, NEW YORK, NY 10022."

The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and the following name and address:

“JONATHAN H. KRAMER
C/O SHANHOLT GLASSMAN KLEIN KRAMER & CO
575 LEXINGTON AVENUE
19TH FLR
NEW YORK, NY 10022.”

12. The affidavit of Susan Saccocio, a manager in the Division’s mail room, 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. As noted, each of the 22 pages of the CMR attached to the Picard affidavit as exhibit “A” contains a USPS postmark of January 31, 2020. On page 22, corresponding to “Total Pieces and Amounts” is the preprinted number 236 and next

to “Total Pieces Received at Post Office” is the handwritten entry “236,” indicating 236 pieces of mail were received by the USPS. There is a set of initials or a signature on page 22.

13. According to the Picard and Saccocio affidavits, copies of the notice were mailed to petitioner and his representative on January 31, 2020, as claimed.

14. Petitioner’s representative did not respond to the Division’s motion.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) (1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). As the petition in this matter was timely filed (*see* finding of fact 5), 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 determination shall address the instant motion as such.

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, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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, 544 [1975]; *John William Costello Assocs. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984] *appeal 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 hearing has not lapsed” (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 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). A notice is issued when it is properly mailed, and it is properly mailed when it

is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals tribunal, May 23, 1991). In the case of a notice of deficiency, proper mailing requires mailing of the notice by registered or certified mail to the taxpayer's last known address (*see* Tax Law § 681 [a]), and it is the Division's initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured.

E. Where, as here, the timelessness 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 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 the standard procedure was followed in this particular instance (*see Matter of Novar TV & Air Conditioner Sales & Serv.*).

F. Here, the Division has offered sufficient proof to establish the mailing of the statutory notice to petitioner's last known address on January 31, 2020. 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 resident income tax return for the year 2014, which satisfies the “last known address” requirement in Tax Law § 681 (a).

G. It is therefore concluded that the Division properly mailed the notice on January 31, 2020, 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 for conciliation conference was filed on May 20, 2020. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the July 3, 2020 conciliation order issued by BCMS.

H. While the Tax Law does not specifically provide for service of the notice on a taxpayer’s representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition is tolled if the taxpayer’s representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v Frank*, 43 NY2d 168 [1977]).

Here, the evidence demonstrated that the notice was sent by certified mail to Jonathan H. Kramer, petitioner’s representative, at his last known address on January 31, 2020, thus fulfilling the case law requirement for doing so.

I. The Division of Taxation's motion for summary determination is granted, the petition of Robert Herskowitz is denied, and the July 3, 2020 conciliation order issued by BCMS is sustained.

DATED: Albany, New York
July 08, 2021

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE