

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOSE ESPINAL	:	ORDER
	:	DTA NO. 831138
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 Year 2019.	:	

Petitioner, Jose Espinal, 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 year 2019.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), brought a motion, dated October 21, 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 Antonio Jose Ruiz, did not respond to the Division of Taxation's motion by November 20, 2024, which date commenced the 90-day period for issuance of this order.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely request for a 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 2019, dated April 6, 2022, and bearing assessment identification number L-055371495 (notice). The notice was addressed to petitioner, Jose Espinal, and to Karina Valenzuela,¹ at an address in Woodhaven, New York.

2. On August 4, 2022, petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On September 23, 2022, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner and to Ms. Valenzuela. 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 4/6/2022, but the request was not mailed until 8/4/2022, or in excess of 90 days, the request is late filed.”

4. On October 12, 2022, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order.

5. To show proof of proper mailing of the notice, the Division, by a document purporting to be an affirmation of Peter B. Ostwald, Esq., dated October 21, 2024, submitted the following with its motion papers: (i) an affidavit, sworn to on October 17, 2024, of Marianna Denier, a Principal Administrative Analyst and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a copy of pages 1, 397 and 642 of a “CERTIFIED

¹ The petition in this matter is filed in petitioner Jose Espinal's name only.

RECORD FOR - DTF-962-F-E - Not of Def Follow Up DTF-963-E - Notice of Determination” (CMR), postmarked April 6, 2022; (iii) an affidavit of Justin Lombardo, an Associate Administrative Analyst and a manager of the Division’s mail room, sworn to on October 17, 2024; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioner and Ms. Valenzuela; (v) an affidavit, sworn to on October 17, 2024, of Beth Levy, a Legal Assistant 1 in the Division’s Office of Counsel; (vi) a request for delivery information/return receipt (United States Postal Service [USPS] form 3811-A) and the USPS response to such request, dated April 3, 2023; (vii) a copy of the conciliation order issued to petitioner and Ms. Valenzuela on September 23, 2022 and petitioner’s request for a conciliation conference; and (viii) a copy of petitioner’s electronically filed form IT-201, New York State resident income tax return for the year 2021 (2021 return), filed on February 5, 2022, which lists the same Woodhaven, New York, address for petitioner as was listed on the notice.

6. The affidavit of Ms. Denier, who has been in her current position since August of 2022, and has worked as a supervisor in MAPS since October of 2004, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Denier is the Director of MAPS, which is responsible for the receipt and storage of CMRs. She is familiar with the Division’s Case and Resource Tracking System (CARTS) as well as the Division’s past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. According to Ms. Denier, 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, these dates were manually changed on the first and last page of the CMR in the present case to the actual mailing date of “4/6/22.” In addition, as described by Ms. Denier, generally all pages of the CMR are banded together

when the documents are delivered into the possession of the USPS and remain so when returned to the Division. According to Ms. Denier, the pages of the CMR stay banded together unless otherwise ordered and the page numbers are noted in the upper right corner of each page in the format "PAGE: 1," "PAGE: 2," etc.

7. 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 P.O. ADDRESS."

8. The CMR for the batch of notices to be issued on April 6, 2022, including the notice addressed to petitioner herein, allegedly consisted of 642 cut sheet pages. The Division included with its submission only page "1" (the first page), page "397" (the page on which information pertaining to petitioner and Ms. Valenzuela appears) and page "642" (the last page of the CMR). Each of these three pages includes in its upper left corner the date expressed as the year, Julian day of the year and military time of the day, in this case "20220910635." Appearing in the upper right corner of pages 1 and 642 is the handwritten date "4/6/22," reflecting the manual change made by the Division personnel to ensure that the preprinted date on the CMR was changed to conform 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 April 6, 2022. Ms. Denier noted that the 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.

9. Page 397 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 1654 5022 and reference number L 055371495, was mailed to petitioner and Ms. Valenzuela at the Woodhaven, New York, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit “B,” bears this same certified control number and petitioner’s name and address as noted.

10. Appearing on page 642 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS,” and next to which is the preprinted number “8,688.” A USPS postmark, dated April 6, 2022, appears on this page, as well as the initials or signature of a USPS employee.

11. The affidavit of Mr. Lombardo describes the general operations and procedures of the Division’s mail room. Mr. Lombardo has been a manager of the mail room since 2016 and is familiar with the practices of the mail room regarding statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Lombardo 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 first and last pieces of mail are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained 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. According to Mr. Lombardo’s affidavit, a USPS employee

affixed a postmark to each page of the CMR. 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. A review of the April 6, 2022 CMR indicates that a USPS employee did not write the number of pieces received on the CMR nor circle the preprinted number next to the heading “TOTAL PIECES AND AMOUNTS.”

12. According to the Denier and Lombardo affidavits submitted, a copy of the notice was properly mailed to petitioner at his Woodhaven, New York, address on the date indicated as claimed.

13. The affidavit of Ms. Levy details her filing of USPS form 3811-A in this matter. 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 1654 5022 on April 6, 2022 to petitioner at his Woodhaven, New York, address. The USPS response to the request states that the article, bearing the aforementioned certified control number and addressed to petitioner, was delivered on April 4, 2022, at 1:02 p.m., to an address in “Woodhaven NY 11421.” Further down on the USPS response, it states that the same article, was delivered on “04/11/2022 at 13:02:00.” The USPS response shows the scanned image of the recipient’s signature and printed name below the recipient’s signature. In her affidavit, Ms. Levy avers that the subject item was delivered on April 4, 2022.

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, 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 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 (*see* Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice 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 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 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 carried 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. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Denier and Mr. Lombardo, 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 11). Hence, that proof alone fails to establish that the notice was properly mailed on April 6, 2022 and, thus, the period within which to file a protest did not commence as of such date.

G. 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], *rev'd* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

H. Although the Division has attempted to overcome the evidentiary deficiencies with regard to demonstrating the mailing of the notice, the Division has failed to establish delivery of the notice to petitioner. The Division's proof in this matter, via the Levy affidavit and the accompanying USPS form 3811-A and response thereto, attempts to establish that the notice was delivered to petitioner on April 4, 2022, two days before it was mailed by certified mail on April 6, 2022. The Division's delivery information in this matter raises more questions than it answers. Based on these evidentiary shortcomings, the Division has failed to prove the notice was delivered to petitioner on April 6, 2022.

I. In addition, regardless of whether the Division had demonstrated that the notice was mailed, it has failed to establish the notice was mailed to petitioner's last known address as required by Tax Law § 681 (a). Mr. Ostwald's purported affirmation attempts to establish petitioner's last known address by stating that petitioner's 2021 return was the last return filed with the Division by petitioner before the notice was issued. The statements in this document have no evidentiary value as the purported affirmation does not comport with CPLR § 2106. CPLR § 2106, effective January 1, 2024, provides that:

“[t]he statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ____ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)”

The purported affirmation does not contain the affirmation language of CPLR § 2106, nor did Mr. Ostwald submit a notarized affidavit. Although he states that he “affirms under penalties

of perjury,” this is insufficient (*see Matter of Grandsard v Hutchison*, 2024 WL 1957086 [Sup Ct., New York County, 2024], *affirmed* 227 AD3d 491 [1st Dept., 2024]; *R.F. v L.K.*, 82 Misc3d 1221 [A] [Sup Ct, Westchester County 2024]; *Deigo Beekman Mutual Housing Association Housing Development Fund Corp. v Hammond*, 81 Misc3d 1244 [A] [Civ Ct, Bronx County 2024]).

J. The Division of Taxation’s motion for summary determination is hereby denied. A hearing in this matter will be scheduled in due course.

DATED: Albany, New York
February 13, 2025

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE