

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NELSON PEREZ	:	DETERMINATION
	:	DTA NO. 825930
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 2009 and 2010.	:	

Petitioner, Nelson Perez, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2009 and 2010.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), brought a motion dated August 6, 2014 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)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the Division of Taxation's motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, 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 notices of deficiency for the years 2009 and 2010.

FINDINGS OF FACT

1. Petitioner, Nelson Perez, filed a Request for Conciliation Conference (Request) with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division). The Request was filed in protest of notices of deficiency dated February 15, 2013, bearing assessment numbers L-038859674 and L-038859658, asserting penalty due in the amount of \$248,000.00 for the year 2009 and \$229,000.00 for the year 2010, respectively. The envelope in which the Request was filed bears a United States Postal Service (USPS) postmark dated August 20, 2013 and is date stamped as received by BCMS on August 22, 2013.

2. On September 6, 2013, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. Referencing notice numbers L-038859674 and L-038859658, the Order determined that petitioner's protest 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 notices were issued on February 15, 2013, but the request was not mailed until August 20, 2013, or in excess of 90 days, the request is late filed.

3. Petitioner challenged this dismissal by filing a petition with the Division of Tax Appeals. The petition is dated as signed by petitioner on October 24, 2013, and the envelope in which the petition was mailed bears a USPS postmark dated October 24, 2013. The envelope and petition in turn are date stamped as received by the Division of Tax Appeals on October 28,

2013. There is no dispute that the petition was filed within 90 days after the September 6, 2013 issuance of the Order and constitutes a timely challenge thereto.

4. In support of its motion and to prove the issuance of the notices of deficiency under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated August 6, 2014, of Peter B. Ostwald, Esq.; (ii) an affidavit, dated August 5, 2014, of Nicholas Farone, Taxpayer Services Specialist 2 and Supervisor of the Electronic Communication unit of the Division; (iii) a copy of the Division's Online Services (OLS) Account Terms and Conditions for Individuals; (iv) a screenshot of petitioner's OLS account summary to "Manage Email;" (v) a screenshot of petitioner's OLS "View Online Services Account;" (vi) correspondence dated November 5, 2010 from the Division to petitioner confirming petitioner's creation of an OLS account; (vii) a screenshot of petitioner's OLS account "OTC tpid results" user ID history; (viii) the subject notices of deficiency dated February 15, 2013; (ix) a copy of petitioner's "Event Management Transaction Log" within the e-Manages Process for an Integrated Revenue Enterprise (e-MPIRE); (x) a screenshot of petitioner's OLS account summary; (xi) the Division's printout of "Delivery Details by Template ID;" and (xii) the Division's printout of electronic message delivery status.

5. The affidavit of Nicholas Farone sets forth the Division's general practice and procedure for the processing and delivery of taxpayer specific electronic communications including electronic statutory notices. Mr. Farone has held the position of Taxpayer Services Specialist 2 and supervisor of the Division's Electronic Communication Unit since July 2012. As part of Mr. Farone's duties, he supervises the processing and delivery of taxpayer specific electronic communications and the monitoring of reports to determine the electronic status of email alerts referring to statutory notices. Taxpayers may open an OLS account and request

electronic communication of their tax-related documents from the Division. The OLS system allows a taxpayer to authorize the Division to send an email alert to their chosen external email address advising the taxpayer to check their OLS account for any message in the Message Center section. The Message Center is a secure section within OLS where a taxpayer can view electronic correspondence from the Division. Taxpayers can choose which email service they would like to receive through OLS by clicking on check boxes in the Manage Email section of their OLS account, with options including emails for bills and related notices and other notifications. The Division acknowledges when an online account has been created by sending correspondence to the taxpayer confirming the taxpayer's creation of an OLS account.

6. The Division's OLS Account Terms and Conditions for Individuals provides that in consideration of a taxpayer's use of an OLS account, the taxpayer agrees that by providing electronic communication authorization, the taxpayer agrees to receive the indicated tax-related documents and communications electronically and agrees that the Division will not use physical (postal) mail to provide the communications. The Division instead sends an email that alerts the taxpayer to sign on to his or her OLS account to access the information. The taxpayer further agrees to provide an updated email address and periodically check for new account activity.

7. The Division's Advanced Function Presentation (AFP) system initiates billing printouts. The AFP system uses the Division's DZ4010Z Retrieve View Data (RVD) program. The RVD program verifies email eligibility based on the Internal Taxpayer ID, tax type and the billing form. The RVD program uses Internal Taxpayer ID, User ID, email address, and email eligibility to determine authorization to receive electronic communications through OLS.

8. When a statutory notice is scheduled to be issued to a taxpayer, the AFP system generates a mail file of the electronic statutory notices. The AFP system stores the file of the electronic statutory notices and the verified email address from the RVD program until the issuing date is reached. On the issuing date, email alerts are sent to the external email address associated with the recipient's OLS account and the message is displayed in the OLS Message Center. The email alerts are delivered through a third-party vendor, GOVDelivery. GOVDelivery provides the Division delivery status information that the Division stores and reports advising of every email sent on behalf of the Division, with a status of "D" for delivered or "U" for undelivered.

9. The statutory notice is stored in a message file until the issuing date. On the issuing date, the notice is posted on a secure database for viewing by the taxpayers in their Message Center upon logging in to the OLS. The statutory notice is viewable in the Message Center section of the taxpayer's OLS account.

10. Petitioner opened an OLS account with the Division on November 2, 2010 under his name, taxpayer identification number, and user identification number, using a Logon ID nickname of "nperez28" and an email address of ***newyork@***.com.¹ On December 2, 2011, petitioner updated his OLS account with a new email address of ***taxsolution@***.com.² Petitioner's OLS account for this user identification number and email address remains active to date. Petitioner also previously opened an OLS account with the Division under his name, taxpayer identification number, and a different user identification

¹ The email address is partially redacted herein for privacy purposes.

² The email address is partially redacted herein for privacy purposes.

number, using a Logon ID nickname of “nperezny.” Petitioner’s OLS account for “nperezny” was closed on December 17, 2009 and is inactive.

11. In the Manage Email section of petitioner’s OLS account, petitioner indicated “yes” under “receive emails” in response to “Bills and Related Notices,” “Get emails about your Bills” and “Other Notifications,” and “Get emails about refunds, filings, payments, account adjustments, etc.”

12. On November 5, 2010, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account on November 2, 2010 under the username of “nperez28.”

13. In the present case, on February 15, 2013, the Division posted two messages stating, “You have a new liability” to petitioner’s OLS account and sent corresponding email alerts to petitioner’s email address of ***taxsolution@***.com. The Division posted notices of deficiency numbers L-038859674 and L-038859658 to petitioner’s OLS account on February 15, 2013, which were stored in his OLS Message Center.

14. The Division maintains delivery status information of email alerts in the Delivery Details by Template ID (Delivery Details). The Delivery Details relevant to the present case indicate that the Division sent email alerts to petitioner at his email address of ***taxsolution@***.com on February 15, 2013, with APL Tracking ID MG021520133581931 and APL Tracking ID MG021520133581917. The Delivery Details indicate the status of the emails sent to petitioner on February 15, 2013 as “D” (delivered).

15. Attached to Mr. Farone’s affidavit is a printout of the status of messages sent to petitioner’s OLS account and email address. As explained by Mr. Farone, the status information reports a status of “R” for read and “U” for unread. The status printout relevant to the February

15, 2013 messages sent to petitioner indicates that messages APL Tracking ID MG021520133581931 and APL Tracking ID MG021520133581917 delivered to petitioner's OLS account and email address had a status of "U" or unread on February 15, 2013. The status printout for the February 15, 2013 messages sent to petitioner indicates that messages APL Tracking ID MG021520133581931 and APL Tracking ID MG021520133581917 delivered to petitioner's OLS account and email address had a status of "R" or read on June 7, 2013.

16. According to the Farone affidavit, the subject notices of deficiency were posted to petitioner's OLS account on February 15, 2013.

17. The facts set forth in Findings of Fact 5 through 16 were, as noted, established through the affidavit of Mr. Farone, as well as the documentary evidence presented by the Division. Mr. Farone's affidavit avers that he is knowledgeable of the general practice and procedure for the delivery of electronic statutory notices and that the procedures followed and described in his affidavit were the normal and regular procedures of the Division's Electronic Communication Unit on February 15, 2013.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). As the petition in this matter was timely filed (*see* Finding of Fact 3), 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 petitioner's request for conciliation conference. This order shall address the instant motion as such.

B. 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][1]).

C. Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 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, 562 [1980]). 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, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] *citing Zuckerman*).

D. Petitioner did not respond to the Division’s motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to

contest the facts alleged in the affidavits; consequently, those facts are deemed admitted

(*Kuehne & Nagel v. Baiden*, at 544; *Whelan v. GTE Sylvania*).

E. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law §§ 681[b]; 689[b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation services “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). 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 a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (Tax Law § 681[b]; *see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. Where the timeliness of a taxpayer’s protest against a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or

documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). Where a notice of deficiency has been properly mailed, Tax Law § 681(a) does not require actual receipt by the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

G. While Tax Law § 681(a) requires the mailing of a notice of deficiency by certified or registered mail to the taxpayer's last known address, Tax Law § 35 provides for an alternative method of issuing a notice by means of electronic communication. Specifically, Tax Law § 35 provides as follows:

Notwithstanding any other provision of New York state law, where the department has obtained authorization of an online services account holder, in such form as may be prescribed by the commissioner, the department may use electronic means of communication to furnish any document it is required to mail per law or regulation. If the department furnishes such document in accordance with this section, department records of such transaction shall constitute appropriate and sufficient proof of delivery thereof and be admissible in any action or proceeding.³

H. In accordance with Tax Law § 35, the Division furnished the notices of deficiency to petitioner by use of electronic means of communication. The Division has established that it obtained petitioner's authorization, as an OLS account holder, to furnish such notices electronically. Specifically, the Division has proven, through the affidavit of Nicholas Farone and the documentary evidence attached thereto, its standard procedure for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders.

³ There are two sections 35 of the Tax Law. The relevant section herein is section 35, Use of electronic means of communication. The other section 35 contains provisions for the Economic transformation and facility redevelopment program tax credit and is not relevant here.

The Division has also established through the affidavit and documentary evidence 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). The evidence shows that petitioner established an OLS account on November 2, 2010 under his name and identification number, using a Logon ID nickname of “nperez28” and an email address of ***newyork@***.com. On November 5, 2010, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account under the username of “nperez28.” The evidence further shows that petitioner updated his email address with the Division on December 2, 2011, indicating a new email address ***taxsolution@***.com. The evidence also establishes that petitioner authorized the Division to send notices electronically by checking “yes” in the box within his OLS account, Manage Email section, which indicates his agreement to receive email regarding bills, notices and other notifications. Pursuant to the Division’s OLS account terms and conditions for individuals, by providing electronic communication authorization, the taxpayer agrees to receive the indicated documents and communications electronically and agrees that the Division will not use physical (postal) mail to provide these communications.

The Division has also offered proof sufficient to establish that the statutory notices were furnished to petitioner by means of electronic communication on February 15, 2013 to his OLS account with alerts sent to his last known email address. Specifically, the Division’s records show that two email alerts were sent to petitioner’s updated email address and the two subject notices of deficiency were posted to petitioner’s OLS account and stored in his OLS Message Center on February 15, 2013. The email alerts sent to petitioner’s email address advised him that “you have a new liability due,” alerting him to view the statutory notices posted in the Message Center of his OLS account. The Division’s records further show the delivery status of the

February 15, 2013 emails as “D” (delivered). The Division’s records show that the messages sent by the Division to petitioner on February 15, 2013 had a status of “U” (unread) on February 15, 2013, and a status of “R” (read) on June 7, 2013. Based on the foregoing, it is determined that the Division has presented sufficient records to establish that it furnished the subject notices of deficiency on February 15, 2013 by use of electronic means of communication pursuant to Tax Law § 35, and that the records presented constitute appropriate and sufficient proof of delivery thereof.

I. It is thus concluded that the Division properly furnished the notices by means of electronic communication on February 15, 2013, pursuant to Tax Law § 35, and 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][a]; 681[b]).

J. Petitioner’s Request for Conciliation Conference was filed on August 20, 2013. This date falls after the 90-day period of limitations for the filing of such a request. Consequently, the Request was untimely (*see* Tax Law §§ 681[b]; 170[3-a][b]) and the same was properly dismissed by the September 6, 2013 Order issued by BCMS. Petitioner has offered no claim or evidence to meet his burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired.

K. The Division’s motion for summary determination is hereby granted, the September 6, 2013 Order dismissing petitioner’s Request is sustained and the petition is denied.

DATED: Albany, New York
October 23, 2014

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE