

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VIKAS AND PRIYANKA SHARMA	:	DETERMINATION DTA NO. 825748
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2010 and 2011.	:	

Petitioners, Vikas and Priyanka Sharma, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2010 and 2011.

On April 16, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affirmation of Christopher O'Brien, Esq., dated April 16, 2014 and annexed exhibits. Petitioners did not respond to the motion. Accordingly, the 90-day period for the issuance of this determination commenced on May 19, 2014, the date on which petitioners' time to serve a response to the Division of Taxation's motion expired. After due consideration of the documents submitted, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely request for a conciliation conference following the issuance of a notice of deficiency.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Deficiency to petitioners, Vikas and Priyanka Sharma, notice number L-038807520, dated December 24, 2012, which asserted a deficiency of personal income tax in the amount of \$17,026.75 plus penalty and interest for a balance due of \$21,309.59. On the same day, the Division issued a Notice of Deficiency, notice number L-038807521, which asserted a deficiency of personal income tax in the amount of \$7,536.28 plus penalty and interest for a balance due of \$8,508.03. There was a statement on the first page of each of the notices advising petitioners that, if they disagreed with the amount due, they had the option of requesting a conciliation conference or requesting a petition for a hearing.

2. Petitioners filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the subject notices of deficiency. The request, dated April 7, 2013, was mailed via the United States Postal Service on April 15, 2013 and received by BCMS on April 17, 2013. On May 3, 2013, BCMS issued a conciliation order dismissing request. The order determined that petitioners' 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 of the statutory notice. Since the notices were issued on December 24, 2012, but the request was not mailed until April 15, 2013, or in excess of 90 days, the request is late filed.

3. On July 1, 2013, the Division of Tax Appeals received a petition dated June 13, 2013. The petition acknowledged that the notices of deficiency were mailed on December 24, 2012 and that in response to the notices, petitioners mailed documentation to the auditor regarding the tax years 2010 and 2011. The petition explained that petitioners recognize that this was a mistake

and that they should have filed a request for a conference. On March 26, 2013, petitioners received a response from the auditor stating that the documentation had been reviewed and that the original notices were sustained. The response from the auditor led petitioners to believe that it was proper for them to respond, in the first instance, to the auditor. The response from the auditor also prompted petitioners to file the Request for a Conciliation Conference with BCMS . Petitioner Vikas Sharma also notes that he was traveling extensively during the period January 14, 2012 through May 6, 2013.

4. In support of its motion and to prove mailing of the notices of deficiency under protest, the Division submitted, among other documents, the following: (i) the petition of Vikas and Priyanka Sharma, dated September 10, 2012, (ii) the notices of deficiency issued to petitioners, dated December 24, 2012, (iii) an affidavit, dated April 4, 2014, of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (iv) an affidavit, dated April 4, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (v) an affidavit, dated April 4, 2014, of Heidi Corina, a Legal Assistant 2 in the Office of Counsel, (vi) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked December 24, 2012; and, (vii) a copy of petitioners' New York State Resident Income Tax Return for 2011, dated and filed on October 12, 2012.

5. The affidavits of Bruce Peltier and Daniel A. Maney concern the mailing procedures followed by the Division in mailing notices of deficiency. These affidavits describe the Division's standard mailing procedure including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheets as well as the CMR and the inclusion of such mailing cover sheets along with the notices in the windowed

envelopes for mailing. The CMR, offered by the Division, contains a list of the notices allegedly issued by the Division on December 24, 2012 including the notices allegedly issued to petitioners.

6. The last affidavit pertained to correspondence between Heidi Corina and the Postal Service. Ms. Corina is a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Form 3811-A. This form is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

7. Attached to Ms. Corina's affidavit are two copies of Form 3811-A. The forms separately request information regarding the items that were mailed on December 24, 2012 bearing either certified mail item number 7104 1002 9730 1435 3563 or 7104 1002 9730 1435 3570. Each item was addressed to petitioners at "380 Rector Pl., Apt. 7P, New York, N.Y. 10280-1445." With respect to each mailing, the certified mail number on the request for information corresponds with the certified number on the CMR. The Postal Service's separate responses to the requests on Form 3811-A are also attached to Ms. Corina's affidavit. In each letter, the Postal Service refers to the certified mail number and states, in part: "The delivery record shows that this item was delivered on January 12, 2013 at 12:40 pm in NEW YORK, NY 10274." The letters also contain a scanned image of the signature of the recipient.

8. The last tax return filed by petitioners before the issuance of the notices of deficiency was a New York State Resident Income Tax Return for the year 2011. The address listed on this form is 380 Rector Place, Apt. 7P, New York, NY 10280. This is the same address as appears on the notices and the petition.

CONCLUSIONS OF LAW

A. The Division brings this motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, summary determination under section 3000.9(b). As the petition in this matter was timely filed, the Division of Tax Appeals has jurisdiction over the petition, and accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioners' Request for Conciliation Conference. This determination will address the instant motion as such.

B. A motion for summary determination will be granted:

if, upon all 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]).

C. Here, petitioners did not respond to the Division's motion and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). Moreover, petitioners submitted no evidence to contest the facts alleged; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 671). Accordingly, summary determination may be granted in this matter.

D. There is a 90-day statutory time limit for filing either a petition for hearing or request for conciliation conference following the issuance of a Notice of Deficiency (Tax Law § 170[3-a][a]; § 681[b]; § 689[b]). Generally, where, as here, the timeliness of such a protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioners' last known address (*see Matter of Katz*, Tax Appeals Tribunal,

November 14, 1991; Tax Law § 681[a]). In the present matter, however, the Division relies upon both the date of issuance of the statutory notice and the date of receipt of the notice by the taxpayer. In the later instance, the 90-day period for filing a petition or a request for a conciliation conference commences with the date of actual notice (*see Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]).

E. The Maney and Peltier affidavits establish the Division's standard mailing procedure, including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheets as well as the CMRs, and the inclusion of such mailing cover sheets along with the notices in the windowed envelopes for mailing. A review of the mailing cover sheets related to the notices mailed to petitioners confirms that the control numbers listed thereon are consistent with the control numbers listed on the CMRs and the USPS responses to the Division's request for delivery information. The documentation provided to the Division by the USPS also shows that two articles of mail bearing such certified control numbers were delivered to petitioners' address on January 12, 2013. Petitioners thus received actual notice of the subject notices of deficiency on that date.

F. It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of deficiency becomes fixed and the Division of Tax Appeals is without jurisdiction to consider the merits of the protest (Tax Law § 689[b]; § 170[3-a][b]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

G. Petitioners' request for a conciliation conference was filed on April 15, 2013, which is beyond 90 days from the date of receipt of the actual notices. The request was therefore untimely filed (Tax Law § 689[b]; § 170[3-a][b]; *Matter of Riehm v. Tax Appeals Tribunal*).

Consequently, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioners' protest (*see Matter of Deepak*, Tax Appeals Tribunal, December 22, 2011).

H. Petitioners' argument that they mistakenly responded to the receipt of the notices of deficiency by mailing documents to the auditor does not warrant a different result. The notices of deficiency clearly advised petitioners what steps they needed to take if they disagreed with the amount claimed due. Further, it is well established that absent a timely protest, a notice of deficiency becomes a fixed and final assessment, and consequently, the Division of Tax Appeals is without jurisdiction to consider the merits of the protest (*see* Tax Law § 1138[a][1]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

I. The Division of Taxation's motion for summary determination is granted and the petition of Vikas and Priyanka Sharma is hereby denied.¹

DATED: Albany, New York
July 10, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

¹ Petitioners may not be without some remedy, for they may pay the disputed tax and file a claim for refund (Tax Law § 687). If the refund claim is disallowed, petitioners may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 689[c]).