

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PEDRO PANTOJAS	:	DETERMINATION
	:	DTA NO. 826111
for Redetermination of a Deficiency or for Refund	:	
of New York State Personal Income Tax under	:	
Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Years 2010	:	
and 2011.	:	

Petitioner, Pedro Pantojas, 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 2010 and 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion on June 10, 2014, seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1) and (b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not file a response. Accordingly, the 90-day period for the issuance of this determination began on July 11, 2014. After due consideration of the motion papers and pleadings filed in this matter, Arthur S. Bray, Administrative Law Judge, issues the following determination.

ISSUE

Whether petitioner filed a timely Request for a Conciliation Conference following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Pedro M. Pantojas, two notices of deficiency that were dated May 15, 2013 and addressed to petitioner at “2816 KINGSLAND AVE, BRONX, NY 10469-3412.” The first Notice of Deficiency, notice number L-039149778-3, asserted that additional New York State personal income tax was due for the year 2010 in the amount of \$3,572.00, plus penalty and interest, for a balance due of \$5,009.44. The second Notice of Deficiency, notice number L-039120412-9, asserted that additional New York State personal income tax was due for the year 2011 in the amount of \$3,155.50, plus penalty and interest, for a balance due of \$4,026.86.

2. Petitioner 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 was mailed via United States Postal Service on November 8, 2013. On November 29, 2013, BCMS issued a conciliation order dismissing request. 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 May 15, 2013 but the request was not mailed until November 8, 2013, or in excess of 90 days, the request is late filed.

3. On February 24, 2014 the Division of Tax Appeals received a petition dated February 18, 2014 that stated, in pertinent part, that due to his wife’s pregnancy, neither he nor his wife was able to file a timely request for a conciliation conference. According to Mr. Pantojas, his wife was hospitalized and very ill. Petitioner submits that he has the supporting documentation to substantiate the deductions claimed for 2010 and 2011 and is requesting a hearing so that he can establish that his expenses were valid.

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 Pedro Pantojas, dated February 18, 2014, that was stamped received by the Division of Tax Appeals on February 24, 2014 (ii) the notices of deficiency issued to Pedro M. Pantojas, dated May 15, 2013, (iii) an affidavit, dated June 5, 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 June 5, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (v) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked May 15, 2013; and (vi) a copy of petitioner's New York State Resident Income Tax Return for the year 2012.

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. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page of the CMR to the actual mailing date of "5/15/13." In addition, according to Mr. Maney, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by Mr. Maney. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

6. 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 entitled "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."

7. According to the Maney affidavit, the CMR in the present matter consists of 43 pages. Mr. Maney notes that the entire CMR is attached to his affidavit, and that portions have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

8. Page 12 of the CMR indicates that two notices of deficiency with certified control numbers 7104 1002 9730 1561 0726 and 7104 1002 9730 1561 0773 and assessment ID numbers L 039120412 and L 039149778, respectively, were mailed to petitioner at the Bronx, New York, address listed on the subject notices of deficiency. The corresponding mailing cover sheets, attached to the Maney affidavit, bear the certified control numbers and petitioner's name and address as previously noted.

9. The affidavit of Bruce Peltier describes the Division's mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. 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. Staff members then weigh, seal and

place postage on each envelope. The certified control numbers are 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 or initials on the CMR, indicating receipt by the post office. The mail room 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. Each page of the CMR, which is attached to the Maney affidavit, contains a USPS postmark of May 15, 2013. On page 43, corresponding to "Total Pieces and Amounts," is the preprinted number 471. The initials or signature of an individual appears near the circled number of pieces.

10. The Peltier affidavit explains that the affixation of the postmarks and the Postal Service employee's initials or signature shows that 471 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS on May 15, 2013.

11. According to both the Maney and Peltier affidavits, a copy of the subject notices were mailed to petitioner on May 15, 2013 as claimed.

12. Petitioner's New York State Resident Income Tax Return for the year 2012 was the last return filed before the notices were issued. The address appearing on the return is "2816 Kingsland Avenue, Bronx, NY 10469 3414." This was the last return filed before the notices were issued and the address shown on this return corresponds with the addresses appearing on the notices and the CMR.

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 petitioner's Request for Conciliation Conference. This determination will address the instant motion as such.

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. 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 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*, 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 merits of the

protest (*see* Tax Law § 681[b]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a petition or request for a 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 petitioner's last known address (Tax Law § 681[a]; *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 notice, the Division must make the following showing:

the establishment of a standard procedure for the issuance of such notices by one with knowledge of such procedures, and, the introduction of evidence to show that the procedure was followed in the particular case at hand (*Matter of Katz*).

E. The Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., May 15, 2013, to petitioner's last known address. 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 (*see 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 petitioner's New York State income tax return for the year 2012, which satisfies the "last known address" requirement in Tax Law § 681[a]. The notice was thus properly mailed to petitioner on May 15, 2013. It is noted that petitioner has not denied receipt of the notice.

F. In sum, since the Notice of Deficiency was mailed on May 15, 2013 but the Request for a Conciliation Conference was not filed until November 8, 2013, the Request was not filed within the requisite period of limitation and must be dismissed (Tax Law § 170[3-a][a]).

G. Although the Division of Tax Appeals lacks subject matter jurisdiction, petitioner has the option of paying the tax and, within two years of the payment, filing a claim for refund (Tax Law § 687[a]). If the claim for refund is disallowed, petitioner may request a conciliation conference or file a petition with the Division of Tax Appeals within 90 days of the notice of disallowance to contest such disallowance (Tax Law §§ 170[3-a][a]; 689[c]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

H. The Division's motion for summary determination is granted, the November 29, 2013 Order dismissing petitioner's Request is sustained and the petition of Pedro Pantojas is denied.

DATED: Albany, New York
October 2, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE