

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AMY AND BROOKS ATWOOD : DETERMINATION
for Redetermination of Deficiencies or for Refund of New : DTA NO. 825942
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, Amy and Brooks Atwood, filed a petition for redetermination of deficiencies 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.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Robert Tompkins, Esq., of counsel) brought a motion filed March 4, 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. Accompanying the motion was the affidavit of Robert Tompkins, Esq., dated March 3, 2014, and annexed exhibits. Petitioners, appearing pro se, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination began on April 3, 2014, the due date for petitioners' response. After due consideration of the affidavits and documents presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioners' protest of two notices of deficiency dated April 1, 2013 and addressed to petitioners, Amy and Brooks Atwood, at a Brooklyn, New York, address. The first Notice of Deficiency, notice number L-039078067, asserted additional New York State and New York City personal income taxes for the year 2010 in the total amount of \$5,049.07, plus interest and penalty, for a balance due of \$6,848.89. The second Notice of Deficiency, notice number L-039078071, asserted additional New York State and New York City personal income taxes due for the year 2011 in the total amount of \$7,056.34, plus interest and penalty, for a balance due of \$8,901.61.

2. Petitioners protested the two notices of deficiency by filing with the Division's Bureau of Conciliation and Mediation Services (BCMS) a Request for Conciliation Conference (Request), dated March 17, 2013. The Request was mailed to BCMS by United States Postal Service (USPS) Priority Mail on October 8, 2013. BCMS received the Request on October 11, 2013. The request lists petitioners' address as the Brooklyn, New York, address.

3. On October 25, 2013, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioners. 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 date of the statutory notice. Since the notice(s) was issued on April 1, 2013, but the request was not mailed until October 8, 2013, or in excess of 90 days, the request is late filed.

4. In response to the dismissal, petitioners filed a petition with the Division of Tax Appeals. The petition is dated as signed by Mrs. Atwood on October 30, 2013, and the envelope in which the petition was mailed by USPS Certified Mail on October 30, 2013. The envelope and petition in turn are date stamped as received by the Division of Tax Appeals on November 4, 2013. There is no dispute that the petition was filed within 90 days after the October 25, 2013 issuance of the Order and constitutes a timely challenge thereto.

5. 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) an affidavit, dated March 3, 2014, of Robert Tompkins, Esq.; (ii) an affidavit, dated December 13, 2013, of Daniel A. Maney, a Taxpayer Services Specialist 4 and Manager of the Refunds, Deposits, Overpayments and Control Units, which includes the Division's Case and Resource Tracking System (CARTS); (iii) an affidavit, dated December 13, 2013, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 1, 2013; and (v) a copy of petitioners' joint Resident Income Tax Return (Form IT-201) for the year 2011 dated May 4, 2012, which was the last filing from petitioners prior to the issuance of the notices of deficiency.

6. The affidavit of Daniel A. Maney, who has been in his current position since January 2010, 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. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR, using the year, the numeric ordinal day of the year and military time of day. Following the Division's general practice, the actual date of

mailing is handwritten on the first page of the CMR, in the present case “4/1/13.”¹ It is also the Division’s general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

7. 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 “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 P.O. Address.”

8. The CMR relevant to the notices of deficiency under protest consists of 27 pages and lists 293 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated April 1, 2013 to each page of the CMR and also wrote his or her initials on the last page thereof.

¹ In his affidavit, Mr. Maney states that “[i]n the upper left hand corner of Page 1 of the certified mail record, the date the notices were mailed was handwritten by personnel in the Department’s Mail Processing Center.” In fact, the handwritten date of mailing appears in the upper *right* corner on the pages attached to the Maney affidavit.

9. Page 12 of the CMR indicates that two notices of deficiency with certified control numbers 7104 1002 9730 1525 9659 and 7104 1002 9730 1525 9666 and assessment ID numbers L-039078067 and L-039078071 were mailed to “Atwood-Amy” at the Brooklyn, New York, address listed on the subject notices of deficiency.²

10. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room, describes the mail room’s general operations and procedures. The mail room receives the notices in an area designated for “Outgoing Certified Mail.” Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on 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 or initials on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed page 27 and affixed a postmark dated April 1, 2013 to each page of the CMR. The Mail Processing 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 last page of the CMR. Here, the USPS employee complied with this

² The certified mail record lists only the name Amy Atwood because it is standard procedure for the certified mail record to set forth the name of the primary taxpayer associated with the statutory notice. Thus, when as here, a husband and wife file a joint personal income tax return wherein the wife’s social security number is listed in the place designated for the primary taxpayer, only the wife’s name will appear on the certified mail record.

request by both writing and circling the number “293” on the last page next to the heading “Total Pieces Received at Post Office.”

11. According to the Peltier affidavit, copies of the subject notices of deficiencies were mailed to petitioners on April 1, 2013, as claimed.

12. The facts set forth above in Findings of Fact 6 through 11 were, as noted, established through the affidavits of Daniel A. Maney and Bruce Peltier, as well as the documentary evidence presented by the Division. Mr. Maney’s affidavit avers that he is and was fully familiar with the Division’s present and past office procedures concerning the generation and processing of notices of deficiency for shipment to the Division’s Mail Processing Center. Mr. Peltier’s affidavit avers that he has been a supervisor in the Division’s mail room since 1999 and that he is currently a principal mail and supply supervisor and is fully familiar with the operations and procedures for the mailing of notices.

13. Petitioners’ 2011 Resident Income Tax Return, dated May 4, 2012, reported petitioners’ address as Brooklyn, New York 11205. This was the last return filed by petitioners prior to the issuance of the subject notices. This address corresponds with the address on the CMR and on the notices that were sent to petitioners.

SUMMARY OF PETITIONERS’ POSITION

14. Petitioners did not respond to the Division’s motion. On page 3 of their petition in the section entitled “Conciliation Conference,” petitioners wrote, as follows: “[w]e had sent a conciliation conference request twice we were asked to send it a second time and received the denial for the claim please accept the supporting documentation.” Attachments to the petition included, among other documents, a copy of the Request dated as signed by Mr. Atwood on March 17, 2013 that references notices dated February 11, 2013, and a copy of a personal

income tax Statement of Proposed Audit Changes, dated February 11, 2013, for tax year 2010.

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 4), 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 shall address the instant motion as such. Given the timely petition, the Division's motion to dismiss under section 3000.9(a) of the Rules is improperly brought.

B. A motion for summary determination shall 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. 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 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, 487 NYS2d 316, 317-318 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [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, 293 NYS2d 93 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [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, 206 NYS2d 879, 881 [1960]).

“To defeat a motion for summary judgment, the opponent must also produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449, 582 NYS2d 170, 173 [1992], *citing Zuckerman* at 562).

D. 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 such notice (Tax Law § 681[b]; § 689[b]). Alternatively, a taxpayer may contest a notice of deficiency 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, Inc.*, 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 (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioners' last known address (Tax Law § 681; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notices, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

F. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices to petitioners' last known address on April 1, 2013. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheet and CMR conforms with the address listed on petitioners' 2011 Resident Income Tax Return, which satisfies the "last known address" requirement in Tax Law § 681(a). The notices were properly mailed to petitioners on April 1, 2013, and it was incumbent upon petitioners to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter (Tax Law § 170[3-a]; § 681[b]).

G. Petitioners, in their petition, asserted that their Request was submitted twice, on an

unknown date³ and again on October 8, 2013. In support of this assertion, they submitted a copy of their Request dated as signed by Mr. Atwood on March 17, 2013 and a copy of the personal income tax Statement of Proposed Audit Changes, dated February 11, 2013, for the tax year 2010. Assuming petitioners' Request was filed as dated on March 17, 2013, it was filed prior to the issuance of the notices of deficiency on April 1, 2013 and was premature and invalid (*see Matter of West Mountain Corp. v. Dept. of Taxation & Fin.*, 105 AD2d 989, 482 NYS2d 140 [1984], *affd* 64 NY2d 991, 489 NYS2d 62 [1985]).

H. The documents in the record establish that petitioners' Request for Conciliation Conference was mailed on October 8, 2013 and this date falls beyond the 90-day period of limitations for filing of such request. Consequently, petitioners' Request for Conciliation Conference was untimely filed (Tax Law § 681[b]; § 170[3-a][b]) and the same was properly dismissed by the October 25, 2013 Order issued by BCMS. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation (*see Matter of American Woodcraft, Inc.*)

I. Finally, it is observed that petitioners are 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 in order to contest such disallowance (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

³ No proof of mailing was submitted.

J. The Division of Taxation's motion for summary determination is granted, the October 25, 2013 order dismissing petitioners' request is sustained and the petition of Amy and Brooks Atwood is denied.

DATED: Albany, New York
June 12, 2014

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE