

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TIMOTHY AND JILL QUIGLEY : DETERMINATION
for Redetermination of Deficiencies or for Refund of : DTA NO. 825906
New York State and City Personal Income Tax under :
Article 22 of the Tax Law and the New York City :
Administrative Code for Tax Years 2010 and 2011. :

Petitioners, Timothy and Jill Quigley, filed a petition for redetermination of deficiencies or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for tax years 2010 and 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion dated March 19, 2014, seeking an order dismissing the petition pursuant to section 3000.9(a)(ii) of the Tax Appeals Tribunal's Rules of Practice and Procedure, or in the alternative, for summary determination in favor of the Division of Taxation pursuant to section 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Petitioners, appearing pro se, did not respond by the due date of April 18, 2014, at which time the 90-day period for the issuance of this determination began. After due consideration of the affidavit and documents presented by the Division of Taxation, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation's motion to dismiss should be granted for lack of subject matter jurisdiction.

II. Whether the Division of Taxation's motion for summary determination as to the timeliness issue should be granted.

FINDINGS OF FACT

1. Petitioners, Timothy and Jill Quigley, filed a petition with the Division of Tax Appeals in protest of conciliation orders dismissing request, CMS Nos. 258329 and 258330, dated July 26, 2013. Both conciliation orders explained the basis for the dismissal as follows:

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 February 8, 2013, but the request was not received until July 8, 2013, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

2. The petition stated that petitioners had no record of receiving the tax notices in issue. Included with the petition was a fax transmission cover sheet dated June 11, 2013, with handwritten notes (presumably by petitioners) that "this is the only receipt of the 2010 & 2011 original tax notices so my request for conciliation was timely based on when I received the notices."

3. The Division of Taxation (Division) brought this motion to dismiss, or in the alternative, a motion for summary determination dated March 19, 2014, on the basis that petitioners' protest was filed more than 90 days from the date the notices were delivered to petitioners' last known address. Included with the Division's motion were the following

documents: i) the affirmation of Michele W. Milavec, Esq., in support of the motion; ii) a copy of the petition, which includes two conciliation orders dismissing request; iii) a copy of the Division's answer; iv) the affidavit of Daniel A. Maney, a taxpayer services specialist and manager of a unit that oversees the Case and Resource Tracking System (CARTS); v) a copy of the certified record for presort mail dated February 8, 2013 (CMR); vi) a copy of a Notice of Deficiency, notice number L-039075393-1, issued to petitioner Timothy Quigley at a Berkeley Heights, New Jersey, address, dated February 8, 2013, asserting personal income tax due in the amount of \$2,355.59, plus interest, for tax year 2010; vii) a copy of Notice of Taxpayer Rights; viii) a copy of a Notice of Deficiency, notice number L-039075394-9, issued to petitioners, at a Berkeley Heights, New Jersey, address, dated February 8, 2013, asserting personal income tax due in the amount of \$388.66, plus interest, for tax year 2011; ix) the affidavit of Bruce Peltier, a supervisor in the mail room of the Division; x) a Request for Conciliation Conference dated June 27, 2013; xi) a copy of petitioners' New York nonresident and part-year resident income tax returns, Form IT-203, for the years 2010 and 2011, bearing the same Berkeley Heights, New Jersey, address as the notices of deficiency issued to petitioners, with the 2010 return dated April 17, 2011 and the 2011 return bearing no date; xii) a copy of petitioners' U.S. individual income tax returns, Forms 1040, for tax years 2010 and 2011, dated April 17, 2011 and October 14, 2012, respectively; xiii) numerous W-2s issued to Timothy Quigley for tax year 2011; and xiv) a Form 1009-G for 2011 issued to Timothy Quigley by the New York State Department of Labor-Unemployment Insurance.

4. The affidavit 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, sets forth the Division's general practice and procedure for preparing and

mailing statutory notices to taxpayers. Mr. Maney has held this position since January 2010. As part of his duties, he receives the computer-generated CMR and a batch of corresponding notices from CARTS. CARTS prepares “batches” of statutory notices and the accompanying one-page mailing cover sheet, predated with the intended date of mailing. The front of each cover sheet bears a certified control number, a bar code, the taxpayer’s mailing address, the departmental return address and, on the back, taxpayer assistance information. CARTS also generates any enclosures referenced within the body of the notices in the batch.

The CMR, which is printed approximately 10 days prior to the batch’s anticipated mailing date, lists the notices in the batch, in the order that they are generated. In accordance with the Division’s general practice, this date was manually changed on the first (and only) page of the CMR to reflect the actual date of mailing. In this case, the date was changed to “2/8/13.” The purpose of printing the CMR prior to the anticipated mailing date is to provide sufficient lead time for the notices to be manually reviewed and processed for postage by employees of the Division’s Mail Processing Center (the Center). It is also the Division’s general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and for the CMR to be maintained in this same manner when returned to CARTS, unless otherwise ordered by Mr. Maney.

5. The one-page CMR relevant to this matter lists two certified control numbers with corresponding assessment numbers, petitioners’ names and address, and consists of the two entries, both of which represent notices sent to petitioners. The CMR bears a February 8, 2013 postmark from a branch of the USPS,¹ and the initials of a USPS employee. In addition, on page

¹ The postmark is only partially legible, but appears to represent a postmark from Colonie Center.

one of the CMR, the number “2” has been circled. Mr. Maney affirms that these markings indicate that the two notices listed on this CMR were mailed on February 8, 2013.

Page one of the CMR contains a listing indicating that a Notice of Deficiency, assigned certified control number 7104 1002 9735 1139 3291 and assessment number L-039075393, was mailed to petitioner Timothy P. Quigley at his Berkeley Heights, New Jersey, address listed thereon. Additionally, a Notice of Deficiency, assigned certified control number 7104 1002 9735 1139 3307 and assessment number L-039075394, was mailed to petitioners at their Berkeley Heights, New Jersey, address. The corresponding mailing cover sheets, submitted with the Division’s motion papers, bear the same certified control numbers and petitioners’ names and address as noted.

6. The affidavit of Bruce Peltier, a mail and supply supervisor in the Center since March 1999, describes the Center’s general operations and procedures. Notices that are ready for mailing to taxpayers are received by the Center in an area designated for “Outgoing Certified Mail.” A mailing cover sheet precedes each notice and is accompanied by any required enclosures. Additionally, the Center receives a CMR with each batch of statutory notices. Each CMR, together with the associated batch of notices, is forwarded by CARTS to the Center for delivery to the USPS for mailing.

A member of Mr. Peltier’s staff operates a machine that places each notice, cover sheet and any enclosures into a windowed envelope such that the address and certified number listed on the cover sheet is visible through the window. The same staff member then weighs and seals each envelope and places postage thereon. Next, a mail processing clerk verifies the first and last envelope in the batch against the information listed on the CMR and also performs a random review of up to 30 envelopes by checking the envelopes against the information listed on the

CMR. After completing the review as described, the CMR and the associated sealed and stamped envelopes are delivered by a member of the Center's staff to a USPS branch located in the Albany, New York, area. An employee of the USPS affixes a postmark and/or places his or her initials or signature on the CMR, indicating receipt of the mail listed on the CMR. In addition, the Center has requested that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing this number on the CMR to indicate the number of pieces received by the USPS. Here, page one of the CMR bears a dated postmark and handwritten initials. Also as noted, consistent with the Center's request, the number "2" has been circled on page one of the CMR. Mr. Peltier also attested to the truth and accuracy of the copy of the one-page CMR relevant to this matter, which contains a list of the notices issued by the Division on February 8, 2013. In sum, according to the Maney and Peltier affidavits, a copy of the subject notices of deficiency were mailed to petitioners on February 8, 2013.

7. Beginning on the first page of each of the notices of deficiency issued to petitioners on February 8, 2013, and submitted by the Division in support of its motion, contains the following instructions, in pertinent part:

If you don't pay or formally protest by March 1, 2013:

- We'll impose additional interest and penalties on you.
- We'll issue additional bills that will allow us to begin collection actions against you.

* * *

Formal protest rights: You have the right to challenge this notice in either of these ways:

- File a *Request of Conciliation Conference* (Form CMS-1), available at www.tax.ny.gov or call us at (518) 457-3280
- File a *Petition for a Division of Tax Appeals Hearing* (Form TA-10), available at www.nysdta.org.

If you don't file your protest by May 9, 2013, the amount due will become final and subject to collection action. Contacting us online, by telephone, mail or fax doesn't extend your time to file a formal protest.

SUMMARY OF THE PARTIES' POSITIONS

8. The Division maintains that petitioners' protest to the notices of deficiency was filed more than 90 days from the date the notices were delivered to petitioners' last known address. Concluding it was an untimely protest, the Division asserted that the Division of Tax Appeals lacks jurisdiction to review the substantive merits of petitioners' protest of the notices issued for tax years 2010 and 2011.

The Division, in the alternative, argues that summary determination as a matter of law should be granted in favor of the Division, on the basis that there are no questions of fact.

9. Petitioners did not respond to the motion.

CONCLUSIONS OF LAW

A. The Division has made a motion to dismiss, or alternatively, a motion for summary determination, as to the issue of the timeliness of petitioners' request for a conciliation conference. A motion to dismiss the petition may be granted, as pertinent in this matter, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9[a][ii]). 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]). Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules § 3212. "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 eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v City of New York*, 49 NY2d 557 [1980]). 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]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]).

B. The Division’s motion to dismiss is denied (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013, citing *Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). The Division did not introduce any evidence with respect to the date of the issuance of the conciliation orders, which, on their face, bear a date of July 26, 2013. The petition indicates that it was received by the Division of Tax Appeals on October 10, 2013, within 90 days after the issuance of the conciliation orders (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Accordingly, the Division of Tax Appeals has subject matter jurisdiction over the issue of whether petitioners timely filed their request for a conciliation conference (Tax Law § 170(3-a)(e); § 2006(4); *see also* 20 NYCRR 3000.1[k]; 3000.3[b][8]; 4000.5[c][4]), and such issue will be addressed herein.

C. Tax Law § 681(a) provides the authority for the Division to issue a notice of a deficiency of income tax to a taxpayer. This deficiency will become irrevocably fixed unless the taxpayer files a petition with the Division of Tax Appeals within 90 days from the issuance of the notice (Tax Law § 681[b]; § 689[b]). Prior to petitioning the Division of Tax Appeals for a hearing, a taxpayer may request a conciliation conference at the Division’s Bureau of Conciliation and Mediation Services within 90 days of the issuance of the notice (Tax Law §

170[3-a][a]; 20 NYCRR 4000.3[a]; 4000.5[c]). If after the Conciliation Order is issued, a taxpayer remains unsatisfied, there is an additional 90 days from the issuance of such order within which to file a petition with the Division of Tax Appeals (Tax Law § 170[3-a][e]). Failure to timely file a petition or request a conciliation conference challenging the notice of deficiency bars the Division of Tax Appeals from acquiring jurisdiction over the substantive merits of the matter (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. In a case where the timeliness of a petitioner's 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 petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 681[a]). 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.*).

The affidavits of Daniel Maney and Bruce Peltier were offered to establish the Division's mailing procedures for notices of deficiency, and adherence to such procedures in this case. Mr. Maney's affidavit sets forth the Division's general practice and procedure for processing statutory notices, and Mr. Peltier's affidavit sets forth the Division's procedures for the mailing of statutory notices and the return of the CMR to the Division. The CMR relevant to the notices of deficiency under protest consists of one page and lists two certified control numbers along with corresponding assessment numbers, names and addresses. Each statutory notice was placed in an envelope by a Division employee who delivered them to a U.S. Postal Service representative. A USPS employee affixed a postmark dated February 8, 2013, to page 1, where

the total number of pieces of “2” is circled and initials are handwritten, meeting the requirements set forth by the Division’s procedures.

The CMR in this matter is properly completed and as such constitutes highly probative documentary evidence of the mailing of the subject notice to the address listed and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits, together with the properly completed CMR, established that the chain of custody from the creation of the statutory notices and their preparation for mailing, to the placement of such notices in the hands of the USPS and the return of the documented CMR, proves mailing on a particular date. Taken as a whole, the Division has established the existence of mailing procedures and that the requisite procedures were followed in the present matter. Accordingly, the Division has established that it mailed a copy of the subject notices to the address listed on the CMR on February 8, 2013.

Petitioners’ Berkeley Heights, New Jersey, street address as listed on the CMR and on the notices conforms with the address reported on petitioners’ 2011 New York Nonresident and Part-Year Resident Personal Income Tax Return. The copy of petitioners’ return submitted into evidence, although undated, has attached to it 12 forms W-2 and a form 1099-G all indicating the Berkeley Heights address. Petitioners indicated the same Berkeley Heights, New Jersey, address on their the Request for Conciliation Conference and the petition and have never denied this was their address. The evidence taken as a whole supports the conclusion that the Division’s obligation to issue the statutory notice to petitioners’ “last known address,” as required by Tax Law § 681(a), has been met.

E. The information contained within the notices that set forth the procedures petitioners needed to follow if they disagreed with the notices and desired to exercise their formal protest rights was clearly presented. The notices set forth the date by which petitioners needed to respond, i.e. May 9, 2013, and they were notified that the notices would become assessments subject to collection action for a failure to respond. The record supports that the Division did not mislead petitioners with its instructions at the time of the issuance of the original notices. The notices set forth petitioners' options in a clear and concise manner. Had there been an allegation and proof that the Division confused or misled petitioners at that time, it may have served to prohibit the Division from denying the timeliness of petitioners' protest (*see Matter of Eastern Tier*, Tax Appeals Tribunal, December 6, 1990 [where a taxpayer essentially relied on confusing letters from the Division to its detriment, and the Tribunal appropriately applied principles of estoppel to prevent the manifest injustice of denial of its right to a conciliation conference]).

F. As the Division has established that it properly mailed the subject notices of deficiency on February 8, 2013, 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][b]; § 689[b]). Petitioners' Request for Conciliation Conference was prepared on June 27, 2013 and received by BCMS on July 8, 2013. Although there is a slight discrepancy between the preparation date of the request and its receipt by the Division that is not explained in the record, both dates fall after the 90-day period of limitations for the filing of such a request. Petitioners' request was therefore untimely filed (*see* Tax Law §170[3-a][b]; § 689[b]). As a result, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006). Since there are

no material facts in dispute concerning the issue of timeliness, the Division's motion for summary determination is granted.

G. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioners may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 687[a]). If the claim for refund is disallowed, petitioners may then request a conciliation conference or file a petition with the Division of Tax Appeals within 90 days of the notice of disallowance in order to contest such disallowance (Tax Law § 689[c]; §170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

H. The Division's motion to dismiss is denied. The Division's motion for summary determination is granted, and the notices of deficiency dated February 8, 2013, are sustained.

DATED: Albany, New York
June 19, 2014

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE