

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
KWAJO BERKO : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 826438
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the year :
2012. :

Petitioner, Kwajo Berko, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Kent J. Gebert, Esq., of counsel), brought a motion dated December 18, 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 by Charles Albangbee, EA, 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, Joseph W. Pinto, Jr., 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 a Notice of Deficiency.

FINDINGS OF FACT

1. Petitioner, Kwanjo Berka, 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 a Notice of Deficiency, dated January 29, 2014, bearing assessment number L-040118044-4 and asserting tax due of \$7,988.66 plus interest for the year 2012. The Request was date stamped as received by BCMS on May 20, 2014.

2. On June 6, 2014, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. Referencing notice number L-040118044, 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 notice(s) was issued on January 29, 2014, but the request was not mailed until May 15, 2014, 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 was dated and signed by petitioner on June 28, 2014, and the envelope in which the petition was mailed bears a United States Postal Service (USPS) postmark dated August 12, 2014. The envelope and petition in turn are date stamped as received by the Division of Tax Appeals on August 14, 2014. There is no dispute that the petition was filed within 90 days after the June 6, 2014 issuance of the Order and constitutes a timely challenge thereto.

4. In support of its motion and to prove mailing of the Notice of Deficiency under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated December 18, 2014, of Kent J. Gebert, Esq.; (ii) an affidavit, dated December 5, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management

Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated December 10, 2014, 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 January 29, 2014; and (v) a copy of a letter from the Division, dated December 27, 2013 confirming petitioner's creation of an Online Services Account with the Division using his newest Bronx, New York, address and a screenshot of the e-mpire taxpayer address summary for petitioner, which indicates the same address as of December 24, 2013, reporting the same address for petitioner as that listed on said notice, the request for BCMS conference and the petition.

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and 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 and last page of the CMR in the present case to the actual mailing date of "1/29/14." In addition, as described by Ms. Nagengast, 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 the Division. The pages of the CMR stay banded together unless otherwise ordered. 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 "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. The CMR relevant to the Notice of Deficiency under protest consists of 40 pages and lists 439 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 40, which contains 10 such entries. 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 January 29, 2014 to each page of the CMR and also wrote his or her initials on the last page thereof.

8. Page 15 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0149 9762 and assessment number L-040118044, was to be mailed to petitioner at a Bronx, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

9. The affidavit of Bruce Peltier describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." The 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. 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 40 and affixed a postmark dated January 29, 2014 to each page of the CMR. The 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 request by circling the handwritten number "438" on the last page next to the heading "Total Pieces Received at Post Office."¹

10. According to the Peltier affidavit, a copy of the subject Notice of Deficiency was mailed to petitioner on January 29, 2014 as claimed.

11. The facts set forth above in Findings of Fact 5 through 10 were established through the affidavits of Mary Ellen Nagengast and Bruce Peltier, as well as the documentary evidence presented by the Division. Ms. Nagengast's affidavit avers that she is and was fully familiar with the Division's present and past office procedures concerning the generation and processing of notices 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 of the mailing of notices.

¹The printed number of pieces was 439. However, one piece was deleted from page 15, denoted by certified control number 7104 1002 9730 0149 9779.

12. The Division submitted two documents to establish petitioner's last known address prior to the issuance of the notice: a copy of a letter from the Division, dated December 24, 2013, confirming petitioner's creation of an Online Services Account with the Division using his newest Bronx, New York, address, and a screenshot of the e-mpire taxpayer address summary for petitioner, which indicates the same address as of December 24, 2013, reporting the same address for petitioner as that listed on said notice, the request for BCMS conference and the petition.

CONCLUSIONS OF LAW

A. The Division brought 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, 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 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 moot.

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]).

D. Petitioner did not respond to the Division’s motion, thereby conceding that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc., v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Nagengast and Peltier affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel, Inc., 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]). 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 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 (*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 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 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:

“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*).”

G. The Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's last known address on January 29, 2014. 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 the letter to petitioner acknowledging petitioner's creation of an Online Services Account with the Division using his newest Bronx, New York, address, and the address listed on the screenshot of the e-empire taxpayer address summary for petitioner, which indicates the same address as of December 24, 2013. These two documents satisfy the "last known address" requirement. It is thus concluded that the Division properly mailed the notice on January 29, 2014 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]).

H. Petitioner's Request for Conciliation Conference was received on May 20, 2014. 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 June 6, 2014 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.

I. The Division's motion for summary determination is hereby granted, the June 6, 2014 Order dismissing petitioner's Request is sustained and the petition is denied.

DATED: Albany, New York
April 2, 2015

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE