

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
EMILIO AND ZOE RODRIGUEZ : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 821698
of New York State Personal Income Tax Under :
Article 22 of the Tax Law for the Year 2005. :

Petitioners, Emilio and Zoe Rodriguez, 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 2005.

The Division of Taxation by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed October 3, 2007, seeking dismissal of the petition or, in the alternative, summary determination in the above referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with exhibits attached in support of the motion. Petitioners, appearing pro se, had 30 days to respond to the motion but did not do so, and thus the 90-day period for issuance of this determination commenced on November 2, 2007, i.e., the date on which petitioners' time to serve a response to the motion expired. After due consideration of the documents and argument presented, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the issues raised in the petition.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioners, Emilio and Zoe Rodriguez, a Notice of Deficiency (Notice), dated December 11, 2006, bearing Assessment I.D. L-027798921-6, and asserting additional New York State personal income tax due for the year 2005 in the amount of \$13,638.71, plus interest.

2. On April 10, 2007, petitioners filed a request for a conciliation conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) challenging the Notice. By a Conciliation Order Dismissing Request (CMS No. 218752) dated April 27, 2007, BCMS advised petitioners that their Request was denied as untimely since it was mailed more than 90 days after the issuance of the Notice.

3. The Division of Tax Appeals received a petition, signed and hand-dated May 7, 2007, challenging the dismissal of the Request as well as the underlying Notice. The envelope in which the petition was mailed bears the May 8, 2007 postmark of the Hialeah, Florida branch of the United States Postal Service (USPS), and is stamped as received by the Division of Tax Appeals on May 11, 2007.

4. The subject motion seeks dismissal of the petition or summary determination on the basis that a protest against the Notice was not filed by or on behalf of petitioners, as required by statute, within 90 days after the date on which the Notice was issued. Under these circumstances, evidence concerning the date and fact of issuance of the subject Notice is relevant and is set forth hereinafter.

5. Statutory notices, such as the Notice at issue herein, are computer generated by the Division's Case and Resource Tracking System (CARTS). Each notice is predated with the anticipated date of mailing, and each is assigned a certified control number. The certified control

number for each notice appears on a separate one-page mailing cover sheet (Form DTF-997), which also bears, among other things, a bar code and the taxpayer's mailing address. CARTS also generates any enclosures referenced within the body of each notice. Each notice, with the accompanying mailing cover sheet and enclosures is a discrete unit within the batch of notices, with the mailing cover sheet being the first sheet in the unit.

6. Each batch of statutory notices is accompanied by a computer printout entitled "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (Certified Mail Record or CMR). The CMR lists each statutory notice in the order that it is generated in the batch. The certified control numbers appear on the CMR under the heading entitled "CERTIFIED NO.," the assessment numbers appear under the heading entitled "REFERENCE NO.," and the names and addresses of the taxpayers to whom notices are being issued appear under the heading entitled "NAME OF ADDRESSEES, STREET and PO ADDRESS." The upper left corner of the CMR lists the "Run," which signifies the date and time the CMR was produced by year, ordinal day of the year and military time of day, and each page of the CMR is numerically identified, in sequence, in its upper right corner. All pages of a CMR are banded (connected) throughout the process of issuance of the associated statutory notices, including when delivered into the possession of the USPS, and remain banded at all times unless otherwise specifically directed by the Division.

7. Each batch of statutory notices together with its associated CMR is forwarded to the Division's Mail Processing Center. Each statutory notice within the batch is preceded by its mailing cover sheet and is accompanied by any required enclosures. These statutory notices, now ready for mailing by the Division, are received by the Mail Processing Center in an area designated for "Outgoing Certified Mail."

8. The Division's Mail Processing Center follows a series of regular procedures in the ordinary course of delivering outgoing mail to branch offices of the USPS. A member of the Mail Processing Center staff operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet show through the window. The staff member then weighs and seals each envelope and places postage and fee amounts on the envelope. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and also performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the Mail Processing Center staff delivers the sealed, stamped envelopes to a branch of the USPS in the Albany, New York area. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the USPS.

9. The CMR for the batch of statutory notices issued on December 11, 2006, including the Notice pertaining to petitioners, is a 31-page document with each page numerically identified in the upper right corner. The "Run" information lists the ordinal date and time "20063341701" as the date and time that the entire CMR was printed. There are 11 entries on each page of the CMR, except for page 31 which has two entries, for a total of 332 entries. Page 29 of the CMR reflects that a statutory notice numbered L-027798921, the same assessment ID number as appears on the Notice, the Request and the Conciliation Order, was sent to "Rodriguez - Emilio, 1000 West 33 Place, Hialeah, FL 33012-4926, by certified mail using certified control number "7104 1002 9730 1676 1830."¹ A USPS postmark of the Colonie Center, New York branch

¹ The CMR lists only the name of petitioner Emilio Rodriguez in accordance with the Division's standard procedure under which a CMR contains only the name of the "primary" taxpayer associated with a statutory notice. Specifically, where a husband and wife file a joint personal income tax return on which the husband's social security

office of the USPS, zip code 12205, dated December 11, 2006 is stamped on each page of the CMR. The postal employee also wrote his or her initials and the number “332” after the printed statement “TOTAL PIECES RECEIVED AT POST OFFICE” on page 31 of the CMR, in compliance with the Division’s specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the CMR in order to indicate the number of pieces of mail actually received at the post office.

10. The CMR is the Division’s record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division’s Mail Processing Center, each CMR is picked up at the post office by a staff member on the day following its initial delivery and is returned to the originating office which, in this case, is the CARTS Control Unit. Each CMR is then maintained by the CARTS Control Unit in the regular course of its business. In the regular course of business and as a common practice, the Division does not request, demand or retain individual return receipts from certified or registered mail generated by CARTS.

11. The facts set forth above in Findings of Fact “5” through “10” were established through the affidavits of Patricia Finn Sears and James Steven VanDerzee. Ms. Sears is employed as a Tax Processing Specialist II, her duties include supervising the preparation and mailing of statutory notices, including notices of deficiency, and she is fully familiar with the procedures involved therewith. Mr. VanDerzee is employed as a Principal Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center, and his duties include

number is listed in the place designated for the “primary” taxpayer, only the husband’s name will appear on the CMR.

supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

12. The record includes petitioners' Federal and New York State personal income tax returns for 2005. Each of these returns, various schedules attached thereto, as well as the Request and the petition filed in this matter consistently list petitioners' address as 1000 West 33 Place, Hialeah, Florida 33012-4926.

13. Petitioners did not file a response to this motion. Petitioners offered no argument or evidence to support a claim that they filed any protest against the Notice within the requisite period of time for doing so, i.e., 90 days after issuance of such Notice.

CONCLUSIONS OF LAW

A. 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]).

B. Petitioners offered no arguments or evidence to counter the Division's motion regarding the issue of the timeliness of petitioners' protest, and petitioners are therefore deemed to have conceded that no question of fact requiring a hearing on such issue exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984]). Specifically, since petitioners presented no evidence to contest the facts alleged in the Sears and Vanderzee affidavits, those facts may, as a consequence, be deemed admitted (*see Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 [1992]). Upon all of the proof presented,

and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 681(a) authorizes the Commissioner of Taxation 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.” 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]). Alternatively, Tax Law § 170(3-a)(a) allows a taxpayer to file a request for a conciliation conference with the Division’s BCMS following the issuance of a notice of deficiency so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to these provisions, petitioners had 90 days from the issuance of the subject Notice to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals.

D. The Division of Tax Appeals lacks jurisdiction to consider the merits of a challenge filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). In this instance, BCMS dismissed petitioners’ Request as untimely upon the assertion that it was not filed within 90 days after issuance of the Notice. In turn, there is no dispute that petitioners’ subsequent filing of the petition with the Division of Tax Appeals occurred within 90 days after the issuance of the BCMS Conciliation Order, and thus was a timely challenge to such dismissal order, at least insofar as to allow for review herein to determine whether the initial Request was in fact untimely (Tax Law § 170[3-a][e]). However, such petition was filed after the conciliation order, and hence after the filing of petitioners’ Request. Accordingly, and assuming the Notice was

issued as asserted by the Division on December 11, 2006, the petition could not qualify as a timely challenge allowing for jurisdiction to address the merits of the Notice. Thus, the focus must be upon the date of issuance of the Notice, for the same is the triggering event by which the timeliness of any challenge thereto is measured.

E. Where the timeliness of a challenge to a statutory notice is at issue, the Division bears the initial burden of proving proper mailing of such notice (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory 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). When a notice of deficiency is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, that notice is valid and petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

F. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard mailing procedure used by the Division provided by one with knowledge of the relevant procedure; 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*). In this case, the Division has met its burden of establishing proper mailing. Specifically, the Division was required to mail the Notice to petitioners at their last known address (Tax Law § 681[a]; *see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Ms. Sears and Mr. VanDerzee, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) statutory notices, the Division has offered adequate proof to

establish the fact that the Notice in issue was actually mailed to petitioners at their last known address by certified mail, specifically on December 11, 2006, the date appearing on the Notice and on the CMR. The Sears and VanDerzee affidavits describe the various stages of producing and mailing statutory notices, and attest to the authenticity and accuracy of the Notice and of the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Sears and VanDerzee affidavits were followed with respect to the Notice issued to petitioners. In short, the Division has established that it mailed the Notice to petitioners by certified mail on December 11, 2006 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

G. In order to be considered timely, any protest (i.e., a conference request or a petition) against the Notice had to have been filed within 90 days thereafter, that is, by March 11, 2007. Unfortunately, the Request in this matter was not filed until it was mailed on April 10, 2007, and the petition was not filed thereafter until it was mailed on May 8, 2007, and thus neither was a timely challenge allowing for review of the merits of the Notice. Petitioners did not respond to the subject motion or otherwise provide any documents or other evidence to establish that any other protest against the Notice was filed within the requisite 90-day time period. Since a protest was not timely filed as required by statute, there is no jurisdiction to proceed with this matter (Tax Law § 170 [3-a][e]; § 689[b]; 20 NYCRR 4000.5[c][4]).²

² Petitioners may not be entirely without recourse in this matter. That is, petitioners may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 689[c]). Upon its denial, petitioners may then proceed with a timely petition for a hearing to contest the refund denial.

H. The Division of Taxation's motion for Summary Determination dated October 3, 2007 is granted and the petition of Emilio and Zoe Rodriguez is hereby dismissed.

DATED: Troy, New York
January 31, 2008

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE