

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition
of
DEBORAH VAN DER HEYDEN
for Redetermination of Deficiencies or for Refund of
New York State and New York City Personal Income
Tax under Article 22 of the Tax Law and the
Administrative Code for the City of New York for the
Years 2013 and 2014.

ORDER
DTA NO. 830214

Petitioner, Deborah Van Der Heyden, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2013 and 2014.

On April 1, 2022, the Division of Taxation, by its representative, Amanda Hiller, Esq., (Jennifer Hink-Brennan, Esq., of counsel), brought a motion 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) (1) (i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Syed W. Quadri, CPA, did not respond to the motion. The 90-day period for issuance of this order commenced on May 2, 2022. 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 order.

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of two notices 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, Deborah Van Der Heyden, in protest of two notices of deficiency (notices), each dated September 7, 2018:

(a) notice of deficiency, assessment ID number L-048736814, that asserted additional tax, plus penalties and interest, for the year 2014; and

(b) notice of deficiency, assessment ID number L-048736815, that asserted additional tax, plus penalties and interest, for the year 2013.

Each notice is addressed to "VANDERHEYDEN-DEBORAH" at a "240 E 39TH ST APT 46B NEW YORK, NY 10016-7212," address.

2. Copies of the notices were also sent to petitioner's then-representative, Randy Samuelson, CPA, at the following address:

"RANDY SAMUELSON, CPA
SM CPAS PC
10 NEW KING STREET
STE 118
WHITE PLAINS, NY 10604-1208."

3. Petitioner filed a request with BCMS in protest of the notices. The request was signed by petitioner's representative, Syed W. Quadri, CPA, and was dated October 15, 2020. The request was faxed to and received by BCMS on October 16, 2020.

4. On November 6, 2020, BCMS issued a conciliation order dismissing request (conciliation order) (CMS No. 000323962) to petitioner. The conciliation order determined that petitioner's protest of the notices 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 September 7, 2018, but the request was not received until October 16, 2020, or in excess of 90 days, the request is late filed.”

5. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on December 23, 2020. The petition was date stamped received by the Division of Tax Appeals on December 28, 2020. In her petition, petitioner asserts that she has “several documents as well as substantial circumstantial evidence confirming her non NYC residential status which was not given due consideration by the Tax Department.” Petitioner also claims that

“[her] representative duly filed protest through Form CMS-1 on Dec 08, 2018 which was well within the stipulated deadline. However Tax Department did not schedule the conference for unknown reasons. A follow-up request was made to the Tax Department on Feb 02, 2019 to schedule the conference; however it also remain [sic] unanswered till date. . . .”

In her petition, petitioner further claims that assuming the original request for conciliation conference “was perhaps lost,” her representative refiled the request on October 15, 2020. However, the “Tax Department dismissed the request citing late filing as the reason . . . ; although the original CMS-1 filing was made well within the stipulated deadline.” Attachments to the petition include, among other documents, a request for conciliation conference hand dated and signed by petitioner's representative, Mr. Samuelson, on “12/8/18”; and a copy of a typed “SM CPA'S P.C. Facsimile Transmittal” cover sheet that lists the sender as “Randy Samuelson CPA,” a date of “2/13/2019,” “Re: Debra Van Der Heyden,” “To: Protest Unit” at “Fax No. 518-435-2990,” and “No. Pages: 3.”

6. To show proof of proper mailing of the notices, the Division provided the following with its motion papers: (i) the affirmation, dated April 1, 2022, of Jennifer Hink-Brennan, Esq., the Division's representative; (ii) an affidavit, dated March 17, 2022, of Estelle L. Diamond, an Office Assistant 2 (Calculations) in the Division's Income Franchise Field Audit Management District Office Control Unit; (iii) a certified mail record, PS Form 3877 (CMR), postmarked September 7, 2018; (iv) an affidavit, dated March 17, 2022, of Susan Ramundo, a manager in the Division's mail room; (v) copies of two notices allegedly mailed to petitioner and her representative, Mr. Samuelson, with the associated mailing cover sheets; (vi) a copy of the power of attorney form, dated May 30, 2018, authorizing Mr. Samuelson to represent petitioner with respect to "personal income" tax for the years "2012, 2013, 2014, 2015, 2016, 2017, 2018," that listed Mr. Samuelson's White Plains, New York, address; (vii) a copy of petitioner's request for conciliation conference, faxed to BCMS on October 16, 2020 at 2:41 p.m.; and (viii) a copy of petitioner's New York State residential income tax return (form IT-201) for the year 2016, electronically filed on October 16, 2017.

7. Jennifer Hink-Brennan, an attorney in the Office of Counsel of the Division, avers in her affirmation that petitioner's 2016 tax return was electronically filed on October 16, 2017, and that this was the last return filed before the Division issued the notices. Ms. Hink-Brennan affirms that the address "appearing on the last return is 240 east 39th street APT 46b, New York, NY 10016," and that address "corresponds to the address appearing on the Notices."

8. Attached to Ms. Hink-Brennan's affirmation is a copy of the power of attorney form on file with the Division when the two notices were issued. On the power of attorney form, petitioner's representative's address was listed as Randy Samuelson CPA, SM CPAS PC, 10 New King Street STE 218, White Plains, NY 10604-1208. Petitioner's address was listed as 240

East 39th Street, Apt. No. 46B, New York, NY 10016, on the power of attorney form appointing Mr. Samuelson as her representative.

9. The affidavit of Estelle Diamond states that she is an Office Assistant 2 (Calculations) in the Audit Division's Income Franchise Audit Management District Office control unit (DOCU) and that she has worked for the Division since October 1997. The affidavit states that as part of her regular duties as an Office Assistant 2 in DOCU, she is "fully familiar with the operations and procedures of the Audit Division in effect on September 7, 2018, including the mailing of Notices of Deficiency" within the United States by certified mail. According to Ms. Diamond, in September of 2018, it was the practice of the Audit Division that certain notices were pulled for manual review and a clerk in the DOCU would manually prepare the CMR (PS Form 3877) in certain circumstances. Notices were pulled for manual review in order to verify a taxpayer's or a taxpayer's representative's mailing address. The notices of deficiency were sent to the DOCU from the Case and Resource Tracking System (CARTS) control unit.

10. Ms. Diamond asserts in her affidavit that:

"After review, a clerk would complete the CMR (PS Form 3877). A certified control number was assigned to the Notices of Deficiency listed on the CMR. The clerk then placed the Notices in envelopes where the certified control number, taxpayer's name and address were revealed through the windowed envelopes and applied certified mail stickers provided by the Department of Taxation and Finance's Mail Processing Center to the envelopes. A copy of the CMR was kept by the Audit Division's Income Franchise Field Audit Management District Office Control Unit in the regular course of business."

11. Ms. Diamond further asserts that "[t]he Notices of Deficiency and the CMR were then delivered by the Audit Division's Income Franchise Field Audit Management District Office Control Unit to the Department of Taxation and Finance's Mail Processing Center."

12. Each page of a CMR is a separate and individual CMR for the notice(s) listed on that page only and each page contains spaces to record the "Total Number Pieces Listed by Sender,"

the “Total Number of Pieces Received at Post Office,” and “Postmaster, Per (Name of Receiving Employee)” for the notice(s) listed on just that page. The CMR for the notices consisted of one page. Ms. Diamond claims that the notices of deficiency “mailed to Deborah Vanderheyden and Randy Samuelson, CPA were the four listings on this mail log.” Ms. Diamond averred in her affidavit that certified control numbers 7104 1002 9730 0284 4752 and 7104 1002 9730 0284 4745 “were used for the Notices of Deficiency mailed to Deborah Vanderheyden” and 7104 1002 9730 0284 4738 and 7104 1002 9730 0284 4721 “were used for the Notices of Deficiency mailed to Randy Samuelson, CPA. The assessments [sic] numbers L-048736814 and L-048736815 are listed in the right-hand column” of the CMR.

13. Attached to Ms. Diamond’s affidavit as exhibit “A” is a copy of the one-page CMR, PS Form 3877, which contains the list of notices allegedly issued on September 7, 2018. In the upper left corner of PS Form 3877, in the sender address space, the name and address of the sender is typed as “STATE OF N.Y. DEPT. OF TAXATION AND FINANCE ALBANY, N.Y. 12227”; the date, “SEP 07 2018,” is stamped in the lower right corner of the sender address space; the certified box is check marked by hand in the column labeled “Indicate Type of Mail:”; and the space in the upper right corner contains the typed notation “DOCU, Building 9, Room 350 Postmark & Date of Receipt e. diamond.” The PS Form 3877 lists in table form for each item sent the article number, the name and address of the addressee, the postage, fee and “Rest Del. Fee Remarks.” Four typed entries appear on the PS Form 3877 as follows:

Line 1: article number 7104 1002 9730 0284 4752, “Deborah Van der Heyden, 240 E. 39th St. Apt 46B, New York, NY 10016-7212,” under Rest Del. Fee Remarks: “L-048736815”;

Line 2: article number 7104 1002 9730 0284 4745, “Deborah Van der Heyden, 240 E. 39th St. Apt 46B, New York, NY 10016-7212,” under Rest Del. Fee Remarks: “L-048736814”;

Line 3: article number 7104 1002 9730 0284 4738, “Randy Samuelson, CPA, SM CPAS PC, 10 New King St., Ste. 118, White Plains, NY 10604-1208 rep for tp,” under Rest Del. Fee Remarks: “L-048736815”; and

Line 4: article number 7104 1002 9730 0284 4721, “Randy Samuelson, CPA, SM CPAS PC, 10 New King St., Ste. 118, White Plains, NY 10604-1208 rep for tp,” under Rest Del. Fee Remarks: “L-048736814.”

Across the bottom of the page next to “Total Number of Pieces Listed by Sender” the number “4” is typed; in the space labeled “Total Number of Pieces Received at Post Office” the handwritten number “4” is entered; and in the space labeled “Postmaster, Per (name of Receiving Employee) illegible initials or signature of the Postal Service’s receiving employee appear. This CMR is date stamped September 7, 2018 by the Albany New York, Colonie Center Branch of the United States Postal Service (USPS). Ms. Diamond states that the Division’s “Mail Processing Center returned a copy of the CMR to the Audit Division’s Income Franchise Field Audit Management District Office Control Unit with a Postmark affixed showing the date of mailing.”

14. According to Ms. Diamond, the procedures followed and described in her affidavit, “were the normal and regular procedures of the Audit Division’s Income Franchise Field Audit Management District Office Control Unit on September 7, 2018.”

15. The affidavit of Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Ramundo has been in this position since 2017 and has been employed there since 2012, and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. Statutory notices that are ready for mailing are received by the mailroom in an “Outgoing Certified Mail” area. Each notice in the batch is preceded by a mailing cover sheet and any accompanying required enclosures. The mailroom also receives a CMR for each batch of notices. A staff member retrieves the notices,

accompanying enclosures and mailing cover sheets and operates a machine that puts each notice, accompanying enclosures and mailing cover sheet into a windowed envelope so that the address and certified control number listed on the mailing cover sheet show through the windows. 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 mail room 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other departmental personnel for storage and retention.

16. In this particular instance, the postal employee affixed a postmark dated September 7, 2018, on the single-page CMR, filled in the number “4” as to the number of articles received at the post office, and initialed or signed the page.

17. Ms. Ramundo’s affidavit explains that the CMR retrieved from the USPS is the Division’s record of receipt by the USPS for the pieces of certified mail listed thereon. Ms. Ramundo states that, based upon her review of that CMR and the affidavit of Estelle Diamond, as well as her knowledge of the procedures of the Mail Processing Center, on September 7, 2018, an employee of the Mail Processing Center delivered two pieces of certified mail addressed to “Vanderheyden-Deborah, 240 E 39th St., Apt. 46B, New York, NY 10016-7212,” and two pieces of certified mail addressed to “Randy Samuleson, CPA, SM CPAS PC, 10 New King Street, Ste

118, White Plains, NY 10604-1208,” to the USPS in Albany, New York, in sealed postpaid windowed envelopes for delivery by certified mail. According to Ms. Ramundo, the name of petitioner and petitioner’s representative and their respective addresses, as set forth on the statutory notices, would have been displayed in the windows of the envelopes.

18. Ms. Ramundo avers that the procedures described in her affidavit

“concerning the mailing of a piece of certified mail are the regular procedures followed by the mail room staff in the ordinary course of business when handling items to be sent by certified mail and such procedures were followed in mailing the pieces of certified mail described herein on September 7, 2018.”

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) (1) (i) 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, 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 order 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 [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]). Upon such a motion, it is not for the court “to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (*see Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]).

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 day 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).

E. Where the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified mail of the subject notice. The Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).”

The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Balan*, Tax Appeals Tribunal, October 27, 2016; *Matter of Western Aries Constr. LLC*, Tax Appeals Tribunal, March 3, 2011). When a notice of deficiency is found to have been properly mailed by the Division to a petitioner’s last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v State Tax Commission*, 97 AD2d 634, 635 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

F. In this case, the Division failed to establish the Income Franchise Field Audit Management DOCU’s standard procedure for issuance of notices of deficiency. First, there is no affidavit from someone who has personal knowledge of the generation of the notices of deficiency, including the anticipated dates of mailing, the assignment of certified control numbers and the generation of the mailing cover sheets and any enclosures. Second, Ms. Diamond’s affidavit merely indicates that the DOCU receives the notices of deficiency from CARTS. It is unclear from Ms. Diamond’s affidavit whether the clerk in DOCU who completes the CMR also assigns a certified control number to each notice of deficiency listed on the CMR.

In addition, the Diamond and Ramundo affidavits are inconsistent as to which unit puts the statutory notices into envelopes. The Diamond affidavit indicates that the clerk in DOCU who prepares the CMR, puts the notices into the envelopes and applies certified mail stickers provided by the Mail Processing Center to the envelopes, whereas Ms. Ramundo's affidavit asserts that a member of her staff operates a machine that puts each statutory notice into an envelope. Given the gaps and inconsistencies in the Division's proof, material and triable issues of fact exist in this matter. Therefore, the Division of Taxation's motion for summary determination must be denied.

G. The Division of Taxation's motion to dismiss the petition or for summary determination is denied and the matter will be scheduled for hearing in due course.

DATED: Albany, New York
July 28, 2022

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE