

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ALEXEI P. MOSTOVOI : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 827171
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2011. :

Petitioner, Alexei P. Mostovoi, 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 year 2011.

On July 28, 2016, the Division of Taxation, by Amanda Hiller, Esq., (Michele W. Milavec, Esq., of counsel), filed a motion for summary determination of the proceeding pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). Accompanying the motion was the affirmation of Michele W. Milavec, Esq., dated July 27, 2016, and annexed exhibits. Petitioner, appearing pro se, filed a response in opposition to the Division's motion on August 26, 2016, which date commenced the 90-day period for issuance of this determination. After due consideration of the motion papers, attached affidavits and annexed exhibits, petitioner's response in opposition, and all pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition 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 Alexei P. Mostovoi's protest of a Notice of Deficiency dated April 6, 2015 and addressed to Alexei P. Mostovoi and Kayoko Mostovoi, "104 Edgemont Rd, Scarsdale, NY 10583-2714." This Notice of Deficiency, notice number L-042384146-7, asserted additional New York State personal income tax due for the year 2011 in the amount of \$679.00, plus interest, for a balance due of \$848.38. The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0443 8645.

2. On August 26, 2015, petitioner mailed a petition by FedEx Express standard overnight shipping to the Division of Tax Appeals. It was received on August 27, 2015. The petition lists petitioner's address as 104 Edgemont Road, Scarsdale, New York 10583.

3. On November 12, 2015, the Division filed its answer to the petition affirmatively alleging, among other things, that a Notice of Deficiency was issued to petitioner on April 6, 2015; petitioner filed a petition with the Division of Tax Appeals on August 27, 2015, more than 90 days after the notice was issued; and that the Division of Tax Appeals lacks jurisdiction to review the merits of the late-filed petition, i.e., the Division's calculation of petitioner's allowable refund for tax year 2011.

4. Initially, petitioner elected to have the proceedings in this matter conducted in the Small Claims Unit. On February 10, 2016, petitioner was notified that the Small Claims hearing scheduled for March 31, 2016 would confine itself to the issue of the timeliness of the request for conference or the petition filed in this matter. By faxed letter dated February 24, 2016, petitioner requested to have this matter proceed before an administrative law judge.

5. On March 11, 2016, the Division filed a motion seeking an order dismissing the petition

or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Petitioner, appearing pro se, submitted the affidavit of Alexei Mostovoi, dated April 8, 2016, and documents in opposition to the Division's motion on April 11, 2016. By order of July 7, 2016, the undersigned denied the Division's motion to dismiss the petition or for summary determination.

6. On July 28, 2016, the Division filed the present motion for summary determination. In support of this motion and to prove proper and timely mailing of the Notice of Deficiency under protest, the Division submitted the following: (i) the affirmation of Michele W. Milavec, Esq., the Division's representative, dated July 27, 2016; (ii) the affidavit, dated July 19, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated April 6, 2015; (iv) the affidavit, dated July 20, 2016, of Bruce Peltier, store and mail operations supervisor in the Division's mail room; (v) the affidavit, dated July 26, 2016, of Heidi Corina, Legal Assistant 2 in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (vi) Postal Service form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated July 21, 2016; (vii) a copy of the petition filed with the Division of Tax Appeals on August 27, 2015, and the FedEx Express Standard Overnight shipping envelope in which the petition was sent; and (viii) a copy of petitioner's and his spouse, Kayoko Mostovoi's joint New York State Resident Income Tax Return (form IT-201) for the year 2013, filed on April 15, 2014, which was the last filing from petitioner and his spouse prior to the issuance of the Notice of Deficiency.

7. 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 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 pages of the CMR in the present case to the actual mailing date of "4/6/15." 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 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.

8. 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 taxpayer 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."

9. Ms. Nagengast attested to the truth and accuracy of the copy of the 106-page CMR, which contains a list of 1,158 statutory notices issued by the Division on April 6, 2015. The CMR lists 1,158 computer-printed 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 106, which contains 3 such entries. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding.

10. Page 30 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0443 8645 and reference number L-042384146, was issued to “Mostovoi-Alexei P,” at the 104 Edgemont Road, Scarsdale, New York, address listed thereon.¹ The corresponding mailing cover sheet, attached to the Nagengast affidavit as “Exhibit B,” bears this certified control number and petitioner’s name, “Mostovoi-Alexei P,” and his spouse’s name, “Mostovoi-Kayoko” and the address as noted above.

11. The affidavit of Bruce Peltier, a supervisor in the Division’s mail room since 1999, 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 and fee amounts on each envelope. The first and last pieces of mail 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 information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the

¹ The certified mail record lists only the name Alexei P. Mostovoi 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 husband’s social security number is listed in the place designated for the primary taxpayer, only the husband’s name will appear on the certified mail record.

various USPS branches located in the Albany, New York, area.

12. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. Here, the postal employee did affix a USPS postmark to every page of the CMR, but it is barely legible on eight pages of the CMR. However, the postmark dated April 6, 2015 of the Colonie Center branch of the USPS is legible on page 30, the page on which information concerning the subject Notice of Deficiency and Alexei P. Mostovoi's name and address appear, and the last page of the CMR. The USPS employee also initialed or signed all 106 pages of the CMR. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, the USPS employee complied with this request by circling and writing the number "1158" on the last page of the CMR next to "TOTAL PIECES RECEIVED AT POST OFFICE."

13. Mr. Peltier's affidavit states that the CMR is the Division's record of receipt, by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

14. Based upon his review of the affidavit of Mary Ellen Nagengast, the exhibits attached thereto and the CMR, Mr. Peltier avers that on April 6, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to "MOSTOVOI-ALEXEI P, MOSTOVOI-KAYOKO, 104 EDGEMONT RD, SCARSDALE, NY 10583-2714, to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail." He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to

and accepted by the USPS on April 6, 2015 to be kept as part of the records of the Department. Mr. Peltier asserts that the procedures described in his affidavit were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to Alexei P. Mostovoi and Kayoko Mostovoi on April 6, 2015.

15. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0443 8645 on April 6, 2015 from the Colonie, New York, branch of the USPS to "Mostovoi-Alexei" and "Mostovoi-Kayoko" at 104 Edgemont Rd., Scarsdale, NY 10583-2714. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 0443 8645 on April 8, 2015 at 1:53 p.m. in Scarsdale, New York 10583. The scanned image of the recipient's signature as shown on the USPS response is "Kayoko Mostovoi." The scanned address of the recipient indicates "104 EDGEMONT RD."

16. Alexei and Kayoko Mostovoi's joint 2013 Resident Income Tax Return, filed on or about April 15, 2014, reported Mr. and Mrs. Mostovoi's address as 104 Edgemont Road, Scarsdale, New York 10583. This was the last return filed by petitioner and his spouse prior to the issuance of the subject Notice of Deficiency.

17. In opposition to the motion, petitioner asserts that the Division made a previous motion to dismiss and/or for summary determination dated March 11, 2016 and it was denied.

He further asserts that under the Rules of Practice and Procedure (Rules) of the Tax Appeals Tribunal, only one motion for accelerated determination is allowed to a party. Since the Division already made such a motion which was denied, petitioner requests that the present motion be rejected as well. Petitioner also contends that the present motion and its supporting documentation does not support the Division's claim that the Notice of Deficiency was in fact mailed to him and his wife as required under New York law. Petitioner requests that the underlying Notice of Deficiency be dismissed because the Division's "recomputation of tax liability is invalid and has no factual or legal support."

CONCLUSIONS OF LAW

A. Previously, the Division filed a motion to dismiss the petition or for summary determination in its favor, which motion was denied by the undersigned's order of July 7, 2016 (*see* Finding of Fact 5). Petitioner contends that the Tribunal's Rules allow only one motion for accelerated determination and therefore, the Division's current motion for summary determination should be denied. Petitioner has misread 20 NYCRR 3000.9, the accelerated determination section of the Tribunal's Rules. While the Rules allow a party to file only one motion to dismiss a petition pursuant to 20 NYCRR 3000.9(a)(1), there is no such limitation placed upon the filing of a motion for summary determination by a party (*see* 20 NYCRR 3000.9[b]). In this current motion, the Division moves for summary determination of the proceeding pursuant to Tax Law § 2006.6 and 20 NYCRR 3000.9(b), with supporting papers attached.

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 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 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 determination 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 a material 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 [2d Dept 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 [^{1ST} Dept 1992], citing *Zuckerman*).

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 the 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 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 (*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 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 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*).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

G. While each page of the 106-page CMR lists certified control numbers with corresponding notice numbers, names and addresses, it does not contain legible postmarks on each page, indicating the mailing date of April 6, 2015 (*see* Finding of Fact 12). However, the last page of the CMR bears a USPS postmark dated April 6, 2015. In addition, a postal service employee wrote and circled the number “1158” next to the “TOTAL PIECES RECEIVED AT POST OFFICE” heading and initialed and signed the last page, thereby indicating that all 1,158 pieces listed on the CMR were received at the post office. The notice addressed to Alexei P. Mostovoi and Kayoko Mostovi was among the 1,158 pieces so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Raskusin*, Tax Appeals Tribunal, July 26, 2001). Moreover, despite whatever infirmities may or may not exist in the CMR, the Division has confirmed petitioner’s actual receipt of the Notice of Deficiency on April 8, 2015 (*see* Finding of Fact 15).

H. The Division established that the Notice of Deficiency was mailed to petitioner’s last known address, being the same address as reported on Alexei and Kayoko Mostovoi’s joint 2013 resident income tax return, which was the last return filed with the Division before the subject Notice of Deficiency was issued (Tax Law § 681[a]; *see* Finding of Fact 16). It is concluded that the subject Notice of Deficiency was properly mailed and thus, 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 April 6, 2015 (Tax Law §§ 170[3-a][a]; 681[b]).

I. The documents show that the Notice of Deficiency was mailed on April 6, 2015, but petitioner’s petition was mailed by FedEx Express Overnight Standard shipping on August 26, 2015 (*see* 26 USC § 7502[a][1]; Tax Law § 691[a][2][A]), a date beyond the 90-day period,

which ended on July 6, 2015,² for protesting the subject Notice of Deficiency. Consequently, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest and must grant summary determination in favor of the Division of Taxation (*see Matter of Lukacs*).

J. Finally, it is observed that petitioner is not entirely without recourse. That is petitioner 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, petitioner 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).

K. The Division of Taxation's motion for summary determination is granted, and the petition of Alexei P. Mostovoi is hereby denied.

DATED: Albany, New York
November 17, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

² Since July 5, 2015 fell on a Sunday, petitioner had until Monday, July 6, 2015 to file his petition or a request for a conciliation conference in protest of the subject Notice of Deficiency (*see* General Construction Law § 20).