

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NELSON PEREZ	:	DECISION
	:	DTA NO. 825930
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 2009 and 2010.	:	

Petitioner, Nelson Perez, filed an exception to the determination of the Administrative Law Judge issued on October 23, 2014. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner did not file a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner did not file a reply brief. Oral argument, at petitioner's request, was heard on May 14, 2015 in Albany, New York, which date commenced the six-month period for the issuance of this decision.

After reviewing the entire record in this matter the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of deficiency for the years 2009 and 2010.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 4 to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. Petitioner, Nelson Perez, filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division). The request was filed in protest of notices of deficiency dated February 15, 2013, bearing assessment numbers L-038859674 and L-038859658, asserting penalty due in the amount of \$248,000.00 for the year 2009 and \$229,000.00 for the year 2010, respectively. The envelope in which the request was filed bears a United States Postal Service (USPS) postmark dated August 20, 2013 and is date stamped as received by BCMS on August 22, 2013.

2. On September 6, 2013, BCMS issued a conciliation order dismissing request (order) to petitioner. Referencing notice numbers L-038859674 and L-038859658, the order determined that petitioner's protest was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notices were issued on February 15, 2013, but the request was not mailed until August 20, 2013, or in excess of 90 days, the request is late filed.

3. Petitioner challenged this dismissal by filing a petition with the Division of Tax Appeals. The petition is dated as signed by petitioner on October 24, 2013, and the envelope in which the petition was mailed bears a USPS postmark dated October 24, 2013. The envelope and petition in turn are date stamped as received by the Division of Tax Appeals on October 28, 2013. There is no dispute that the petition was filed within 90 days after the September 6, 2013 issuance of the order and constitutes a timely challenge thereto.

4. The Division brought a motion dated August 6, 2014 for dismissal of the petition or, in the alternative, granting summary determination in its favor on the ground that petitioner's request for conciliation conference was untimely filed. In support of its motion and to prove the issuance of the notices of deficiency under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated August 6, 2014, of Peter B. Ostwald, Esq.; (ii) an affidavit, dated August 5, 2014, of Nicholas Farone, Taxpayer Services Specialist 2 and Supervisor of the Electronic Communication unit of the Division; (iii) a copy of the Division's Online Services (OLS) Account Terms and Conditions for Individuals; (iv) a screenshot of petitioner's OLS account summary to "Manage Email;" (v) a screenshot of petitioner's OLS "View Online Services Account;" (vi) correspondence dated November 5, 2010 from the Division to petitioner confirming petitioner's creation of an OLS account; (vi) a screenshot of petitioner's OLS account "OTC tpid results" user ID history; (vii) the subject notices of deficiency dated February 15, 2013; (viii) a copy of petitioner's "Event Management Transaction Log" within the e-Manages Process for an Integrated Revenue Enterprise (e-MPIRE); (ix) a screenshot of petitioner's OLS account summary; (x) the Division's printout of "Delivery Details by Template ID;" and (xi) the Division's printout of electronic message delivery status.

5. The affidavit of Nicholas Farone sets forth the Division's general practice and procedure for the processing and delivery of taxpayer specific electronic communications including electronic statutory notices. Mr. Farone has held the position of Taxpayer Services Specialist 2 and supervisor of the Division's Electronic Communication Unit since July 2012. As part of Mr. Farone's duties, he supervises the processing and delivery of taxpayer specific

electronic communications and the monitoring of reports to determine the electronic status of email alerts referring to statutory notices. Taxpayers may open an OLS account and request electronic communication of their tax-related documents from the Division. The OLS system allows a taxpayer to authorize the Division to send an email alert to his or her chosen external email address advising the taxpayer to check his or her OLS account for any message in the Message Center section. The Message Center is a secure section within OLS where a taxpayer can view electronic correspondence from the Division. Taxpayers can choose which email service they would like to receive through OLS by clicking on check boxes in the Manage Email section of their OLS account, with options including emails for bills and related notices and other notifications. The Division acknowledges when an online account has been created by sending correspondence to the taxpayer confirming the taxpayer's creation of an OLS account.

6. The Division's OLS Account Terms and Conditions for Individuals provides that in consideration of a taxpayer's use of an OLS account, the taxpayer agrees that by providing electronic communication authorization, the taxpayer agrees to receive the indicated tax-related documents and communications electronically and agrees that the Division will not use physical (postal) mail to provide the communications. The Division instead sends an email that alerts the taxpayer to sign on to his or her OLS account to access the information. The taxpayer further agrees to provide an updated email address and periodically check for new account activity.

7. The Division's Advanced Function Presentation (AFP) system initiates billing printouts. The AFP system uses the Division's DZ4010Z Retrieve View Data (RVD) program. The RVD program verifies email eligibility based on the Internal Taxpayer ID, tax type and the billing form. The RVD program uses Internal Taxpayer ID, User ID, email address, and email

eligibility to determine authorization to receive electronic communications through OLS.

8. When a statutory notice is scheduled to be issued to a taxpayer, the AFP system generates a mail file of the electronic statutory notices. The AFP system stores the file of the electronic statutory notices and the verified email address from the RVD program until the issuing date is reached. On the issuing date, email alerts are sent to the external email address associated with the recipient's OLS account and the message is displayed in the OLS Message Center. The email alerts are delivered through a third-party vendor, GOVDelivery. GOVDelivery provides the Division delivery status information that the Division stores and reports advising of every email sent on behalf of the Division, with a status of "D" for delivered or "U" for undelivered.

9. The statutory notice is stored in a message file until the issuing date. On the issuing date, the notice is posted on a secure database for viewing by the taxpayer in his or her Message Center upon logging in to the OLS. The statutory notice is viewable in the Message Center section of the taxpayer's OLS account.

10. Petitioner opened an OLS account with the Division on November 2, 2010 under his name, taxpayer identification number, and user identification number, using a Logon ID nickname of "nperez28" and an email address of ***newyork@***.com.¹ On December 2, 2011, petitioner updated his OLS account with a new email address of ***taxsolution@***.com.² Petitioner's OLS account for this user identification number and email address remains active to date. Petitioner also previously opened an OLS account with

¹ The email address is partially redacted herein for privacy purposes.

² The email address is partially redacted herein for privacy purposes.

the Division under his name, taxpayer identification number, and a different user identification number, using a Logon ID nickname of “nperezny.” Petitioner’s OLS account for “nperezny” was closed on December 17, 2009 and is inactive.

11. In the Manage Email section of petitioner’s OLS account, petitioner indicated “yes” under “receive emails” in response to “Bills and Related Notices,” “Get emails about your Bills” and “Other Notifications,” and “Get emails about refunds, filings, payments, account adjustments, etc.”

12. On November 5, 2010, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account on November 2, 2010 under the username of “nperez28.”

13. In the present case, on February 15, 2013, the Division posted two messages stating, “You have a new liability” to petitioner’s OLS account and sent corresponding email alerts to petitioner’s email address of ***taxsolution@***.com. The Division posted notices of deficiency numbers L-038859674 and L-038859658 to petitioner’s OLS account on February 15, 2013, which were stored in his OLS Message Center.

14. The Division maintains delivery status information of email alerts in the Delivery Details by Template ID (Delivery Details). The Delivery Details relevant to the present case indicate that the Division sent email alerts to petitioner at his email address of ***taxsolution@***.com on February 15, 2013, with APL Tracking ID MG021520133581931 and APL Tracking ID MG021520133581917. The Delivery Details indicate the status of the emails sent to petitioner on February 15, 2013 as “D” (delivered).

15. Attached to Mr. Farone’s affidavit is a printout of the status of messages sent to

petitioner's OLS account and email address. As explained by Mr. Farone, the status information reports a status of "R" for read and "U" for unread. The status printout relevant to the February 15, 2013 messages sent to petitioner indicates that messages APL Tracking ID MG021520133581931 and APL Tracking ID MG021520133581917 delivered to petitioner's OLS account and email address had a status of "U" or unread on February 15, 2013. The status printout for the February 15, 2013 messages sent to petitioner indicates that messages APL Tracking ID MG021520133581931 and APL Tracking ID MG021520133581917 delivered to petitioner's OLS account and email address had a status of "R" or read on June 7, 2013.

16. According to the Farone affidavit, the subject notices of deficiency were posted to petitioner's OLS account on February 15, 2013.

17. The facts set forth in Findings of Fact 5 through 16 were, as noted, established through the affidavit of Mr. Farone, as well as the documentary evidence presented by the Division. Mr. Farone's affidavit avers that he is knowledgeable of the general practice and procedure for the delivery of electronic statutory notices and that the procedures followed and described in his affidavit were the normal and regular procedures of the Division's Electronic Communication Unit on February 15, 2013.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first determined that, as the petition in this matter was timely filed, the proper motion by which to consider the timeliness of petitioner's request for conciliation conference was a motion for summary determination. The Administrative Law Judge then addressed the standard of review on a motion for summary determination. Next, the Administrative Law Judge reviewed statutory and case law relevant to the timeliness of protests

of statutory notices. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the notice. The Administrative Law Judge found that, in order to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case. While proper issuance of a statutory notice generally means that the Division must mail the notice to the taxpayer's last known address using certified or registered mail, the Administrative Law Judge noted that, under certain circumstances, the Division may furnish statutory notices to taxpayers by use of electronic means of communication. The Administrative Law Judge determined that the Division was authorized to furnish electronic notices to petitioner. She also determined that the Division established that it had a standard procedure for the furnishing of statutory notices by electronic means and that such procedure was followed with respect to the notices at issue. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination and denied petitioner's petition.

ARGUMENTS ON EXCEPTION

Petitioner makes a general argument against the use of email to deliver important documents, but offers no challenge to the Division's proof that it electronically furnished him with copies of the subject notices of deficiency. Petitioner also argues that the penalties assessed against him are unfair and unjust.

The Division asserts that the Administrative Law Judge correctly determined that it was authorized to furnish petitioner with the subject notices of deficiency by means of electronic communication; that it established that it had a standard procedure for the furnishing of such notice by means of electronic communication; and that such procedure was followed with

respect to the notices at issue. The Division thus asserts that the Administrative Law Judge's determination should be sustained.

OPINION

We affirm the determination of the Administrative Law judge.

As noted, the Division filed a motion for dismissal of the petition or, in the alternative, for summary determination and the Administrative Law Judge determined that the question of the timeliness of petitioner's request for conciliation conference was properly the subject of a motion for summary determination. Pursuant to the Rules of Practice and Procedure, such a motion is properly 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]).”

We note, as did the Administrative Law Judge, that petitioner did not respond to the Division's motion for summary determination and thus has presented no evidence to contest the facts as alleged in the affidavits submitted therewith. Accordingly, such facts may be deemed admitted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

With certain exceptions not relevant herein, there is a 90-day statutory time limit for filing a request for conciliation conference following the issuance of a notice of deficiency (Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.5 [c] [4]). Pursuant to Tax Law § 170 (3-a) (e) the conciliation order in this case would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition where the taxpayer files a request for conciliation conference beyond the 90-day time limit (*see e.g., Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *Matter of Sak*

Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

As the Administrative Law Judge correctly noted, it is well established that, where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of issuance of the relevant statutory notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011).

The foregoing evidentiary standards are premised on statutes requiring that a notice of deficiency or determination be mailed in order to be properly issued (*e.g.* Tax Law § 681 [a]). In the present matter, however, the subject notices were issued electronically. The furnishing of notices by such means of communication is authorized by Tax Law § 35, which provides:

“Notwithstanding any other provision of New York state law, where the department has obtained authorization of an online services account holder, in such form as may be prescribed by the commissioner, the department may use electronic means of communication to furnish any document it is required to mail per law or regulation. If the department furnishes such document in accordance with this section, department records of such transaction shall constitute appropriate and sufficient proof of delivery thereof and be admissible in any action or proceeding.”³

Although the means by which notices of deficiency of personal income tax are issued differs under Tax Law §§ 681 (a) and 35, we find that the Division's burden to show that it had a standard procedure for issuing notices and that such procedure was followed in a particular instance remains. More specifically, where a statutory notice is issued under Tax Law § 35, we

³ There are two sections 35 of the Tax Law. The relevant section herein is titled “Use of electronic means of communication.” The other section 35 contains provisions for the economic transformation and facility redevelopment program tax credit and is not relevant here.

agree with the Administrative Law Judge that the Division must establish its standard procedures for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders. The Division must also show that such procedures were followed in the particular instance.

Turning to the specific facts herein, we agree with the Administrative Law Judge that the Division has proven, through the affidavit of Nicholas Farone and the documentary evidence attached thereto, its standard procedure for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders.

We also agree with the Administrative Law Judge that the Division has established through the affidavit and documentary evidence that the standard procedures were followed in this particular instance.

Specifically, the evidence shows that petitioner established an OLS account on November 2, 2010 under his name and identification number, using a Logon ID nickname of “nperez28” and an email address of ***newyork@***.com. On November 5, 2010, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account under the username of “nperez28.” The evidence further shows that petitioner updated his email address with the Division on December 2, 2011, indicating a new email address ***taxsolution@***.com.

The evidence also establishes that petitioner authorized the Division to send notices electronically by checking “yes” in the box within his OLS account, Manage Email section, thereby indicating his agreement to receive email regarding bills, notices and other notifications. Pursuant to the Division’s OLS account terms and conditions for individuals, by providing such

electronic communication authorization, the taxpayer agrees to receive the indicated documents and communications electronically and agrees that the Division will not use physical (postal) mail to provide these communications.

We note that petitioner's argument against the use of electronic communications for the issuance of notices of deficiency must fail, given his agreement to the use of such means of communication to furnish him with copies of such notices.

The Division has also offered proof sufficient to establish that the statutory notices were furnished to petitioner by means of electronic communication on February 15, 2013 to his OLS account with alerts sent to his last known email address. Specifically, the Division's records show that two email alerts were sent to petitioner's updated email address and the two subject notices of deficiency were posted to petitioner's OLS account and stored in his OLS Message Center on February 15, 2013. The email alerts sent to petitioner's email address advised him that "you have a new liability due," alerting him to view the statutory notices posted in the Message Center of his OLS account. The Division's records further show the delivery status of the February 15, 2013 emails as "D" (delivered). The Division's records show that the messages sent by the Division to petitioner on February 15, 2013 had a status of "U" (unread) on February 15, 2013, and a status of "R" (read) on June 7, 2013.

Based on the foregoing, we conclude, as did the Administrative Law Judge, that the Division has presented sufficient evidence to establish that it furnished the subject notices of deficiency on February 15, 2013 by use of electronic means of communication pursuant to Tax Law § 35, and that the records presented constitute appropriate and sufficient proof of delivery thereof.

Having determined that the Division properly furnished the notices by means of electronic communication on February 15, 2013 pursuant to Tax Law § 35, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 681 [b]).

Petitioner's request for conciliation conference was filed on August 20, 2013. This date falls well after the 90-day period of limitations for the filing of such a request. Consequently, the request was untimely (*see* Tax Law §§ 681 [b]; 170 [3-a] [b]) and, therefore, was properly dismissed by the September 6, 2013 order issued by BCMS. As noted previously, under such circumstances, the Division of Tax Appeals has no jurisdiction to consider the merits of petitioner's petition (*Matter of Voelker, Matter of Sak Smoke Shop*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Nelson Perez is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Nelson Perez is denied.

DATED: Albany, New York
November 12, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner