

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANDREW J. DUFFY : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 850601
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2020. :
:

Petitioner, Andrew J. Duffy, 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 2020.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), brought a motion on May 20, 2024, 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 Steinberg Enterprises, LLC (Leonard Steinberg, EA), did not respond to the Division of Taxation’s motion by June 20, 2024, which date commenced the 90-day period for the 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, Jennifer L. Baldwin, 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 petitioner's protest of a notice of deficiency for tax year 2020, dated November 10, 2021, and bearing assessment identification number L-054387172 (notice). The notice was addressed to petitioner, Andrew J. Duffy, at an address in Princeton, New Jersey.

2. On June 2, 2023, 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 June 23, 2023, BCMS issued a conciliation order dismissing request, CMS No. 000353076, 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 November 10, 2021, but the request was not faxed until June 2, 2023, or in excess of 90 days, the request is late filed.”

4. On July 21, 2023, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.¹

5. To show proof of proper mailing of the notice, the Division, by affirmation of Peter Ostwald, Esq., dated May 20, 2024, submitted the following with its motion papers: (i) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS), sworn to on December 11, 2023; (ii) a copy of pages 1, 10 and 128 of a “CERTIFIED RECORD FOR - DTF-962-F-E - Not of Def Follow Up” (CMR), postmarked November 10, 2021; (iii) a copy of the notice with

¹ The petition also lists tax year 2021 but does not attach a statutory notice for that year. In its answer, the Division explains that petitioner's claimed overpayment for tax year 2021 was applied to his outstanding tax liability for tax year 2020 pursuant to Tax Law § 686 (a). Accordingly, resolution of the issue herein will inform the refundability of petitioner's claimed overpayment for tax year 2021.

the associated mailing cover sheet addressed to petitioner; (iv) an affidavit of Susan Ramundo, a manager of the Division's mail room, sworn to on December 11, 2023; (v) an affidavit of Beth Levy, a Legal Assistant 1 in the Division's Office of Counsel, sworn to on December 18, 2023; (vi) a request for delivery information/return receipt (United States Postal Service [USPS] form 3811-A) and the USPS response to such request, dated August 22, 2023; (vii) a copy of petitioner's request for conciliation conference and the conciliation order issued by BCMS on June 23, 2023; and (viii) a copy of petitioner's electronically filed form IT-203, New York State nonresident and part-year resident income tax return, for tax year 2020 (2020 return), filed on May 17, 2021, listing the same Princeton, New Jersey, address for petitioner as was listed on the notice.

6. Mr. Ostwald asserts in his affirmation that the Princeton, New Jersey, address was petitioner's last known address when the notice was issued.

7. Ms. 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 "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 P.O. 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. The CMR for the batch of statutory notices to be issued on November 10, 2021, including the notice addressed to petitioner herein, allegedly consisted of 128 cut sheet pages. The Division included with its submission only page "1" (the first page of the CMR), page "10" (the page of the CMR on which information pertaining to petitioner appears) and page "128" (the last page of the CMR). Each of these three pages includes in its upper left corner an initial date that is approximately 10 days in advance of the anticipated mailing date. Appearing in the upper right corner of the pages 1 and 128 is the handwritten date "11/10/21." Following the Division's

general practice, this date was manually changed to ensure that the preprinted date on the CMR conformed with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. Each of the foregoing three pages includes a USPS postmark, dated November 10, 2021. Ms. Denier noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

11. Page 10 of the CMR indicates that a notice with certified control number 7104 1002 9735 1168 2647, and reference number L 054387172, was mailed to petitioner at the Princeton, New Jersey, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Denier affidavit with a copy of the notice as exhibit "B," bears this same certified control number and petitioner's name and address as noted.

12. Appearing below the certified control number entries on page 128 of the CMR is the preprinted heading "TOTAL PIECES AND AMOUNTS," and next to which is the preprinted number "1,750." Immediately beneath this heading is the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE." A USPS postmark, dated November 10, 2021, appears on this page, as well as the initials of a USPS employee.

13. Ms. Denier states that the notice was mailed on November 10, 2021, as indicated by the CMR, as well as the USPS postmark on pages 1, 10 and 128 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 November 10, 2021.

15. Ms. 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 into 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 contains a postmark, and that a USPS employee initialed or signed page 128 of the CMR. A review of the CMR indicates that a

USPS employee did not write the number of pieces received on the CMR or circle the preprinted number next to the heading "TOTAL PIECES AND AMOUNTS."

19. Based on her review of the affidavit of Ms. Denier and the exhibits attached thereto, and her personal knowledge of the procedures of the mail room, Ms. Ramundo stated that on November 10, 2021, an employee of the mail room delivered one piece of certified mail addressed to petitioner at his Princeton, New Jersey, address in a sealed postpaid envelope for delivery by certified mail. She also stated that the CMR delivered to the USPS on November 10, 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 November 10, 2021.

20. In her affidavit, Ms. Levy details her filing of USPS form 3811-A in this matter. As part of her duties, Ms. Levy prepares USPS form 3811-A, or asks the Division's mail room staff to make such requests on behalf of her office. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Levy filed form 3811-A seeking information for the item mailed by the Division bearing certified control number 7104 1002 9735 1168 2647 on November 10, 2021, to petitioner at his Princeton, New Jersey, address. The USPS response to the request confirmed that the article, bearing the aforementioned certified control number and addressed to petitioner, was delivered on November 12, 2021, at 3:42 p.m., to an address in "Princeton, NJ 08540." The USPS response shows the scanned image of the recipient's signature and printed address below the recipient's signature.

21. Attached to the Levy affidavit as exhibit “A” is the Division’s “Request for Delivery Information/Return Receipt” for article number 7104 1002 9735 1168 2647. Exhibit “B” to the Levy affidavit is the USPS response to the Division’s request indicating delivery of the same article to petitioner’s address.

22. Petitioner 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 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 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 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 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 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 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 conciliation conference 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 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 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. 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 v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Denier and Ms. Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). However, the submission of a partial (or truncated) CMR, as here, is not sufficient to establish that the Division's standard mailing procedure was followed (*see Matter of Ankh-Ka-Ra Sma-Ntr*, Tax Appeals Tribunal, April 14, 2016; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Moreover, the Division has failed to establish that its standard mailing procedure was followed in this instance because the USPS employee neither wrote nor circled the number of pieces of certified mail received as requested by the Division (*see* finding of fact 18). Hence, that proof alone fails to establish that the notice was properly mailed on November

10, 2021, and, therefore, the period within which to file a protest was not triggered as of such date.

H. An inadequacy in the evidence of mailing may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing, the 90-day period for filing either a request or a petition is tolled until such time as the taxpayer actually receives the notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib.*, 179 AD2d 970, 971 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest will commence (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v Tax Commn.*, 68 NY2d 891, 893 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. Notwithstanding the evidentiary deficiencies with regard to demonstrating the mailing of the notice, the Division has nonetheless established, via the Levy affidavit and the accompanying USPS form 3811-A and response thereto, that the notice was mailed by certified mail and was, in fact, delivered to and accepted at petitioner's last known address on November 12, 2021 (*see* finding of fact 20). As a result, the period within which to challenge the subject notice of deficiency commenced to run on the date of such actual receipt, that is, November 12, 2021, and, in order to be timely, a petition with the Division of Tax Appeals or a request for conciliation conference with BCMS was required to be filed within 90 days thereafter (*see Matter of Agosto v Tax Commn.*, 68 NY2d at 893; *Matter of Rosen*). Since the BCMS conciliation conference request form was not filed until June 2, 2023, well in excess of 90 days from the delivery of the notice, petitioner's request for conciliation conference was properly

dismissed by the June 23, 2023, conciliation order issued by BCMS, and the Division of Tax Appeals is without jurisdiction to provide a hearing to address the merits of the notice.

J. The Division of Taxation's motion for summary determination is granted, the petition of Andrew J. Duffy is denied, and the conciliation order dismissing petitioner's request, dated June 23, 2023, is sustained.

DATED: Albany, New York
September 12, 2024

/s/ Jennifer L. Baldwin
ADMINISTRATIVE LAW JUDGE