

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT DIXON	:	DETERMINATION
	:	DTA NO. 830207
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2018.	:	
	:	

Petitioner, Robert Dixon, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2018.

On August 19, 2021, the Division of Taxation, by Amanda Hiller, Esq. (Mary Hurteau, Esq. of counsel), filed a motion seeking to have the petition dismissed, or, in the alternative, granting summary determination in the above-captioned 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, submitted documents in response to the motion on September 15, 2021. The 90-day period for issuance of this order commenced on September 20, 2021. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jessica DiFiore, 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 notice of deficiency L-050486066.

FINDINGS OF FACT

1. Petitioner, Robert Dixon, timely filed a 2018 New York State resident income tax return, form IT-201 (2018 return), providing an address of 142-29 253 Street, Rosedale, NY 11422.

2. The Division of Taxation (Division) issued petitioner notice of deficiency L-050486066 for tax year 2018 on October 22, 2019 (notice). The notice is addressed to petitioner at “14229 253RD ST ROSEDALE NY 11422-2509.”

3. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) regarding the notice on November 16, 2020. Petitioner’s address on the request was listed as “130-22 231st Street Laurelton, NY 11413.” BCMS dismissed petitioner’s request as untimely by conciliation order dismissing request (order) number 000324966, dated December 11, 2020. The order provided petitioner requested a conciliation conference on November 16, 2020, in excess of 90 days after the notice was issued on October 22, 2019.

4. Petitioner timely appealed the BCMS order by filing a petition with the Division of Tax Appeals on December 29, 2020. In his petition, petitioner challenged the notice and claimed that he “worked the same amount for the past 3 years and has been paid without a problem. All supporting documents were submitted to support my claim, expenses [sic] etc.”

5. On or about March 24, 2021, the Division filed its answer to the petition, affirmatively alleging, among other things, that petitioner’s challenge to the notice was untimely because he failed to file a request for a conference with BCMS or a petition with the Division of Tax Appeals within 90 days of its issuance.

6. On August 19, 2021, the Division filed a motion seeking the dismissal of the petition, or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. In support of the motion, the Division provided the following documents: (i) an affirmation of Mary Hurteau, Esq., dated August 19, 2021; (ii) an affidavit of Heidi Corina, sworn to on August 19, 2021; (iii) Request for Delivery Information/Return Receipt, U.S. Postal Service, form 3811-A (form 3811-A) for the notice; (iv) response to the form 3811-A request; (v) an affidavit of Deena Picard, sworn to on April 22, 2021; (vi) a certified mail record (CMR) entitled “Certified Record for – DTA-962-F-E – Not of Def Follow Up” postmarked October 22, 2019; (vii) a copy of the notice with its associated mailing cover sheet; (viii) an affidavit of Susan Saccocio, sworn to on April 22, 2021; (ix) a copy of the first page of petitioner’s request for conciliation conference for the notice, dated November 16, 2020, with a copy of an envelope to BCMS with a postmark of the same date; (x) a copy of the conciliation order dismissing request for the notice; and (xi) a copy of petitioner’s 2018 return.

7. Mary Hurteau, an attorney in the Office of Counsel of the Division, asserts in her affidavit that petitioner’s 2018 return was filed on February 15, 2019, and that this was the last return filed before the Division issued the notice. Ms. Hurteau affirms that the address appearing on the return corresponds to the address appearing on the notice, except that the notice was addressed to “14229 253rd St.” She asserts that when looking up a zip code by address for 142-29 253 Street, Rosedale, NY 11422 on the United States Post Office’s website, the result defaults to “14299 253rd St., Rosedale, NY 11422-2501.” She also avers that the notice was issued to petitioner’s last known address at “14229 253rd St., Rosedale, NY 11422.”

8. Heidi Corina, a Legal Assistant 2 in the Office of Counsel of the Division, has been employed with the Division since April of 2000. As part of Ms. Corina's duties in her position, she prepares form 3811-A or requests the Division's mail room staff to on behalf of the Office of Counsel. Ms. Corina avers that form 3811-A is used by the mailer to request return receipts after mailing and can be used for registered, certified, insured, and express mail. The Postal Service will provide whatever information they have available concerning delivery when delivery can be confirmed.

9. In this case, Ms. Corina prepared form 3811-A requesting tracing information for tracking number 7104 1002 9735 5211 3490 and mailed it to Mark Ruddy, Business Service Network Representative of the U.S. Postal Service- Albany General Mail Facility, located at 30 Old Karner Road, Albany, NY 12288. The response Ms. Corina received from Mr. Ruddy shows that certified mail number 7104 1002 9735 5211 3490 was delivered on October 25, 2019 to 14229 253rd Street Rosedale, NY 11422. The form also reflects an illegible signature.

10. Deena Picard has been the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS) since May 2017. She is also a Data Processing Fiscal Systems Auditor 3 and has held that position since February 2006. In performing her duties for both positions, Ms. Picard has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of deficiency. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Picard's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices.

11. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

12. Each batch of notices is accompanied by a CMR. The CMR lists each notice in the order the notices are generated in the batch. The certified control number is listed on the CMR under the heading entitled "Certified No." The statutory notice 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." Each CMR and associated batch of statutory notices are forwarded to the mail room together.

13. All pages of the CMR are banded together when the documents are delivered to the Division's mail room 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.

14. Here, the CMR for the notices issued by the Division on October 22, 2019, including the notice at issue, consists of 15 pages. Each page consists of twelve to fifteen entries with the exception of page 15 which consists of six entries of 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.

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 is manually changed on the first and last page of the CMR to the actual date of mailing. In the instant case, the actual mailing date as handwritten on the first and last page of the CMR was "10/22." A USPS representative affixed a postmark, dated October 22, 2019, to each page of the CMR, wrote "200" on page 15 next to the heading "Total Pieces Received at Post Office," and initialed the page.

15. Page 12 of the CMR indicates that the notice with certified control number 7104 1002 9735 5211 3490 was mailed to petitioner at "14229 253RD ST ROSEDALE, NY 11422-2509." The corresponding mailing cover sheet, attached to the Picard affidavit with the notice as exhibit "B," bears this certified control number, petitioner's name, and his address as stated above.

16. Ms. Picard avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on October 22, 2019.

17. Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures in her affidavit as they relate to statutory notices. Ms. Saccocio has been a manager in the mail room since 2017. As a mail room manager, Ms. Saccocio is knowledgeable regarding past and present office procedures as they relate to statutory notices. Ms. Saccocio's official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the United States Postal Service.

18. The mail room receives statutory notices that are ready for mailing in an "Outgoing Certified Mail" area. The mail room also receives the corresponding CMR for each batch of

notices. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet in a windowed envelope. That staff member then weighs, seals, and places postage on each envelope. A clerk then checks the first and last pieces of certified mail against the information contained on the CMR. A clerk will also perform a random review of up to 30 pieces of certified mail 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 writes his or her initials or signature on the CMR, indicating receipt by the post office. The mail room also 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

19. Ms. Saccocio avers that each page of the CMR in exhibit "A" of the Picard affidavit contains a postmark of October 22, 2019, and that a USPS employee initialed or signed page 15 of the CMR and wrote the total number of pieces of certified mail. A review of the CMR confirms this assertion.

20. Based on her review of the affidavit of Ms. Picard and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Saccocio stated that on October 22, 2019, an employee of the mail room delivered one piece of certified mail addressed to petitioner at 14229 253rd ST, ROSEDALE, NY 11422-2509, in a sealed postpaid envelope for delivery. She also stated the CMR delivered to the USPS on

October 22, 2019 was returned to the Division. Ms. Saccocio attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on October 22, 2019.

21. In response to the motion, petitioner submitted an unsworn letter with “all supporting documents to support [his] claim.” These documents included, among others, several invoices from auto parts dealers, a certificate of live birth for petitioner’s child, a verification of pupil registration for petitioner’s child, a form 1099 for petitioner for 2018 from Ceva Freight LLC, and a certificate of title listing petitioner as owner of a used 2017 Isuzu NHD.

22. Thereafter, on September 29, 2021, petitioner submitted a sheet entitled “2018 Expenses.”

CONCLUSIONS OF LAW

A. The Division brings this motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or 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 4), the Division of Tax Appeals has jurisdiction over the petitioner and a motion for summary determination is the proper motion for relief if petitioner’s request for conciliation conference was untimely (*see Matter of Kallianpur*, Tax Appeals Tribunal, May 29, 2019).

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]). A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (*see* 20 NYCRR 3000.9 [c]). The proponent of a summary judgment

motion must make a prima facie showing of entitlement to judgment as a matter of law, demonstrating there are no material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, however, the opposing party must set forth evidentiary proof establishing the existence of a material issue of fact that requires a trial of the action (*see id.*).

C. Petitioner submitted invoices and other documents in response to the Division's motion but did not submit any evidence contradicting or responding to the assertions the Division made in its motion papers. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed admitted" (*Keuhne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]). As petitioner did not present any evidence contesting the facts alleged in the Division's affidavits, such facts are deemed admitted (*see id.*).

Petitioner also submitted a sheet entitled "2018 expenses" by postmark date of September 29, 2021. Responses to motions are required to be filed 30 days after the date of service of the motion pursuant to 20 NYCRR 3000.5 (b). As the motion in this case was served on August 19, 2021, petitioner's response was due September 20, 2021 and this additional submission is untimely. However, administrative law judges have discretion in accepting late-filed non-jurisdictional documents (*see Matter of O'Keh Caterers Corp.*, Tax Appeals Tribunal, November 5, 1992 [brief filed one day late by the Division was accepted by the Tribunal]). As the Division does not suffer any harm by accepting petitioner's response, such response is accepted and will be considered.

D. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals or a request for conciliation conference with BCMS (*see Tax Law* §§ 681 [b]; 689 [b]; 170 [3-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 date 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 substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a petitioner's 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 the mailing to petitioner's last known address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furn.*, Tax Appeals Tribunal, November 25, 1992). To meet its burden, the Division must show it has a standard mailing procedure for the issuance of statutory notices by one with knowledge of the relevant procedures and that the procedure was followed in this instance (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). Where a notice of deficiency of personal income tax is properly mailed, it is valid whether or not it is actually received (*see Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019).

F. In this case, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on October 22, 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 Modica*, Tax Appeals Tribunal, October 1, 2015). 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 e.g. Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

G. The Division issued the notice to petitioner's last known address. "A taxpayer's last known address shall be the address given in the last return filed by him, unless subsequent to the filing of such return the taxpayer shall have notified the [Division] of a change of address" (Tax Law § 691 [b]). Petitioner's address on the mailing cover sheet and CMR vary slightly from the address listed on petitioner's 2018 return, which was the last return filed by petitioner before the notice was mailed (*see* findings of fact 1 and 7). First, the Division added an additional four digits to petitioner's five-digit zip code. However, the addition of these digits does not invalidate the notice at issue (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001).

Additionally, petitioner's last known address, as indicated on his 2018 return, was 142-29 253 Street, Rosedale, NY 11422. The address that appears on the notice is 14229 253rd St, Rosedale, NY 11422-2509, thus missing the hyphen in the street address as it appears on petitioner's last filed return. It is first noted that petitioner does not contend that the notice was improperly addressed and does not dispute receipt of the notice. The removal of this hyphen is an inconsequential deviation (*see Matter of Rubinos*, Tax Appeals Tribunal, April 3, 2017). The United States Tax Court has held that a deviation in the address used in mailing a notice "is inconsequential where the error is so minor that it would not prevent delivery of the notice (citations omitted)" (*Lee v C.I.R.*, T.C. Memo 2011-129 [2011]). Accordingly, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address.

It is thus concluded that the Division properly mailed the notice on October 22, 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 in protest of that notice commenced on that date (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]).

H. Petitioner's request for conciliation conference for the notice was filed on November 16, 2020 (*see* finding of fact 3). This date falls after the 90-day period of limitation for the filing of such a request. Consequently, the request was untimely (*see* Tax Law §§ 170 [3-a] [b]; 681 [b]) and the same was properly dismissed by the December 11, 2020 conciliation order issued by BCMS. Petitioner has offered no 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.

I. The Division has established that petitioner's request for a conciliation conference with BCMS was untimely and it was proper for BCMS to dismiss such notice. The Division of Taxation's motion for summary determination is granted and the petition of Robert Dixon is denied.

DATED: Albany, New York
December 16, 2021

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE