

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MORRIS NAPOLITANO AND	:	
MARIA NAPOLITANO	:	DETERMINATION
	:	DTA NO. 850492
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 2017 and 2018.	:	

Petitioners, Morris Napolitano and Maria Napolitano, 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 2017 and 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), brought a motion on September 11, 2023, 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. Petitioners, appearing by Robert Singer, CPA, did not file a response. The 90-day period for issuance of this determination commenced on October 11, 2023. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jennifer L. Baldwin, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners 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 petitioners' protest of a notice of deficiency, dated June 3, 2021, and bearing assessment identification number L-053521376 (notice). Two copies of the notice were addressed to petitioners, one listing petitioner Morris Napolitano's name first and the other listing petitioner Maria Napolitano's name first, both at the same Palm Beach Gardens, Florida, address. Two copies of the notice were addressed to petitioners' representative, Robert Singer, at a Melville, New York, address.

2. On February 6, 2023, petitioners filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On February 24, 2023, BCMS issued a conciliation order dismissing request, CMS No. 000350510 (conciliation order), to petitioners. The conciliation order determined that petitioners' 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 6/3/2021, but the request was not mailed until 2/6/2023, or in excess of 90 days, the request is late filed.”

4. On March 26, 2023, petitioners filed a timely petition with the Division of Tax Appeals in protest of the conciliation order. Attached to the petition are power of attorney forms authorizing petitioners' representative, Mr. Singer, to represent each petitioner with respect to all tax types and years, dated May 10, 2018, and September 4, 2018.

5. To show proof of proper mailing of the four copies of the notice, the Division, by affirmation of Peter B. Ostwald, Esq., dated September 11, 2023, submitted the following with its motion papers: (i) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Management Analysis and Project Services Bureau (MAPS), sworn to on August 24, 2023; (ii) a “Certified Record for Presort Mail – Assessments Receivable” (CMR), postmarked June 3, 2021; (iii) copies of the notice mailed to petitioners and petitioners’ representative with the associated mailing cover sheets; (iv) an affidavit of Susan Ramundo, a manager of the Division’s mail room, sworn to on September 5, 2023; (v) a copy of the conciliation order issued by BCMS on February 24, 2023; and (vi) a copy of petitioners’ 2019 New York State nonresident and part-year resident income tax return, form IT-203, filed on September 29, 2020 (2019 return), listing the same Palm Beach Gardens, Florida, address for petitioners and the same Melville, New York, address for petitioners’ representative as is listed on the copies of the notice, the petition, and the power of attorney forms attached to the petition, except that petitioners’ address on the copies of the notice includes an additional four zip code digits to petitioners’ five-digit zip code and abbreviates “Palm Beach Gardens” to “Palm Bch Gdns.”

6. Mr. Ostwald asserts in his affirmation that the Palm Beach Gardens, Florida, address was petitioners’ last known address and the Melville, New York, address was petitioners’ representative’s address when the four copies of the notice were issued.

7. Marianna Denier has served as the Director of MAPS since July 2022. Prior to that, she was a supervisor in MAPS since October 2004. She is also a Principal Administrative Analyst and has held that position since August 2022. Prior to this position, Ms. Denier was a Supervisor of Administrative Analysis from July 2019 through August 2022. In performing her

duties, Ms. Denier has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of deficiency. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Denier is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Denier's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices.

8. 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 on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with its accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

9. Each batch of statutory notices is accompanied by a CMR. The CMR lists each notice in the order it is generated in the batch. The certified control numbers are 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.

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 after mailing. 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.

10. Here, the CMR for the statutory notices issued by the Division on June 3, 2021, including the four copies of the notice herein, consists of 23 pages with 249 certified control numbers and corresponding assessment numbers, names, and addresses. Each page consists of 11 entries with the exception of page 23, which contains 7 entries. Ms. Denier 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.

11. Each page of the CMR listed 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 page of the CMR to the actual date of mailing. The actual mailing date as handwritten on the first and last page of the CMR was “6/3/21.” This was done to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the United States Postal Service (USPS). On page 23, corresponding to “Total Pieces and Amounts” is the preprinted number 249. A USPS representative affixed a postmark, dated June 3, 2021, to each page of the CMR. A USPS representative wrote “249” on page 23 beneath the heading “Total Pieces Received at Post Office,” and initialed or signed page 23.

12. Page 21 of the CMR indicates that the notice with certified control number 7104 1002 9730 0410 1754 and reference number L 053521376, was mailed to petitioner Morris Napolitano at his Palm Beach Gardens, Florida, address. Page 21 of the CMR also indicates that the notice with certified control number 7104 1002 9730 0410 1761 and the same reference number, was mailed to petitioner Maria Napolitano at the same Palm Beach Gardens, Florida,

address. Page 17 of the CMR indicates that two copies of the notice with certified control numbers 7104 1002 9730 0410 1297 and 7104 1002 9730 0410 1303, and the same reference number as stated above, were mailed to petitioners' representative, Mr. Singer, at his Melville, New York, address. The corresponding mailing cover sheets, attached to the Denier affidavit with the copies of the notice as exhibit "B," bear these certified control numbers and petitioners' and petitioners' representative's names and addresses as stated above.

13. Ms. Denier states that four copies of the notice were mailed on June 3, 2021, as indicated by the CMR, as well as the USPS postmark on each of the 23 pages of the CMR.

14. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on June 3, 2021.

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

16. 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.

17. A USPS employee affixes a postmark and writes his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. 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.

18. Ms. Ramundo avers that each page of the CMR in exhibit "A" of the Denier affidavit contains a postmark, and that a USPS employee initialed or signed page 23 of the CMR and wrote the total number of pieces of certified mail. A review of the CMR confirms this assertion.

19. Based on her review of the affidavit of Ms. Denier and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Ramundo stated that on June 3, 2021, an employee of the mail room delivered two pieces of certified mail addressed to petitioners at their Palm Beach Gardens, Florida, address and two pieces of certified mail addressed to petitioners' representative, Mr. Singer, at his Melville, New York, address in sealed postpaid envelopes for delivery by certified mail. She also stated the CMR delivered to the USPS on June 3, 2021, was returned to the Division. Ms. Ramundo 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 June 3, 2021.

20. Petitioners did not file a response 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) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) or, in the alternative, 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* findings of fact 3 and 4), 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 petitioners' 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 v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 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 [2d Dept 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 [1st Dept 1992], citing *Zuckerman v City of New York*, 49 NY2d at 562).

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 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 request for a conciliation conference or petition is at issue, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice to petitioners’ 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 that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. Petitioners did not respond to the Division's motion. As such, petitioners are deemed to have conceded that no question of fact requiring a hearing exists (*see John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]; *Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]). Furthermore, as petitioners have presented no evidence to rebut the facts alleged in the Denier and Ramundo affidavits and supporting documents, the facts alleged therein are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d at 449, citing *Kuehne & Nagel v Baiden*, 36 NY2d at 544).

G. The Division has offered proof sufficient to establish the mailing of the notice to petitioners' last known address on June 3, 2021. 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 sheets and the CMR conform with the address listed on petitioners' 2019 return, which satisfies the "last known address" requirement in Tax Law § 681 (a).¹

¹ While it is noted that the Division added four additional zip code digits to petitioners' five-digit zip code as reflected on their 2019 return, and abbreviated "Palm Beach Gardens" to "Palm Bch Gdns," such differences are deemed inconsequential (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001; *Matter of Rubinos*, Tax Appeals Tribunal, April 3, 2017). Moreover, petitioners do not contend that the notice was improperly addressed, nor do they dispute receipt of the notice, and they did not respond to the motion. As such, it is deemed admitted that the address on the notice was petitioners' last known address.

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]).

Two copies of the notice herein, dated June 3, 2021, were sent to petitioners' representative at his Melville, New York, address. Mr. Singer's address on the mailing cover sheets and the CMR conform with the address listed for him on petitioners' 2019 return as well as the petition and the power of attorney forms attached to the petition. The Division has proven that its standard procedure for mailing a copy of the notice to petitioners' representative was followed in this case.

I. It is thus concluded that the Division properly mailed the notice to petitioners and petitioners' representative on June 3, 2021, and the statutory 90-day time limit to either file 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]). Petitioners' request for a conciliation conference was filed on February 6, 2023. This date falls well after the 90-day period of limitations for the filing of such a request. Consequently, the request was untimely and the same was properly dismissed by the February 24, 2023, conciliation order issued by BCMS.

J. The Division of Taxation's motion for summary determination is granted, the petition of Morris Napolitano and Maria Napolitano is denied, and the February 24, 2023, conciliation order dismissing petitioners' request is sustained.

DATED: Albany, New York
January 04, 2024

/s/ Jennifer L. Baldwin
ADMINISTRATIVE LAW JUDGE