

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PATRICIA MARRERO : DECISION
 : DTA NO. 828100
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Years 2010 through 2012. :

Petitioner, Patricia Marrero, filed an exception to the determination of the Administrative Law Judge issued on August 30, 2018. Petitioner appeared by Hodgson Russ, LLP (Ariele R. Doolittle, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Ellen Krejci, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in Albany, New York, on November 21, 2019, which date began 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 timely filed a petition with the Division of Tax Appeals following the issuance of a notice of deficiency for the years 2010, 2011 and 2012.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 2 and 6. We have also added finding of fact 14. We have made these

changes to more fully reflect the record. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact appear below.

1. On February 21, 2017, petitioner, Patricia Marrero, filed a petition with the Division of Tax Appeals challenging a notice of deficiency, assessment number L-045564631, dated October 20, 2016 (notice), issued by the Division of Taxation (Division) for the years 2010, 2011 and 2012.

2. On March 30, 2017, the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioner. The parties timely filed responses to the notice of intent. On October 12, 2017, the Administrative Law Judge issued an order withdrawing the notice of intent to dismiss petition because of an inconsistency in the Division's proof of mailing of the notice. Specifically, an affidavit of Melissa Kate Koslow, a supervisor in the Division's mail room, asserted that the notice was mailed on August 22, 2016. That assertion was expressly based on a review of the CMR and the affidavit of Division employee Mary Ellen Nagengast regarding the Division's general practice and procedure for processing statutory notices, each of which indicated an October 20, 2016 mailing date. The October 12, 2017 order also directed the Division to file its answer within 75 days.

3. The Division filed an answer on December 6, 2017.

4. On December 15, 2017, petitioner filed an amended petition.

5. On March 25, 2018, the Division filed an amended answer.

6. The Division brought a motion dated March 26, 2018, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (rules of practice and procedure). In support of its motion and to show proof

of proper mailing of the October 20, 2016 notice, the Division provided the following with its motion papers, among other documents: (i) an affidavit of Ellen K. Roach, a senior attorney employed in the Office of Counsel of the Division, dated March 26, 2018; (ii) an affidavit, dated March 9, 2018, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked October 20, 2016; (iv) an affidavit, dated March 12, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (v) a copy of a notice of deficiency, number L-045564631, dated October 20, 2016, and mailing cover sheet addressed to petitioner at 321 Moroe Street, Apt 3, Hoboken, New Jersey 07030; (vi) a copy of a notice of deficiency, number L-045564631, dated October 20, 2016, and mailing cover sheet addressed to R Becerra, as petitioner's then-representative, at 302 7th Street, Hoboken, New Jersey 07030; and (vii) a copy of petitioner's e-filed resident income tax return for the year 2015, dated April 13, 2016 and filed on April 16, 2016. Petitioner's 2015 return lists the same Hoboken, New Jersey, address for petitioner as that listed on the subject notice. Petitioner's 2015 return also lists petitioner's then-representative as Ray Becerra at the same address listed on the copy of the subject notice sent to the representative. Ms. Roach avers that petitioner's 2015 return was the last return filed with the Division by petitioner before said notice was issued and that the address listed thereon was petitioner's last known address.

7. The affidavit of Deena Picard, who has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and has been Acting Director of MAPS since May 2017, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and 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. 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, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "10/20/16." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

8. 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 PO Address." Additionally, according to the Picard affidavit, the last page of the CMR lists the total number of pieces of mail, as well as the total amount of postage and fees.

9. The CMR in the present matter consists of 22 pages and lists 240 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries except page 22, which contains 9 entries. Ms. Picard notes that the copy 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. A USPS representative affixed a postmark dated October 20, 2016 to each page of the CMR, wrote and circled the number “240” on page 22 next to the heading “Total Pieces Received at Post Office” and initialed or signed page 22. Ms. Picard adds that the total number of statutory notices mailed pursuant to the CMR was 240.

10. Page 1 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0036 3491 and reference number L-045564631 was mailed to “MARRERO-PATRICIA” at the Hoboken, New Jersey, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and the name “MARRERO-PATRICIA” and address as noted.

11. Additionally, page 1 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0036 3507 and reference number L-045564631 was mailed to “R BECERRA” at 302 7th Street, Hoboken, New Jersey. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and the name “R BECERRA” and address as noted.

12. The affidavit of Fred Ramundo, a supervisor in the mail room since 2013 and currently a Stores and Mail Operations Supervisor, describes the Division’s mail room’s general operations and procedures. Mr. Ramundo attests that he is familiar with the Division’s present and past office procedures as related to statutory notices, and that these procedures have remained essentially unchanged since approximately 1992. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives 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 on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. The CMR has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." 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 places his or her initials or signature on the CMR, indicating receipt by the post office. 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. Each page of the CMR in exhibit "A" of the Picard affidavit contains a USPS postmark with a date of October 20, 2016. On page 22, corresponding to "Total Pieces and Amounts," is the preprinted number 240 and next to "Total Pieces Received At Post Office" is the handwritten and circled entry "240." There is a set of initials or a signature on page 22.

13. Mr. Ramundo further states that based on his review of the Picard affidavit and exhibits attached thereto, and his personal knowledge of the procedures of the mail room, he can attest that on October 20, 2016, an employee of the mail room delivered one piece of certified mail addressed to "MARRERO-PATRICIA, 321 MOROE STREET APT. 3, HOBOKEN, NJ 07030" and one piece of certified mail addressed to "R BECERRA, 302 7TH STREET, HOBOKEN, NJ 07030" to the USPS in Albany, New York, in sealed postpaid windowed envelopes for delivery by certified mail.

14. Petitioner filed a response to the Division's motion and filed a cross-motion for summary determination in her favor pursuant to sections 3000.5 and 3000.9 of the rules of practice and procedure. In support of her response and cross-motion, petitioner submitted,

among other items, a printout purporting to show USPS tracking information for the certified control number associated with the October 20, 2016 notice (tracking number 71041002973000363491) (*see* finding of fact 10).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the Division's motion to dismiss, as opposed to its motion for summary determination, was the proper procedure where, as here, the ultimate issue is whether the Division of Tax Appeals has jurisdiction over the petition. The Administrative Law Judge also noted that the standard of review for a motion to dismiss is the same as that of a summary determination motion: either motion may be granted where no material issue of fact exists.

The Administrative Law Judge observed that there is a 90-day statutory time limit to file a petition following the issuance of a notice of deficiency and that the Division bears the burden of establishing that it mailed the notice of deficiency to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge noted the well-established rule that the Division must show its standard mailing procedure and that this procedure was followed in the case under consideration in order to meet this burden.

The Administrative Law Judge found that the Division's affidavits and its CMR establish both its general mailing procedure and that this procedure was followed in the present case. The Administrative Law Judge also found that the address to which the notice of deficiency was mailed was petitioner's last known address as required. The Administrative Law Judge rejected petitioner's claim that the Division knew or should have known that petitioner had a new address. She noted that the relevant statute places the onus on the taxpayer to inform the Division of any such change and that petitioner had not so informed the Division. The

Administrative Law Judge thus concluded that the Division proved that the notice of deficiency was properly mailed to petitioner on October 20, 2016.

The Administrative Law Judge dismissed petitioner's contention that the Division's motion should be denied because she did not receive the notice of deficiency. The Administrative Law Judge observed that the Tax Law requires proper mailing of a notice of deficiency, not actual receipt.

The Administrative Law Judge also determined that petitioner's USPS printout did not raise a material issue of fact. She reasoned that there was no evidentiary foundation for the printout and noted the absence of an affidavit from a person with knowledge of USPS procedures to explain how the printout was compiled and the meaning of the entries thereon. The Administrative Law Judge thus concluded that petitioner's claims regarding the printout were unsubstantiated.

The Administrative Law Judge further concluded that a copy of the subject notice was properly mailed to petitioner's former representative, contrary to petitioner's contention. The Administrative Law Judge noted that the address to which the copy of the notice was mailed matched the address for the former representative as reported on petitioner's last-filed personal income tax return as tax preparer.

Regarding petitioner's contention that the Division's amended answer was filed late and that, accordingly, the allegations in the amended petition regarding petitioner's residency status during the audit period should be deemed admitted, the Administrative Law Judge found that the deemed admission of those allegations would have the effect of conferring jurisdiction on the Division of Tax Appeals where no jurisdiction exists in the first instance. The Administrative Law Judge determined that such an outcome was contrary to the rules of practice and procedure.

The Administrative Law Judge thus concluded that the petition in the present matter, filed on February 21, 2017, was filed beyond the 90-day limitations period. Accordingly, she dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner continues to assert that the Division failed to meet its burden to show that the notice of deficiency was properly issued to petitioner and her representative.

As she did in opposition to the notice of intent to dismiss, petitioner argues that the Division submitted inconsistent affidavits related to the mailing of the notice and that it failed to address or reconcile such discrepancies. Petitioner notes that the Koslow affidavit, submitted in support of the notice of intent, references an August 22, 2016 mailing date (*see* finding of fact 2), while the remaining affidavits and documents submitted refer to an October 20, 2016 mailing date. Petitioner asserts that this inconsistency raises an issue of material fact that should result in the denial of the Division's motion.

The Division responds that the reference to August 22, 2016 in the Koslow affidavit is simply a clerical error and that its status as such is evident from the June 13, 2017 Roach affidavit, the May 17, 2017 Nagengast affidavit, and the CMR, all submitted in support of the notice of intent to dismiss, and all of which indicate an October 20, 2016 mailing date. According to the Division, the presence of the error in the Koslow affidavit does not indicate any disagreement or uncertainty by the Division regarding the date of mailing. The Division further asserts that, after the notice of intent was withdrawn, it brought the motion to dismiss, which is the subject of the present exception, and that the affidavits submitted in support of that motion contain no such error.

Petitioner also continues to argue that the USPS tracking information submitted in opposition to the Division's motion and in support of her cross-motion shows that the Division failed to follow its own standard procedure for delivering mail to the USPS in the mailing of the notice of deficiency. Petitioner seeks to counter the Administrative Law Judge's decision to give no evidentiary weight to the tracking information because petitioner offered no evidence of how the entries on the printout were compiled or what they mean. Petitioner contends that she was under no obligation to do so and notes that the Division offered no evidence in rebuttal to the tracking information and asserts that the printout at least raises an issue of fact that compels denial of the Division's motion.

The Division contends that the Administrative Law Judge properly accorded the USPS tracking information no weight because petitioner's assertions regarding the meaning of that document are unsubstantiated. The Division also notes that it did offer argument in rebuttal to the tracking information.

Additionally, petitioner asserts that the Division knowingly mailed the notice of deficiency to petitioner at an address that was known by the Division to no longer be hers. Petitioner contends that the Division was under an obligation to exercise "reasonable diligence" to ascertain petitioner's correct address and that it failed to do so. Petitioner thus contends that the notice was not properly issued and that the Division's motion should be denied accordingly.

The Division asserts in response that it acted reasonably in attempting to contact petitioner during the audit, but that petitioner and her former representative sought to avoid such contact.

Petitioner also contends that, even if the Division properly issued the notice of deficiency to petitioner, it failed to properly issue a copy of the notice to her former representative.

Petitioner asserts that the address used by the Division for her representative in mailing the

notice of deficiency was “abbreviated, incomplete and incorrect.” According to petitioner, the 90-day period was thus tolled, and the petition must be deemed timely.

The Division counters that the notice to petitioner’s former representative was not improperly addressed.

Pursuant to the foregoing arguments, petitioner contends that the Division has not met its burden to prove proper mailing of the notice of deficiency and that, accordingly, the assessment must be canceled.

The Division asserts that it has shown proper mailing and that, therefore, the Administrative Law Judge properly dismissed the petition. Alternatively, the Division takes the position that the proper remedy where the Division fails to prove proper mailing is a hearing on the merits.

Assuming she prevails on the jurisdictional issue, petitioner asserts that summary determination should be awarded in her favor on the underlying substantive issue of residency. Petitioner’s argument is premised on her contention that the Division’s answer to her amended petition was filed late. Petitioner notes that the rules of practice and procedure provide that the remedy for a late answer is to deem all material allegations of fact in the petition admitted. According to petitioner, her amended petition’s allegations of nonresidency must be deemed admitted and the statutory notices canceled.

The Division contends that, if petitioner is entitled to a hearing on the merits, she is not entitled to summary determination in her favor because its amended answer was not late. Alternatively, the Division contends that the “deemed admitted” remedy for late answers does not apply to amended answers.

OPINION

The Division brought a motion to dismiss pursuant to 20 NYCRR 3000.9 (a) (1) (ii) or, alternatively, for summary determination under 20 NYCRR 3000.9 (b). Petitioner filed papers in opposition to the Division's motion and brought a cross motion for summary determination. A motion to dismiss, rather than a motion for summary determination, is appropriate where, as here, the threshold issue is whether a petition has been timely filed with the Division of Tax Appeals. The standard of review on a motion to dismiss is the same as that for summary determination (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). Such a 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" (20 NYCRR 3000.9 [b] [1]). Motions to dismiss and motions for summary determination are subject to the same provisions as motions to dismiss and motions for summary judgment brought under CPLR §§ 3211 and 3212, respectively (20 NYCRR 3000.9 [c]).

The Court of Appeals has summarized the well-established standard for granting a motion for summary judgment as follows:

"To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. On summary judgment, facts must be viewed in the light most favorable to the non-moving party and 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 demonstrate the absence of any material issues of fact" (*Matter of New York City Asbestos Litigation*, 33 NY3d 20, 25-26 [internal citations and quotations omitted] [2019]).

When the Division determines a deficiency of personal income tax, it may mail a notice of deficiency to a taxpayer (Tax Law § 681 [a]). Such a notice must be mailed by certified or registered mail to the taxpayer at his or her last known address (*id.*). If properly mailed, a

taxpayer's actual receipt of a notice of deficiency is not required (*Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019). With exceptions not relevant here, there is a 90-day statutory time limit for filing a petition following the issuance of a notice of deficiency (Tax Law §§ 681 [b], 689 [b]). There is also a 90-day time limit to file a request for conciliation conference with BCMS, if a taxpayer so chooses (Tax Law § 170 [3-a] [a]). A notice of deficiency becomes an assessment subject to collection unless the taxpayer files a timely petition or a timely request for conciliation conference (Tax Law § 681 [b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a late-filed protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; Tax Law § 2006 [4]).

Where the timeliness of a taxpayer's petition is in question, the Division has the burden to prove the date and fact of mailing of the relevant statutory notice, by certified or registered mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered to the custody of the USPS for mailing (*Matter of Novar TV & Air Conditioner Sales & Serv., Inc.*, Tax Appeals Tribunal, May 23, 1991). The Division must show proof of a standard mailing procedure and proof that such procedure was followed in the instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by "producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)" (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

In her order withdrawing the notice of intent, the Administrative Law Judge found that the contradiction between the Division's employee affidavits regarding the date of mailing raised a question of fact as to whether the Division's standard mailing procedures were followed in this

case (*see* finding of fact 2). Petitioner asserts that this contradiction remains unreconciled. Although petitioner complains that the Administrative Law Judge did not address this point in the determination, petitioner herself did not raise it in opposing the motion to dismiss. She raises it on exception, however, and as it is a legal issue, we address it here (*Matter of Horn*, Tax Appeals Tribunal, April 20, 2017 [new legal issues can be raised on exception]).

As noted, the Division argues that a close review of the evidence submitted in support of the notice of intent shows that the August 22, 2016 mailing date referred to in the Koslow affidavit is simply a clerical error. The Division also asserts that the affidavits submitted in support of its motion to dismiss contain no such error.

The Division has not offered any evidence to directly explain the references to August 22, 2016 in the Koslow affidavit. Rather, the Division's argument requires that we infer from other evidence in the record that the Koslow affidavit's August 22, 2016 references are erroneous. The Division thus urges us to resolve the contradiction by discounting the Koslow affidavit. "The function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]). We acknowledge that the contradiction in the Division's evidence might well be the result of a clerical error, considering particularly that the CMR appears to have been properly completed (*Matter of Modica*, Tax Appeals Tribunal, October 1, 2015 [properly completed CMR is highly probative evidence of the fact and date of mailing]). It is inappropriate, however, to resolve this question in the context of a motion to dismiss. Employee affidavits are, generally, a necessary component of the Division's proof in a timeliness case to show that it has a standard mailing

procedure and that such procedure was followed in each case (*Matter of Balan*). Here, the Division's employee affidavits are contradictory and the Koslow affidavit does not accurately describe the CMR. Hence, there is at least a doubt as to the material and triable issue of whether the Division's standard mailing procedure was followed in this case (*Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965] [summary judgment should not be granted where there is any doubt as to the existence of a triable issue]).

We note also that the affidavits submitted in support of the Division's motion to dismiss do not solve the Division's proof problem, as the Koslow affidavit remains part of the record and its references to August 22, 2016 remain unexplained.

Accordingly, viewing the evidence in a light most favorable to petitioner, we find that an issue of material fact exists in the present matter and that the Division has thus failed to make a prima facie showing of entitlement to judgment as a matter of law. Its motion to dismiss must therefore be denied.

As we have denied the Division's motion to dismiss, we do not address the remaining issues raised by petitioner on exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Patricia Marrero is granted to the extent indicated in paragraph 3 below;
2. The determination of the Administrative Law Judge is reversed; and
3. This matter is remanded to the Administrative Law Judge for further proceedings on the issue of the timeliness of the petition, and if determined to be appropriate, a determination on the merits.

DATED: Albany, New York
May 21, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner