

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BARBARA L. RONON : DETERMINATION
DTA NO. 818584
for Redetermination of a Deficiency or for Refund of :
Personal Income Taxes under Article 22 of the Tax Law :
and the New York City Administrative Code for the Years :
1996 and 1997.

Petitioner, Barbara L. Ronon, 6139 Carversville Road, P.O. Box 137, Carversville, Pennsylvania 18913, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1996 and 1997.

The Division of Taxation, appearing by Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel), brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or file a petition with the Division of Tax Appeals within 90 days of the issuance of the Notice of Deficiency. The Division of Taxation submitted a Notice of Motion and the affidavit of Jennifer A. Murphy, Esq., with attachments, including the affidavits of Geraldine Mahon, James Baisley and Mary Sauter, in support of its motion. Petitioner did not respond by October 20, 2001, which date began the 90-day period for issuance of this determination.

Upon review of the pleadings, and the affidavits and documents submitted in support of the motion of the Division of Taxation, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation has shown entitlement to a determination granting summary determination in its favor on the ground that the material facts presented show petitioner's request for a conciliation conference with the Bureau of Conciliation and Medication Services was untimely.

FINDINGS OF FACT

1. The Division of Taxation ("Division") purportedly issued to petitioner, Barbara Ronon, a Notice of Deficiency dated September 14, 2000, identified by Assessment ID No. L-018532284-2, bearing certified mail control number P 911 205 579. Such notice asserted additional personal income taxes due for the years 1996 and 1997, as follows:

Tax Period Ended	Tax	Interest	Penalty	Total Amount Due
12-31-96	\$21,412.32	\$6,098.28	0.00	\$27,510.60
12-31-96	20,440.92	5,821.62	0.00	26,262.54
12-31-97	4,271.95	796.80	0.00	5,068.75
12-31-97	15,419.34	2,876.01	0.00	18,295.35
Totals	\$61,544.53	\$15,592.71	\$0.00	\$77,137.24

The notice of deficiency is addressed to petitioner at "6139 Carversville RD, Carversville, PA 18913-9701" and has been made a part of the record herein. The notice of deficiency states that the notice may be challenged by filing a request for a conciliation conference or a petition for a tax appeals hearing by "12/13/00." The notices then state, in part, "[i]f we do not receive a

response to this notice by 12/13/00: This notice will become an assessment subject to collection action.”

2. Petitioner filed a Request for Conciliation Conference dated October 14, 2000, stating that she is a resident of Pennsylvania and has provided the appropriate documentation requested. She further stated that she did not agree with the tax assessed. This request was mailed to the Bureau of Conciliation and Mediation Services (“BCMS”) in an envelope bearing a postage paid date stamp of March 6, 2001.

3. A conciliation order dismissing petitioner’s request, dated March 30, 2001, was issued by BCMS, bearing the following explanation:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on September 14, 2000, but the request was not mailed until March 6, 2001, or in excess of 90 days, the request is late filed.

Petitioner filed a petition with the Division of Tax Appeals in protest of the order on June 23, 2001.

4. In support of its motion for summary determination, the Division submitted the following: its answer to the petition; an affidavit of its representative Jennifer A. Murphy, Esq.; affidavits of Geraldine Mahon, James Baisley and Mary Sauter, employees of the Division; a copy of the notice of deficiency issued to petitioner; a copy of the Certified Record for Non-Presort Mail; United States Postal Service (“USPS”) Form 3811-A; a copy of the first two pages of petitioner’s 1999 Nonresident and Part-Year Resident Income Tax Return; a copy of the petition received by the Division of Tax Appeals on June 25, 2001; a copy of petitioner’s Request for Conciliation Conference dated October 14, 2000; a copy of the envelope in which petitioner’s request for conciliation conference was made, dated March 6, 2001; a copy of a

payment document sent to petitioner; and a copy of the Conciliation Order (CMS No. 185652) dated March 30, 2001 dismissing petitioner's request for a conference as untimely.

5. Geraldine Mahon, has, since 1989, held the position of Principal Clerk of the Case and Resource Tracking System (hereinafter "CARTS") Control Unit of the Division. Her duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing. The general process for issuing and mailing notices of determination and deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Non-Presort Mail," referred to as a Certified Mail Record ("CMR"), and the corresponding statutory notices generated by CARTS. The CMR is printed approximately ten days prior to mailing to allow time for review and processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

6. The affidavit of James Baisley, Chief Mail Processing Clerk of the Mail Processing Center of the Division since 1994, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. Statutory notices ready for mailing are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center. A member of the staff weighs and seals each envelope and places postage and fee amounts on each. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of 30 or fewer pieces of certified mail is checked against the information on the CMR. At some point in this process an employee of the Mail Processing Center manually changes the

date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee affixes a postmark and initials or a signature to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. An employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate the total number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

7. In support of its position that the procedures outlined in Finding of Fact "6" were followed in this case, the Division has also submitted a copy of the CMR. The CMR consists of 18 pages with 11 entries on each page, with the exception of page 18 which bears one entry. It shows a printed date of "09/04/00" on each of the 18 pages. On page one the printed date has a line through it and above it is handwritten the date of "9-14-00." There is a consecutive listing of 188 certified control numbers beginning with P 911 205 407 and ending with P 911 205 594. There is a clear and complete Postal Service postmark of September 14, 2000 on pages 1, 3, 5-9, 11, 13 and 17 of the CMR. The remaining pages bear postmarks that are only partially legible.

A Postal Service postmark without a clear date, though obviously from the month of September 2000, appears on page 16. On the last page next to “TOTAL PIECES AND AMOUNTS LISTED” appears the printed number 188. There is no amount next to “TOTAL PIECES RECEIVED AT POST OFFICE.” There is no signature or initials under the number 188 on the last page, and the number is not circled.

Petitioner’s name is listed on page 16 of the CMR concerning the notice in issue. The certified number listed on the CMR for the notice sent to petitioner is P 911 205 579, which matches the certified number shown at the top of the notice issued to petitioner.¹ The name and address of petitioner is listed next and also corresponds to the information set forth on petitioner’s notice.

8. Mary Sauter is employed as a Legal Assistant 1 in the Division’s Office of Counsel. As part of her duties, she prepares USPS Forms 3811-A, a Request for Delivery Information/Return Receipt After Mailing. This form is available to a mailer to request return receipts with respect to registered, certified, insured and express mail after mailing. The Form 3811-A is sent to the USPS post office where the piece of mail in question was delivered, in this case to the Carversville, Pennsylvania post office. The USPS employee at that post office, in turn, fills in Form 3811-A based upon evidence they have of such delivery.

9. For petitioner, Ms. Sauter prepared Form 3811-A, Request for Return Receipt, for the notice in issue, identified by its certified mail number. Based upon information provided to her by the Office of Counsel, she filled out sections 2B and 2C of the form, indicating the article was addressed to Barbara Ronon, 6139 Carversville Rd., Carversville, PA 18913, and the Article

¹ The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

Number P 911 205 579 and mailing date of 9/14/00, respectively. In Section 2D, as “Requestor,” Ms. Sauter filled in her name and business mailing address. She also placed an “x” in a box midway on the form to indicate “Return receipt WAS NOT paid for at time of mailing,” and placed an “x” next to “certified” in Section 2A, indicating the type of postal service. Ms. Sauter mailed the Form 3811-A from the Colonie Center branch of the USPS on July 19, 2001. In turn, she received confirmation back from the Carversville, Pennsylvania post office, with such delivering post office’s postmark dated July 31, 2001 stamped in a box in the lower right hand corner of the page. On the form, “Barbara Ronon” was handwritten in a box indicating to whom the delivery was made, and the date “09-23-00” was handwritten beneath petitioner’s name in a box designated for the “Delivery Date.”

10. Attached to the Division’s motion papers was a copy of the first two pages of petitioner’s 1999 Nonresident and Part-Year Resident Income Tax Return (“Form IT-203”), dated October 13, 2000. The form indicates petitioner’s address as “6139 Carversville Road, Carversville, PA 18913.”

11. On June 23, 2001, petitioner filed a petition with the Division of Tax Appeals. The petition was hand dated June 20, 2001, signed by petitioner, and bore a Request for Conciliation Conference attached thereto. The Request for Conference stated that petitioner is a resident of Pennsylvania and that she has provided the appropriate documentation requested, protesting the tax claimed due.

12. Petitioner submitted no response to the Division’s motion.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. Tax Law § 681(a) authorizes the Division to issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined. Said section further provides that the notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.”

C. In order to challenge a notice of deficiency, a petition for an administrative hearing must be filed with the Division of Tax Appeals within 90-days after the issuance of the notice (Tax Law § 689[b]). As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Where a taxpayer fails to file a timely petition or a request for a conciliation conference contesting a notice, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). In this case, the earliest document in the record indicating petitioner's disagreement and protest against the Division's notice is the Request for Conciliation Conference postmarked March 6, 2001 (*see*, Findings of Fact "2," "3" and "4"). It was rejected as not having been filed in a timely manner, i.e., within 90 days after the issuance of the statutory notice.

D. Where, as here, a taxpayer files a protest, but the timeliness of the protest is at issue, the Division has the burden of proving proper mailing of the notices (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the USPS (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). The mailing evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular

instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*). Petitioner has raised no claim that the notice at issue was not mailed, that the address to which the notice was sent was incorrect or that the notice was somehow otherwise improperly mailed, or that she did not in fact receive the notice. Nonetheless, the Division remains under a duty to either establish proper mailing of the notice or, alternatively, to establish that the notice was in fact received by the taxpayer and the date of such receipt.

E. In this case, the Division has introduced adequate proof of its standard mailing procedures, including the assignment of certified mail numbers to each of the notices, through the affidavits of Ms. Mahon and Mr. Baisley, Division employees involved in and possessing knowledge of the process of generating, reviewing and mailing notices of deficiency. However, the CMR bears incomplete postmarks on many pages, including the page bearing petitioners' name, no initials or signature of a USPS employee, and no indication of verification that 188 pieces were received by the USPS, either by a handwritten number indicating the number received in the space provided, or by a circling of the number of pieces listed to indicate the same. As a result, the documents and affidavits in the record do not establish that the general mailing procedures described by Ms. Mahon and Mr. Baisley were followed with respect to the notice issued to petitioner. That is, the Division has not established, by such affidavits, the actual mailing of the subject notice or the date of such mailing.

F. While the Division has failed to establish the actual date of mailing, it has nonetheless satisfactorily proven the date on which the notice was received by petitioner. The affidavit of the Division's employee, Mary Sauter, together with the Form 3811-A, establish that the notice of deficiency was received by petitioner, Barbara Ronon, on September 23,

2000. Where the exact date of mailing cannot be proved, but receipt of the notice can be established, the 90-day statutory period for filing a protest begins to run from the date of receipt of the notice (*Matter of Green Valley Liquors*, Tax Appeals Tribunal, November 25, 1992). Since the Division established that the notice was received on September 23, 2000, the 90-day protest period commenced on such date. In turn, the 90-day protest period expired thereafter on December 22, 2000.

G. It is the contention of the Division that it is entitled to summary determination in its favor because petitioner failed to file a timely request for a conciliation conference or petition for a tax appeals hearing. As discussed above, a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party. In fact, petitioner did not respond to the Division's motion for summary determination, and therefore, she is deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). In this regard, petitioner made no allegation that the notices were improperly addressed or mailed, or were not received. Since petitioner offered nothing to contest the facts concerning receipt of the notice, as established by Form 3811-A, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Accordingly, I conclude that there is no material and triable issue of fact presented and the Division is entitled to a determination in its favor. That is, the Division has tendered evidence establishing petitioner's receipt of the notice on September 23, 2000, and there was no protest thereafter within 90 days as required,

thus leaving no jurisdiction to address the merits of the underlying notice of deficiency.

Accordingly, pursuant to 20 NYCRR 3000.9(b)(1), summary determination will be granted.

H. The Division's motion for summary determination is granted and the petition of Barbara L. Ronon is hereby dismissed.²

DATED: Troy, New York
January 17, 2002

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE

² It is noted that petitioner is not entirely without recourse, for she may pay the disputed tax and, within two years from the date of payment, file a claim for refund (Tax Law § 689[c]). If her request for refund is denied, she may then proceed with a timely petition for a hearing contesting the refund denial (*see, Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).