

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JOANNE FELICIANO : DECISION
 : DTA NO. 827649
for Redetermination of Deficiencies or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Years 2008 and 2009. :

Petitioner, Joanne Feliciano, filed an exception to the determination of the Administrative Law Judge issued on November 17, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Linda Jordan, Esq., of counsel).

Petitioner filed a letter brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on March 9, 2017, the date that petitioner's reply brief was due.

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

ISSUE

Whether the Division of Tax Appeals properly dismissed petitioner's protest of the notice of deficiency as untimely.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except finding of fact 5, which we have modified for clarity. The findings of fact and the modified finding are set forth below.

1. The Division of Taxation (Division) issued a notice of deficiency, number L-040652088-2, dated May 23, 2014, to petitioner, Joanne Feliciano, asserting additional personal income tax due in the sum of \$3,939.00, plus penalty and interest, for the year 2008. The notice bore the address of “PO Box 1285, New York, NY 10163-1285.”

2. The Division issued a notice of deficiency, number L-041789035-1, dated October 7, 2014, to petitioner asserting additional personal income tax due in the sum of \$4,393.00, plus penalty and interest, for the year 2009. The notice bore a West 91st Street, New York, New York, address.

3. Petitioner filed a petition with the Division of Tax Appeals on May 23, 2016, protesting the notices of deficiency (numbers L-040652088-2 and L-041789035-1). The petition maintained that petitioner resided and filed taxes in New Jersey during 2008 and 2009. She further explained the existence and use of a post office box in New York as her mailing address from 2000 until 2012.

4. On June 27, 2016, the petition intake unit of the Division of Tax Appeals issued a notice of intent to dismiss petition with respect to the aforementioned petition. The notice stated, in pertinent part, as follows:

“You are hereby notified of our intent to dismiss the petition in the above referenced matter.

The protest of a notice of deficiency issued under Article 22 of the Tax Law must be filed within ninety (90) days following the issuance of the notice (*see* Tax Law § 689[b]).

Here, the Notices of Deficiency, Assessment Nos. L-040652088-2 and L-041789035-1, appear to have been issued on May 23, 2014 and October 7, 2014, respectively. However, the petition was not filed with the Division of Tax Appeals until May 23, 2016, or seven hundred thirty-one (731) and five hundred and ninety-four (594), respectively, days later. As such, the Division of Tax Appeals is without jurisdiction to consider the merits of the petition.

Pursuant to 20 NYCRR 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, a party shall have thirty (30) days from the date of this Notice to submit written comments on the proposed dismissal.”

5. In response to the issuance of the notice of intent to dismiss petition, the Division submitted the affidavits of the following Division employees: (i) Linda Jordan, Esq., an attorney in the Division’s Office of Counsel, dated August 17, 2016; (ii) Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Management Analysis and Project Services Bureau (MAPS) of the Division who, in her position since 2005, is familiar with the past and present office procedures as they relate to generating statutory notices, dated August 15, 2016; (iii) Bruce Peltier, a supervisor in the Division’s mail room since March 1999, dated August 16, 2016; and (iv) Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel since 2005, who is responsible for the preparation of United States Postal Service (USPS) form 3811-A, a form used by the mailer to request return receipts after the mailing of documents, dated August 16, 2016.

In addition, the Division submitted various pertinent documents including the following: (i) a copy of the petition filed with the Division of Tax Appeals on May 23, 2016; (ii) a response from the Division to petitioner’s correspondence called “Explanation and Instructions,” dated October 23, 2015; (iii) a copy of the notice of deficiency, dated May 23, 2014, with a mailing cover sheet; (iv) a copy of the notice of deficiency, dated October 7, 2014, with a mailing cover sheet; (v) a copy of the “CERTIFIED RECORD FOR PRESORT MAIL” (CMR) containing a list of the statutory notices mailed by the Division on May 23, 2014; (vi) a copy of pages 1, 467, and 1,572 from the CMR containing a list of the statutory notices mailed by the Division on October 7, 2014; (vii) a request for delivery information/return receipt after mailing (USPS form 3811-A) concerning an article mailed to petitioner on October 7, 2014, and the response by Ms. Corina from the USPS confirming such delivery on October 9, 2014, to a West 91st Street, New

York, New York, address; and (viii) copies of petitioner's personal income tax returns for tax years 2010 and 2011, dated December 5, 2011 and July 25, 2014, respectively.¹

6. In response to the issuance of the notice of intent to dismiss petition, petitioner sent the Division a letter dated July 17, 2016, indicating that for the years assessed by the Division, petitioner was residing in New Jersey and filed taxes in New Jersey. In addition, petitioner explained that she had continually maintained a post office box as her mailing address from 2000 until 2012, regardless of her actual residence. Lastly, she requested a hearing.

In petitioner's second response dated September 7, 2016, she reiterated the above facts and further added that one of the notices in issue was mailed to her post office box in May 2014, two years after she closed it, and again requested a hearing.

7. The affidavits of Mary Ellen Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from the Case and Resource Tracking System (CARTS) the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and assigned a certified control number. CARTS also generates any enclosures referenced within the body of each notice. Each batch of statutory notices is accompanied by a CMR, listing each statutory notice being mailed, with a certified control number assigned to each, and specified under the heading entitled "CERTIFIED NO." 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."

Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing, allowing for a manual review of the notices prior to mailing.

¹ The Division's submission also included documents unrelated to the matter at issue. As such documents are irrelevant, we do not list them here.

Following the Division's general practice, this date was manually changed on the first and last pages of each CMR in the present case to reflect the actual mailing dates of each of the two CMRs pertinent to this matter: "5/23/14" and "10/7/14."

8. According to the Nagengast affidavit relating to the CMR dated May 23, 2014, the CMR consisted of 18 cut sheet pages, 17 of which bore 11 entries each, that were banded together when the documents were delivered into possession of the USPS and remained so when returned to her office unless it was requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page. Ms. Nagengast notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, circled the number 187 on page 18 and initialed the same page.

Page four of the CMR indicates that one statutory notice with certified control number 7104 1002 9730 0238 3374 and assessment ID number L-040652088 was mailed to petitioner at the same post office box number in New York, New York, as appears on the notice of deficiency dated May 23, 2014. The mailing cover sheet that accompanied the notice of deficiency also bears the same certified control number and address as those that appear on the corresponding CMR.

Ms. Nagengast attested that the notice of deficiency presented into evidence, No. L-040652088, and its mailing cover sheet, bearing certified control number 7104 1002 9730 0238 3374, issued to petitioner, is a true and accurate copy of the notice issued to petitioner on May 23, 2014, and that the assessment identification number and the certified control number

that appear on the CMR for May 23, 2014 are the same as those located on the notice of deficiency and mailing cover sheet issued to petitioner at her post office box New York, New York address on that date.

9. According to the Nagengast affidavit relating to the CMR dated October 7, 2014, the CMR consisted of 1,572 cut sheet pages, 1,571 of which bore 11 entries and the last page listing three entries, that were banded together when the documents were delivered into possession of the USPS and remain so when returned to her office unless it is requested that the pages be disconnected. According to Ms. Nagengast, the page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page. However, included in the record are only copies of pages 1,467, and 1,572 of the CMR prepared by the Division for the statutory notices mailed on October 7, 2014. Ms. Nagengast notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, wrote the number 17,284 on page 1,572 and initialed the same page.

Page 467 of the CMR indicates that a statutory notice with certified control number 7104 1002 9730 0289 5228 and assessment ID number L-041789035 was mailed to petitioner at the same West 91st Street, New York, New York, address as that listed on the notice of deficiency dated October 7, 2014.

Ms. Nagengast attested that the notice of deficiency presented into evidence, No. L-041789035, and its mailing cover sheet, bearing certified control number 7104 1002 9730 0289 5228, issued to petitioner, is a true and accurate copy of the notice issued to petitioner on

October 7, 2014, and that the assessment identification number and the certified control number that appear on the CMR for October 7, 2014 are the same as those located on the notice of deficiency and mailing cover sheet issued to petitioner at her West 91st Street, New York, New York address on that date.

10. The affidavits of Bruce Peltier, a mail room supervisor, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." A staff member operates a machine that puts each notice and the associated documents into a windowed envelope so the addresses and certified numbers from the mailing cover sheet show through the windows. That staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR 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 signature or initials on the CMR, indicating receipt by the post office. The mail room further requests that the USPS employee either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR.

11. According to the Peltier affidavit relating to the CMR dated May 23, 2014, the USPS employee initialed page 18 of the CMR, affixed a postmark dated May 23, 2014 to each page of the CMR, and circled the number of pieces of certified mail received, indicating that a total of 187 pieces of mail listed were delivered to the USPS. Based upon his review, Mr. Peltier attested

to the fact that petitioner's name and address as set forth on the statutory notice would have been displayed in the window of the envelope. According to the Peltier affidavit, the procedures described in his affidavit 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 that such procedures were followed in mailing the pieces of certified mail described herein on May 23, 2014, as claimed.

12. According to the Peltier affidavit relating to the CMR dated October 7, 2014, the USPS employee initialed page 1,572 of the CMR, affixed a postmark to each page of the CMR and wrote the number "17,284," indicating that a total of 17,284 pieces of mail listed on the CMR were delivered to the USPS on that date. Based upon his review, Mr. Peltier attested to the fact that petitioner's name and address as set forth on the statutory notice would have been displayed in the window of the envelope. According to the Peltier affidavit, the procedures described in his affidavit 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 that such procedures were followed in mailing the pieces of certified mail described herein on October 7, 2014, as claimed.

13. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the notice of deficiency dated October 7, 2014. Specifically, using PS form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number "71041002973002895228," and this request is attached to the Corina affidavit. The USPS response to this request, also attached to the Corina affidavit, indicates that the article bearing this certified control number and addressed to petitioner's West 91st Street, New York,

New York, address was delivered on October 9, 2014.

14. As previously described, also attached to the affidavit supporting the motion was petitioner's 2010 form IT-201, New York resident income tax return dated December 5, 2011, which lists the same post office box address for petitioner as that listed on the notice of deficiency dated May 23, 2014. According to the Division's records, this income tax return, was the last return filed with the Division by petitioner before the notice of deficiency dated May 23, 2014, was issued.

In addition, also attached to the affidavit supporting the motion was petitioner's 2011 form IT-201, New York resident income tax return dated July 25, 2014, which lists the same West 91st Street, New York, New York, address for petitioner as that listed on the notice of deficiency dated October 7, 2014. According to the Division's records, this income tax return was the last return filed with the Division by petitioner before the notice of deficiency dated October 7, 2014, was issued.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the statutes and case law relevant to the timeliness of petitions and described the 90-day statutory period in which a taxpayer may file a petition to protest a notice of deficiency. In the absence of a timely protest, the Administrative Law Judge noted that the underlying assessments would be binding upon petitioner as the Division of Tax Appeals would lack jurisdiction to consider the merits of the petition. According to the Administrative Law Judge, under the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules), the Division of Tax Appeals may issue a notice of intent to dismiss a petition if it appeared that a petition was not timely filed.

The Administrative Law Judge noted that it appeared upon receipt of the petition that it was filed late, resulting in the issuance of the notice of intent to dismiss the same. She stated that the determination in this matter would address the issuance of the notice to dismiss the petition. The Administrative Law Judge reasoned that because a determination issued following a notice of intent to dismiss petition would have the same impact as a determination following a party's motion to dismiss, it would be appropriate to apply the same standard of review. She noted that a motion to dismiss may be treated as a motion for summary determination which is subject to the same provisions as a motion for summary judgment under our Rules. The Administrative Law Judge stated further that a motion for summary judgment shall be granted if, upon the proof submitted by the parties, there is no material and triable issue of fact presented. The Administrative Law Judge noted that where timeliness of the petition is at issue, the Division bears the burden of establishing that it properly issued the notices of deficiency by demonstrating the date and fact of mailing of the statutory notice to the taxpayer's last known address. 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.

The Administrative Law Judge concluded that the Division met its burden in demonstrating its standard mailing procedures through the affidavits of its employees responsible for the issuance of statutory notices; however, the Division only proved that it followed such standard mailing procedure with respect to the mailing of the notice of deficiency issued on May 23, 2014. With regard to the notice issued October 7, 2014, in the absence of proof of the fact of mailing, the Administrative Law Judge stated that the 90-day period for protesting a statutory notice commences with the date of actual receipt. The Administrative Law Judge concluded that

the Division had met its burden of demonstrating actual receipt of the notice of deficiency issued on October 7, 2014 by submission of information from the USPS showing that an article of mail bearing the same certified control number was delivered to the taxpayer's last known address on October 9, 2014.

The Administrative Law Judge determined that the petition here at issue was untimely as it was not filed with the Division of Tax Appeals until May 23, 2016, in excess of the 90-day periods following May 23, 2014 and October 9, 2014, respectively. As such, the Administrative Law Judge concluded that the Division of Tax Appeals did not have jurisdiction to consider the merits of petitioner's protest. Thus, the Administrative Law Judge dismissed the petition.

SUMMARY ARGUMENTS ON EXCEPTION

Petitioner argues that the statutory notices here at issue were mailed to a post office box that she had not used since October 2012, thus implying that the notices were not mailed to her last known address. She claims that she resided in New Jersey during 2008 and 2009 and filed personal income taxes with New Jersey for those years and communicated as much to the Division in 2014. Petitioner argues that she is not liable for the tax assessed by the Division for these reasons.

The Division argues that the Administrative Law Judge's determination was correct and should be affirmed. The Division maintains that petitioner's protest of the notices of deficiency here at issue was untimely filed and thus the substantive merits of the protest cannot be reached due to the Division of Tax Appeals' lack of jurisdiction over the petition.

OPINION

The determination in this matter was issued following the Division of Tax Appeals' issuance to petitioner of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of

our Rules (20 NYCRR 3000.9 [a] [4]). The notice of intent to dismiss petition stated that the protest of a notice of deficiency must be filed within 90 days following the issuance of the notice (*see* Tax Law § 689 [b]). We agree with the Administrative Law Judge that the standard of review for a notice of intent to dismiss petition is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). Under our Rules, 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]).

As we previously noted in *Matter of United Water New York, Inc.*:

“Inasmuch 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 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably 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 [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’ (*Daliendo v Johnson*, 147 AD2d 312 [1989]).” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

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 mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal,

October 20, 2011; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). 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.*, Tax Appeals Tribunal, March 3, 2011).

Under Tax Law § 681, the Division shall mail a notice of deficiency by certified or registered mail to the taxpayer at his or her last known address (Tax Law § 681 [a]). Generally, the Division is entitled to rely on the address listed on the last return filed with the Division as the last known address, unless the taxpayer has clearly informed the Division of a change of address (*Matter of Brager*, Tax Appeals Tribunal, March 23, 1996; *see also Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017; *Matter of Toomer*, Tax Appeals Tribunal, August 14, 2003).

We agree with the Administrative Law Judge that the Division has met its burden of showing its standard mailing procedure through the affidavits of Ms. Nagengast and Mr. Peltier. With regard to the notice of deficiency issued on May 23, 2014, we agree with the Administrative Law Judge that the Division met its burden of showing that its standard mailing procedure was followed in that the CMR was properly completed. This fact, together with proof of the Division's standard mailing procedure, constituted highly probative evidence of both the date and fact of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). We note that the notice of deficiency dated May 23, 2014 was sent to petitioner at the address provided on her 2010 personal income tax return, filed on or about December 5, 2011, which was petitioner's last return filed before issuance of this statutory notice. A petition must be timely

filed in order for the Division of Tax Appeals to have jurisdiction to consider the 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). Petitioner claims that with regard to the notice of deficiency dated May 23, 2014, the notice was sent to a mailing address she had not used for two years, thus implying that the notice was not sent to her last known address as required under the statute (*see* Tax Law § 681 [a]). However, our prior decisions have held that the Division may rely on the address given in the last tax return filed (*see Matter of Garitta, Matter of Toomer*). In the absence of anything more than an unsworn statement, and without further documentary support of a notification of a change in address to the Division, petitioner has not shown by clear and convincing evidence that the notice dated May 23, 2014 was not mailed to her at her last known address as of May 23, 2014 (*see* Tax Law § 689 [e]). As petitioner has not provided any proof of her clearly informing the Division of a change of address, we conclude that the notice of deficiency dated May 23, 2014 was mailed to petitioner on that date by certified mail at her last known address.

The submission of an incomplete CMR for the notice of deficiency issued on October 7, 2014, however, precludes the same conclusion with respect to that notice.

However, we agree with the Administrative Law Judge that the Division may overcome an inadequacy in evidence of the mailing of a statutory notice by providing evidence of actual receipt by the taxpayer. In such a case, the 90-day period in which to protest the statutory notice commences with receipt of the same (*Matter of Riehm v Tax Appeals Trib. of State of N.Y. v Tax Appeals Trib.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992], *rearg denied* 90 NY2d 893 [1992]). Here, the affidavit of Ms. Corina and its attached USPS delivery

information provided in response to the Division's request, provides such proof of actual receipt of an item of mail on October 9, 2014 addressed to petitioner at the address listed on her 2011 personal income tax return, filed on or about July 25, 2014, and corresponds to the certified control number assigned to the notice of deficiency dated October 7, 2014.

With regard to the notice of deficiency dated October 7, 2014, petitioner has offered no evidence countering the Division's proof of her actual receipt of the notice in question at the address listed on the last return filed by her with the Division prior to the mailing of that notice. Thus, she similarly has not borne her burden of showing that the Division failed to mail the statutory notice here in question to petitioner at her last known address (*see* Tax Law § 689 [e]).

We conclude that the Division has borne its burden of showing the date and fact of mailing of the notices of deficiency here at issue to petitioner at her last known addresses.

We next consider petitioner's argument that this Tribunal should reach the substantive merits of her protest. A petition must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*Matter of Lukacs, Matter of Sak Smoke Shop*). As the petition in this matter was not filed until May 23, 2016, or in excess of 90 days from both May 23, 2014 and October 9, 2014, we must decline to consider the merits of petitioner's protest of the assessments listed in the notices of deficiency, as the Division of Tax Appeals lacks jurisdiction over the petition in this matter (*see* Tax Law § 681 [b]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joanne Feliciano is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Joanne Feliciano is dismissed.

DATED: Albany, New York
August 24, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner