

ISSUES

I. Whether the Division of Taxation's motion to dismiss should be granted for lack of subject matter jurisdiction.

II. Whether the Division of Taxation's motion for summary determination as to the timeliness issue should be granted, on the basis that petitioner failed to file a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of three notices of deficiency.

FINDINGS OF FACT

1. Petitioners, Gaston Levin and Gabriela C. Dieguez, filed a petition with the Division of Tax Appeals in protest of a Conciliation Order Dismissing Request, CMS No. 256860, dated April 12, 2013. The Conciliation Order explained the basis for the dismissal as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on December 5, 2012, but the request was not mailed until March 29, 2013, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

2. Petitioners filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices of deficiency L-038672707-5, L-038672688-3 and L-038672691-1. The request was dated March 29, 2013, and received by BCMS on April 1, 2013. The line for "date of notice" listed on the Request for Conciliation Conference contains the date March 22, 2013, which corresponds with the date on the notices and demands for payment of tax due for each of the three notices of deficiency in issue. The three notices of deficiency in this matter are dated December 5, 2012.

3. The Division of Taxation (Division) brought this motion to dismiss, or in the alternative, a motion for summary determination dated April 8, 2014, on the basis that petitioners' protest was filed more than 90 days from the date the notices were delivered to petitioners' last known address. Included with the Division's motion were the following documents: (i) the affirmation of Anita Luckina, Esq., in support of the motion; (ii) a copy of the petition filed in this matter, with attachments; (iii) a copy of the Division's answer; (iv) the affidavit of Daniel A. Maney, a taxpayer services specialist and manager of a unit that oversees the Case and Resource Tracking System (CARTS); (v) pages numbered 1, 5, 125, 217, 230, and 281 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR) each either date-stamped or postmarked December 5, 2012; (vi) an affidavit, dated November 6, 2013, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (vii) an affidavit, dated November 6, 2013, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (viii) three Postal Service forms 3811-A (Request for Delivery Information/Return Receipt after Mailing) and the USPS response to each request dated August 27, 2013; (ix) a copy of three notices of deficiency dated December 5, 2012, with the associated mailing cover sheets; (x) a copy of three notices and demands for payment of tax due dated March 22, 2013, for each of the three tax years, i.e., 2009, 2010 and 2011, respectively; and (xi) petitioners' 2011 Form IT-203, New York Nonresident and Part-Year Resident Income Tax Return dated March 8, 2012, which lists the same address for petitioners as that listed on the subject notices.

4. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices 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 reflect the actual mailing date of "12/5/12." Pages 5, 125, 217 and 230 of the CMR, however, were not changed to reflect the December 5, 2012 mailing date.

In addition, Mr. Maney stated that all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by him. The page numbers of the CMR run consecutively, starting with "PAGE 1," and are noted in the upper right corner of each page.

5. 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."

6. According to the Maney affidavit, the CMR in the present matter consists of 281 pages and lists 3,082 certified control numbers along with corresponding assessment numbers, names and addresses. There are three deletions from the list, one on each of pages 125, 217 and 230. Mr. Maney notes that the portion of the CMR that is attached to his affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed his or her initials or signature and/or

a U.S. postmark to each page of the CMR, wrote “3082” on page 281, and initialed or signed that page.

7. Page 5 of the CMR indicates that three notices of deficiency with certified control numbers 7104 1002 9730 1423 7542, 7104 1002 9730 1423 7559 and 7104 1002 9730 1423 7566 and assessment ID numbers L-038672688, L-038672691 and L-038672707, respectively, were mailed to petitioners at the Short Hills, New Jersey, address listed on the subject notices of deficiency. The corresponding mailing cover sheet, attached to the Maney affidavit as exhibit “B,” bears these certified control numbers and petitioners’ names and address as noted.

8. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division’s Mail Processing Center (Center), describes the Center’s general operations and procedures. The Center receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves 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 envelopes are counted and the names and certified control numbers verified against 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 signature on the CMR, indicating receipt by the post office. The Center 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. Page 1 of the CMR bears a date stamp of December 5, 2012, and each of other five pages of the CMR in exhibit “A” of the Maney affidavit contains a USPS postmark of December 5, 2012. On page 281, corresponding to “Total Pieces and Amounts,” is the preprinted number 3,085, and next to “Total Pieces Received

At Post Office” is the handwritten entry “3082” along with initials or a signature. Mr. Peltier explained that the difference reflects three items of mail that were pulled from the original group of 3,085 pieces, and noted that this did not affect petitioners’ notices.

9. According to the Maney affidavit, the affixation of the postmarks and the Postal Service employee’s initials indicate that all 3,082 articles of mail listed on the CMR, including the articles addressed to petitioners, were received by the USPS on December 5, 2012.

10. According to both the Maney and Peltier affidavits, a copy of the subject notices were mailed to petitioners on December 5, 2012, as claimed.

11. The affidavit of Heidi Corina describes the Division’s requests to the USPS for delivery information on the subject notices of deficiency. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the articles of mail bearing certified control numbers 7104 1002 9730 1423 7542, 7104 1002 9730 1423 7559 and 7104 1002 9730 1423 7566. The USPS responses to these requests indicate that the articles bearing certified control numbers 7104 1002 9730 1423 7542, 7104 1002 9730 1423 7559 and 7104 1002 9730 1423 7566 and addressed to petitioners were delivered as addressed on January 16, 2013.

Attached to the Corina affidavit as exhibit “A” are the Division’s requests for delivery information for article numbers 7104 1002 9730 1423 7542, 7104 1002 9730 1423 7559 and 7104 1002 9730 1423 7566. Exhibit “B” to the Corina affidavit is the USPS response to the Division’s requests indicating delivery of the same articles on January 16, 2013, to petitioners’ Short Hills, New Jersey, address.

12. As previously described, also attached to the affidavit supporting the motion was petitioners’ 2011 Form IT-203, New York Nonresident and Party-Year Resident Income Tax Return dated March 8, 2012, which lists the same address for petitioners as that listed on the

subject notices. This income tax return was the last return filed with the Division by petitioners before the notices of deficiency were issued.

CONCLUSIONS OF LAW

A. The Division of Taxation has made a motion to dismiss, or alternatively, a motion for summary determination, as to the issue of the timeliness of petitioners' request for a conciliation conference. A motion to dismiss the petition may be granted, as pertinent in this matter, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9[a][1][ii]). A motion for summary determination may 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 that 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]). Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules § 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 [1980]). Inasmuch 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 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]).

B. The Division's motion to dismiss is denied (*see Matter of Ryan*, Tax Appeals Tribunal,

September 12, 2013, citing *Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). The Division did not introduce any evidence with respect to the date of the issuance of the conciliation order, which, on its face, bears a date of April 12, 2013. The petition indicates that the petition was received by the Division of Tax Appeals on June 11, 2013, within 90 days after the issuance of the conciliation order (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Accordingly, the Division of Tax Appeals has subject matter jurisdiction over the issue of whether petitioners timely filed their request for a conciliation conference (Tax Law § 170(3-a)(e); § 2006(4); *see also* 20 NYCRR 3000.1[k], 3000.3[b][8]; 4000.5[c][4]), and such issue will be addressed herein.

C. Tax Law § 681(a) provides the authority for the Division to issue a notice of deficiency of income tax to a taxpayer. This deficiency will become irrevocably fixed unless the taxpayer files a petition with the Division of Tax Appeals within 90 days from the issuance of the notice (Tax Law § 681[b]; § 689[b]). Prior to petitioning the Division of Tax Appeals for a hearing, a taxpayer may request a conciliation conference at the Division's Bureau of Conciliation and Mediation Services within 90 days of the issuance of the notice (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 4000.5[c]). If after the Conciliation Order is issued, a taxpayer remains unsatisfied, there is an additional 90 days from the issuance of such order within which to file a petition with the Division of Tax Appeals (Tax Law § 170[3-a][e]). Failure to timely file a petition or request a conciliation conference challenging the notice of deficiency bars the Division of Tax Appeals from acquiring jurisdiction over the substantive merits of the matter (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. In a case where the timeliness of a petitioner's protest 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 Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 681[a]). 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.*).

E. Here, the Maney and Peltier affidavits establish the Division's standard mailing procedure. As to whether such procedures were followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the address indicated thereon and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In the present matter, however, such a properly completed CMR is missing from the record. Exhibit "A" of the Maney affidavit contains six pages of what purports to be a longer multi-page computer-generated CMR. Unlike in the procedure described in the Maney affidavit, the six pages in exhibit "A," are not physically connected; the certified mail numbers run consecutively on each page but not from page to page; and the pages are not consecutively numbered. Moreover, the date on the top of pages 1 and 281 has been changed to December 5, 2012, but remains unchanged on page 5. Pages 1 and 281, therefore, bear a different date than page 5. As a result, the partial CMR submitted as exhibit "A" of the Maney affidavit does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

F. Such a flaw may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in this matter. Specifically, the USPS delivery information accompanying the Corina affidavit shows that a copy of the notices at issue, addressed to

petitioners, which were also listed on the CMR, were delivered as addressed on January 16, 2013. The signature provided by the USPS indicates that the recipient accepted delivery at petitioners' address, and petitioners have offered no argument or evidence that one of them did not sign the document as the recipient. Thus, the Division has introduced adequate proof through the affidavit of Ms. Corina, the requests for delivery information, and the USPS responses that the three notices were delivered to petitioners' last known address, as claimed, on January 16, 2013 (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012; *Matter of Winner's Garage*, Tax Appeals Tribunal, May 20, 2010).

G. Based on the above conclusions, the 90-day period for filing a petition or request for conciliation conference with regard to the notices in issue is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), which in this case is the date of delivery, i.e. January 16, 2013. Here, the period within which to challenge the notices commenced to run on that date and petitioners were required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, [1986], *revg* 118 AD2d 894 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Petitioners' Request for Conciliation Conference was filed on or about March 29, 2013, and since it falls within the 90-day period of limitations for the filing of such a request, petitioners' request was timely filed (*see* Tax Law § 170[3-a][b]; § 689[b]). Accordingly, the Division of Tax Appeals has jurisdiction to consider the merits of petitioners' protest.

H. The Division's motion to dismiss is denied. The Division's motion for summary

determination is denied, and a hearing will be scheduled in due course before the Division of Tax Appeals to address the merits of the notices of deficiency dated December 5, 2012.

DATED: Albany, New York
August 7, 2014

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE