

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOSEPHINE L. ESTIMADA : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 825709
Personal Income Tax under Article 22 of the Tax Law :
and the Administrative Code of the City of New York for :
the Years 2009, 2010 and 2011. :

Petitioner, Josephine L. Estimada, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2009, 2010 and 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), brought a motion on April 7, 2014 seeking dismissal of the petition pursuant to section 3000.9(a)(i) or, in the alternative, summary determination pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on May 7, 2014, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of the notices of deficiency.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of three notices of deficiency, dated January 9, 2013 and bearing assessment identification numbers L-038842263, L-038842243, and L-038842260. The notices were addressed to petitioner, Josephine L. Estimada, at her last known address in New York, New York.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the three notices of deficiency, dated January 9, 2013. The request was dated April 30, 2013 and received by BCMS on May 3, 2013.

3. On May 17, 2013, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notices of deficiency 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 notice(s) was issued on January 9, 2013, but the request was not mailed until April 30, 2013, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the January 9, 2013 notices of deficiency, the Division provided the following with its motion papers: (i) an affidavit, dated April 4, 2014, of Daniel A. Maney, manager of the refunds, deposits, overpayments and control units, which includes the Division's Case and Resource Tracking System (CARTS); (ii) an affidavit, dated April 4, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's mail room; (iii) the

“Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked January 9, 2013; (vi) petitioner’s 2011 New York State resident income tax return filed on September 17, 2012, which was the last return filed by petitioner prior to the issuance of the January 9, 2013 notices of deficiency at issue and which sets forth the same address for petitioner as that listed on the subject notices.

5. The affidavit of Daniel A. Maney sets forth the Division’s general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, page 5 of the 70-page CMR contains information on the particular notices in issue and indicates an initial date of January 2, 2013.¹ Following general practices, this date was manually changed to the actual mailing date of “1/9/13.” Taxpayer addresses, certified control numbers, and reference (assessment ID) numbers assigned to each notice may be found under their respective columns on the CMR. The reference number and control number appear on the corresponding notice and the accompanying mailing cover sheet, respectively, while the address appears on both.

6. Page 5 of the CMR indicates that three notices of deficiency with certified control numbers 7104 1002 9730 1443 1575, 7104 1002 9730 1443 1582 and 7104 1002 9730 1443 1599, with respective assessment ID numbers L-038842243, L-038842260 and L-038842263, were mailed to petitioner at the New York, New York, address listed on the subject notices of deficiency. The corresponding mailing cover sheet bears these certified control numbers and petitioner’s name and address as noted.

¹ The CMR specifically states “20130021700” or year 2013, day 2 at 5:00 P.M.

7. The affidavit of Bruce Peltier describes the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. A Mailing Cover Sheet precedes each notice. A staff member retrieves the notices and operates a machine that puts each notice into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against 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 on the CMR, indicating receipt by the post office. The Center 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. A review of the CMR submitted by the Division confirms that a USPS employee postmarked pages 1 through 70 of the CMR. The postmarks are dated January 9, 2013. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 767, which has been circled. Below the total pieces entry are the initials of the USPS employee.

8. According to the Peltier affidavit, the affixation of the postmarks and the postal service employee's initials indicate that all 767 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS on January 9, 2013.

9. According to both the Maney and Peltier affidavits, based on their respective knowledge of the Division's standard mailing procedures and a review of the CMR, a copy of the subject notices were mailed to petitioner on January 9, 2013, as claimed.

10. Petitioner's 2011 New York resident income tax return, filed on September 17, 2012, the last return filed by petitioner prior to the issuance of the notices herein, indicated the same

New York, New York, address as the address appearing on the subject notices, the request for the BCMS conference and the petition.

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. Petitioner did not respond to the Division's motion; she is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Maney, Peltier and O'Brien affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]).

C. Where, as here, the timeliness of a Request for Conciliation Conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (Tax Law § 681[a]); *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. Here, the Maney and Peltier affidavits establish the Division's standard mailing procedure. These affidavits, along with other documentary evidence in the record, also show that this standard procedure was followed in the present matter and thus show that copies of the subject notices of deficiency were mailed as addressed to petitioner on January 9, 2013. Specifically, both the Maney and Peltier affidavits conclude, based on the respective affiant's knowledge of the Division's standard mailing procedures and a review of the CMR, that the subject notices were mailed as claimed on January 9, 2013. The CMR lists certified control numbers associated with the articles of mail addressed to petitioner. This document also bears USPS postmarks dated January 9, 2013 on each page thereof. Such postmarks indicate that all 767 articles of mail listed on the CMR were received by the USPS on January 9, 2013. Additionally, petitioner's address set forth on her 2011 New York resident tax return, filed on September 17, 2012, was her last know address for purposes of this matter and corresponds to the address she listed on her request for BCMS conference and her petition herein. (Tax Law § 1147[a][1]; *Matter of Katz*.)

E. Petitioner's Request for Conciliation Conference was dated April 30, 2013 and received by BCMS on May 3, 2013. These dates both fall after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law § 689[b]; § 170[3-a][b]). The Division of Tax Appeals thus lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

F. The Division of Taxation's motion to dismiss is denied.² The Division of Taxation's motion for summary determination is granted, and the petition of Josephine L. Estimada is denied.

DATED: Albany, NY
July 31, 2014

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE

²Petitioner's petition to the Division of Tax Appeals, contesting the BCMS Order Dismissing Request was timely.