

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GREGORY TURKOV : DETERMINATION
 : DTA NO. 826540
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 Year 2008. :
:

Petitioner, Gregory Turkov, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2008.

On April 17, 2015, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Leo Gabovich), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). Petitioner, appearing pro se, filed no response to the Division of Taxation's motion by its due date on May 18, 2015, which date commenced the 90-day period for the issuance of this determination. After due consideration of the affidavits and documents presented, Catherine M. Bennett, Administrative Law Judge, renders the following order.

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. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Deficiency, bearing assessment ID number L-040912268-4, dated April 2, 2014. The notice is addressed to petitioner, Gregory Turkov, at a Behan Court address in Staten Island, New York. The notice asserts additional personal income tax due in the amount of \$56,202.00, plus interest, for tax year 2008.

2. Petitioner filed a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the April 2, 2014 Notice of Deficiency. The Request is dated July 21, 2014 and is date-stamped as received by BCMS on July 25, 2014. The address born by the Request was the Behan Court, Staten Island, New York, address.

3. BCMS issued a Conciliation Order Dismissing Request to petitioner dated August 8, 2014, to the Behan Court, Staten Island, New York, address. The order determined that petitioner's protest of the subject notice 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 was issued on April 2, 2014, but the request was not mailed until July 23, 2014, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on September 30, 2014, bearing the Behan Court, Staten Island, New York, address.

5. To show proof of proper mailing of the April 2, 2014 Notice of Deficiency, the Division, along with the April 17, 2015 affidavit of Leo Gabovich, provided the following with its motion papers: i) an affidavit, dated March 6, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Management Analysis and Project Services Bureau

(MAPS) of the Division (since October 2005), who is familiar with the Case and Resource Tracking System (CARTS) and procedures for generating statutory notices; (ii) an affidavit, dated April 8, 2015, of Bruce Peltier, a mail room supervisor in the Division's Mail Processing Center (since March 1999); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 2, 2014; (iv) a copy of petitioner's Notice of Deficiency, dated April 2, 2014, bearing a cover letter with certified control number 7104 1002 9730 0210 4047, and petitioner's Behan Court, Staten Island, New York, address; (v) the petition filed with the Division of Tax Appeals on September 30, 2014; and (vi) a representative copy of petitioner's e-filed resident income tax return for tax year 2012, identifying a paid income tax preparer, but no filing date. The Division's affidavit indicates that petitioner's 2012 tax return was filed on June 13, 2013. The return bears the Behan Court, Staten Island, New York, address.

6. The affidavit of Mary Ellen Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and 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 PO Address."

Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing, allowing for a manual review of the notices prior to mailing.

Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to reflect the actual mailing date of "4/2/14."

7. According to the Nagengast affidavit, the CMR in the present matter consists of 125 pages and lists 1,367 certified control numbers along with corresponding assessment numbers, names and addresses. In addition, Ms. Nagengast stated that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page. Ms. Nagengast notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, circled "1,367" on page 125 and initialed the same page.

8. Page 31 of the CMR indicates that a statutory notice with certified control number 7104 1002 9730 0210 4047 and assessment ID number L-040912268 was mailed to petitioner at the Behan Ct, Staten Island, New York, address listed on the subject notice.¹

9. The affidavit of Bruce Peltier, a mail room supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. Once a staff member 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 on the

¹ Although about 20 pages of the CMR have incomplete or somewhat illegible postmarks, page 31, bearing petitioner's name and address, has a clear postmark and appears in sequential order based upon the certified control numbers.

CMR, indicating receipt by the post office. Here, over 100 of the 125 pages of the CMR contain a perfectly legible postmarks, including the page containing petitioner's mailing. The Center further requests that the USPS employee 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 circled the number "1,367" and handwrote what are likely initials over the postmark of April 2, 2014, as well.

10. According to the Nagengast and Peltier affidavits, the subject Notice of Deficiency was mailed to petitioner on April 2, 2014, as claimed, to his Behan Ct., Staten Island, New York, address.

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 filed within 90 days of the conciliation order (*see* Findings of Fact 3 and 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 petitioner's request for conciliation conference. This order shall address the instant motion as such.

B. 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]).

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, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 573 [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*).

Petitioner failed to file a response to the instant motion; therefore he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227, 472 NYS2d 325 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts set forth in the Gabovich, Nagengast, and Peltier affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden* at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]).

D. BCMS is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170 [3-a][a]; 20 NYCRR 4000.1 [c]). Conciliation orders are binding upon

the Division and the person who requested the conference, unless such person petitions the Division of Tax Appeals for a hearing within 90 days after the conciliation order is issued (Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.6 [b]). When the timeliness of the Request is at issue, the Division must establish proper mailing of the statutory notice, which in this case is the Notice of Deficiency, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Tax Law § 691 (b) provides that a taxpayer's "last known address" shall be the address given in the last return filed by him, unless subsequent to the filing of such return, the taxpayer shall have notified the Division of a change of address. A rebuttable presumption of petitioner's receipt of the Notice of Deficiency would arise only upon adequate presentation of proof of mailing by the Division (*see Matter of Mareno v. State Tax Commn.*, 144 AD2d 114 [1988]; *Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314 [1986]).

E. In the present matter, through the submission of documents and affidavits, the Division has met its burden of establishing proper mailing of the Notice to petitioner's last known address. In his petition, although petitioner claims he did not receive the Notice from the Division, his bare assertion, absent more, is insufficient to rebut the presumption of receipt established by the Division's proof of mailing (*Matter of T.J. Gulf v. State Tax Commn.*). Accordingly, the Division has established a prima facie case warranting a determination in its favor.

F. The Division's motion for summary determination is hereby granted and the petition is denied.

DATED: Albany, New York
August 6, 2015

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE